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—

complaint charging the national distributor of a complete line of consumer goods, many under its own brand names, with violating Section 2(f) of the Clayton Act by knowingly inducing and receiving discriminatory prices in the purchase of plumbing fixtures, including bathroom fixtures, which were lower than those paid by its competitors for products of like grade and quality.

COMPLAINT

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

PARAGRAPH 1. Respondent Sears, Roebuck and Co., sometimes referred to as respondent Sears, 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 925 South Homan Avenue, Chicago 24, Illinois.

PAR. 2. Respondent Sears is now, and for many years has been, engaged in the sale and distribution at retail of a complete line of consumer goods throughout the United States, by mail order and direct retail store sales. Said respondent operates some 700 retail stores located in various cities throughout the United States. Its total volume of sales from all products for the fiscal year ending January 31, 1958, amounted to approximately $3,600,000,000.

Said respondent is also the owner of a number of trade or brand names under which a substantial volume of merchandise is marketed.

PAR. 3. Respondent Sears, in the course and conduct of its said business, has been and is now engaged in commerce, as "commerce" is defined in the Clayton Act, in that it has purchased various products for resale from vendors located in various States and causes such products so purchased to be shipped and transported from the States where vendors are located to destinations in other States and in the District of Columbia. There is now and has been a constant course and flow of trade and commerce in such products between respondent and the suppliers of such products throughout the various States of the United States.

PAR. 4. In the course of its said business in commerce, respondent Sears has been in competition with other corporations, partnerships and individuals in the purchase, sale and distribution of the various products handled by it.

PAR. 5. Among the products purchased for resale by said respondent are plumbing fixtures, including but not limited to bathroom

fixtures. For more than three years last past said respondent, in the course of its said business in commerce, has knowingly induced or knowingly received discriminatory prices in the purchase of such plumbing fixtures, including bathroom fixtures, which prices were lower than the prices paid for products of like grade and quality by other purchasers competing with said respondent in the resale of such products.

For example, respondent Sears, for more than three years last past, has purchased plumbing and bathroom fixtures from Universal-Rundle Corporation of New Castle, Pennsylvania, at prices which have been substantially lower than those charged by the same seller to other purchasers, some of whom compete with respondent Sears in the resale of such products. The products sold by Universal-Rundle Corporation to respondent Sears are of like grade and quality as those sold to others who are in competition with respondent Sears.

Said respondent is the owner of approximately 63 percent of the total outstanding capital stock of Universal-Rundle Corporation and purchases its plumbing fixtures, including bathroom fixtures, for resale under its trade-name "Homart."

For the fiscal year ended January 31, 1957, said respondent purchased such plumbing and bathroom fixtures in a substantial amount at prices less than the prices charged by Universal-Rundle Corporation to other competing purchasers, such preferential prices ranging from 5% to 45% less than the prices paid by others who compete with respondent in the resale of such products.

PAR. 6. The effect of said discriminations in price, knowingly induced or received by respondent as herein alleged, may be substantially to lessen competition with or tend to create a monopoly in said respondent in the line of commerce in which it is engaged, or to injure, prevent, or destroy competition between respondent and others engaged in the sale and distribution of said products of like grade and quality.

PAR. 7. The foregoing acts and practices of respondent in knowingly inducing or in knowingly receiving the aforesaid discriminations in price are in violation of the provisions of subsection (f) of Section 2 of the Clayton Act, as amended.

Mr. Lewis F. Depro and *Mr. Stanley M. Lipnick* for the Commission.

Mr. Lawrence L. O'Connor and *Mr. Arthur Medow*, Chicago, Ill., and *Mr. Joseph J. Smith, Jr.* and *Mr. Theodore F. Craver*, Washington, D.C., for respondent.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

The Federal Trade Commission on August 4, 1960, issued its complaint against the above-named respondent charging it with having violated section 2(f) of the Clayton Act, as amended (U.S.C. Title 15, Section 13). Specifically, the substance of the charges alleged is that for more than three years last past the respondent, in the course of its business, has knowingly induced and knowingly received discriminatory prices in the purchase of plumbing fixtures, including bathroom fixtures, which prices were lower than prices paid for products of like grade and quality of other purchasers competing with said respondent in the resale of such products. Respondent denied the charges alleged in the complaint.

On April 12, 1962, counsel in support of the complaint filed a motion to dismiss the complaint against the above-named respondent. The reasons given therefor are as follows:

This case is a companion case In the Matter of *Universal-Rundle Corp.*, Docket No. 8070 [65 F.T.C. 924]. Universal-Rundle was charged, in that matter, with violating section 2(a) of the amended Clayton Act by selling certain products to this respondent at prices lower than those charged for goods of like grade and quality to other purchasers. This respondent is charged with violation of section 2(f) of the amended Clayton Act by knowingly inducing and receiving the benefits of the 2(a) violation charged in Docket No. 8070.

A consent agreement has been executed in Docket No. 8070 which will result in dismissal of that portion of the complaint charging Universal-Rundle with discriminating in favor of this respondent. The reason for such dismissal is the unavailability of proof of probable injury to competition sufficient to meet the requirements of section 2(a) of the statute. For the same reason, it is respectfully submitted, this complaint should be dismissed.

In the absence of opposition to the motion of counsel in support of the complaint, the hearing examiner dismissed the complaint on May 23, 1962.

The trial of the companion case *In the Matter of Universal-Rundle Corp.*, Docket No. 8070, was commenced on October 15, 1962, following the Commission's rejection of the initial decisions dismissing the above-entitled case and dismissing, in part, the aforesaid companion case.[1]

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[1] The decision in the *Universal-Rundle* case was by consent. The effect of the partial dismissal was to require a dismissal of the Sears, Roebuck case involving a 2(f) violation.

At the completion of the Commission's *prima facie* case *In the Matter of Universal-Rundle Corp.*, Docket No. 8070, respondent orally made a motion to dismiss the charge of illegal price discrimination with respect to the sale of plumbing fixtures sold to Sears, Roebuck & Co., relying primarily on the failure of Commission counsel to prove by substantial evidence that such fixtures and the plumbing fixtures sold under the "Universal-Rundle" brand are of like grade and quality. The hearing examiner reserved decision on respondent's motion pending completion of respondent's defense evidence on this issue.

By order dated April 17, 1963, in the *Universal-Rundle* case, the hearing examiner severed the issue of like grade and quality from all other issues in the proceeding, since it then appeared that a revolving of this issue might eliminate the need for the presentment of extensive proof and a lengthy check of the basic cost data by Commission's attorneys and accountants incident to respondent's cost justification defense which was not completed. Because of the severance order, the completion of respondent's cost evidence and Commission's cross-examination and a check of the cost data was thereby precluded. Therefore, all of the evidence relating to respondent's cost justification defense was stricken as irrelevant to the issue of "like grade and quality" without prejudice to its reinstatement as a part of the record on respondent's or Commission's motion in the event the hearing examiner's decision on the severed issue of like grade and quality is not affirmed.

The hearing examiner, after severing the issue of "like grade and quality" from all other issues in the *Universal-Rundle* proceedings, granted respondent's motion to dismiss the charges pertaining to the sale of "Homart" brand fixtures to Sears Roebuck & Co. upon a finding that such fixtures and the fixtures sold under the Universal-Rundle brand name were not of like grade and quality. Findings and conclusions with respect to this issue were made a part of the initial decision filed October 28, 1963. In this connection, the plumbing fixtures at issue under the severance order are virtreous china and enameled cast-iron bathroom fixtures and cast-iron kitchen sinks set forth in the initial decision of the hearing examiner in the *Universal-Rundle* case.

The only issues to be resolved, therefore, in the above-entitled case have been disposed of by the findings and conclusions in the initial decision of the hearing examiner in the companion case, *i.e.*, *In the Matter of Universal-Rundle Corp.*, Docket No. 8070. Obviously, if the Universal-Rundle Corp. is selling plumbing fixtures to Sears Roebuck & Co. under the brand name Homart at lower prices than plumb-

ing fixtures of grade and quality unlike those sold by respondent under the Universal-Rundle brand name, the respondent herein has not violated section 2(f) of the Clayton Act, as amended (U.S.C. Title 15, Section 13). Under these circumstances, in the absence of a 2(a) violation by the Universal-Rundle Corp., there can be no 2(f) violation by Sears and Roebuck in inducing the sale of the Homart brand products (pursuant to Sears and Roebuck's specifications) which are not comparable with the products otherwise marketed by Universal-Rundle.

Since the issue with regard to like grade and quality in the within case is identical to the issue resolved in the *Universal-Rundle* case and evidence has been completely adduced with regard to this issue in the prior proceeding (*Universal-Rundle Corp.*, Docket No. 8070) followed by a dismissal of that case, no advantage would be served in scheduling hearings for the purpose of reproducing the same evidence in the within case as was adduced in the *Universal-Rundle* case unless the Commission should decide that the hearing examiner has erred in dismissing the complaint in the *Universal-Rundle* case on the issue of like grade and quality. Consideration of respondent's motion to dismiss is therefore appropriate.

In view of the foregoing, the hearing examiner with the consent of counsel for the respondent Sears, Roebuck & Co., not a party to the prior *Universal-Rundle* proceedings,[2] takes official notice of his findings, conclusions and order, supported by the evidence of record, insofar as they relate to the issue of like grade and quality set forth in Part I of the initial decision in the *Universal-Rundle* case, Docket No. 8070. In taking official notice of such prior proceedings on the issue of like grade and quality, the hearing examiner is aware that he is taking cognizance of adjudicative facts in a prior proceeding and that in some cases this has been held to be questionable if any of the parties are prejudiced thereby. However, the resolving of the issue of like grade and quality in the *Universal-Rundle* case represents not only the law of that case, but also the law of the within case. Furthermore, no prejudice to the parties can be involved since respondent herein consents and the Commission was a party to the prior proceeding involving the identical issue to be herein resolved. Additionally, the provisions of this initial decision otherwise preclude any possibility of prejudice. Under these circumstances, particularly where the evidentiary facts do not appear to be materially in dispute,

[2] See written consent and waiver of further hearings by counsel for respondent dated October 23, 1963, which is made a part of the record herein.

although the conclusions to be drawn therefrom are, it has not been uncommon for the courts to take notice of facts adduced in a prior proceeding and disposition of prior cases. In fact, it is well established that the courts do take judicial notice of the nature of and disposition of prior cases,[3] inclusive of findings and conclusions with supportive evidence of record. The Supreme Court has declared in many cases that "we take judicial notice of our own records." [4] Indeed, in some cases the Supreme Court has quite freely taken judicial notice of evidence and other materials in records of other cases that happened to be immediately at hand.[5]

Logically, if judicial notice properly depends to some extent upon what is already in the court's possession, then official notice should depend to the same extent upon what is already in the agency's possession.[6]

Based on the evidence of record and the findings, conclusions and order, with reasons therefor, in the *Universal-Rundle* case, Docket No. 8070, relating to the severed issue of like grade and quality, of which official notice is taken,[7] the hearing examiner is compelled to dismiss the complaint in the within case. The purpose of this procedure in the interest of due process is to avoid unnecessary delay in the issuance of the initial decision herein without prejudice, of course, to rights of (or incident to) appeal and the right of adducing any evidence whatsoever on any of the issues raised by the pleadings in the event the hearing examiner's decision is reversed and remanded. The taking of official notice of the prior related proceeding (with respondent's consent and waiver of further hearings under the aforesaid conditions) obviates the need for the adduction of further evidence at this time concerning the matters of which the hearing examiner has taken official notice in the absence of evidence to be adduced herein by the Commission other than that already adduced

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[3] *United States* v. *California Cooperative Canneries,* 279 U.S. 553, 555, 49 S. Ct. 423, 424, 73 L. Ed. 838 (1929); *Freshman* v. *Atkins,* 269 U.S. 121, 124, 46 S. Ct. 41, 42, 70 L. Ed. 193 (1925); *Aspen Mining & Smelting Co.* v. *Billing,* 150 U.S. 31, 38, 14 S. Ct. 4, 37 L. Ed. 986 (1893).

[4] *Bienville Water Supply Co.* v. *Mobile,* 186 U.S. 212, 217, 22 S. Ct. 820, 822, 46 L. Ed. 1132 (1902). See also *Fritzlen* v. *Boatmen's Bank,* 212 U.S. 364, 370, 29 S. Ct. 366, 368, 53 L. Ed. 551 (1909).

[5] *National Fire Insurance Co.* v. *Thompson,* 281 U.S. 331, 50 S. Ct. 288, 74 L. Ed. 881 (1930); *United States* v. *Pink,* 315 U.S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942); see also *Moscow Fire Ins. Co.* v. *Bank of N.Y. & Trust Co.,* 280 N.Y. 286, 20 N.E. 2d 758 (1939), affirmed 309 U.S. 624, 60 S. Ct. 725, 84 L. Ed. 986 (1940).

[6] Davis, Administrative Law Treatise, Vol. 2, page 384.

[7] Section 8 of the Administrative Procedure Act requires all decisions to be premised on findings and conclusions, with reasons therefor.

in the companion case (*i.e.*, *Universal-Rundle Corp.*, Docket No. 8070).[8] The case is accordingly closed, and it is

ORDER

Ordered, That the complaint is herein and hereby dismissed.

FINAL ORDER

The hearing examiner having filed his initial decision herein on November 4, 1963, and counsel supporting the complaint having filed notice of intention to appeal from said decision on November 18, 1963, and thereafter having requested that the appeal be placed on suspense; and

The Commission, on December 13, 1963, having issued an order staying the effective date of the initial decision, and now having determined that the case should not be placed on its own docket for review; and

The Commission having considered a motion filed by respondent on July 10, 1964, requesting that the Commission vacate its order staying the effective date of the initial decision and that it adopt the initial decision as the decision of the Commission, and having determined that said request should be granted:

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

It is further ordered, That the initial decision of the hearing examiner, filed November 4, 1963, be, and it hereby is, adopted as the decision of the Commission.

IN THE MATTER OF

METROPOLITAN GOLF BALL, INC., ET AL.

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

Docket 8528. Complaint, Aug. 27, 1962—Decision, July 31, 1964

Order requiring Santa Monica, Calif., distributors of previously used golf balls which they had rebuilt, to cease selling such golf balls with no disclosure on the packaging or on the balls themselves that the balls were previously used or rebuilt.

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[8] Counsel in support of the complaint have advised the hearing examiner they have no additional evidence to adduce at this time. This disposition is in accord with the authority vested in the hearing examiner under section 7(b) of the Administrative Procedure Act and is consistent with the Federal Trade Commission's Rules and Regulations section 3.14(d) relating to official notice.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by the said Act, the Federal Trade Commission, having reason to believe that Metropolitan Golf Ball, Inc., a corporation, and Leland B. Wagner, individually and as an officer of said 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 Metropolitan Golf Ball, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 1831 Colorado Avenue, Santa Monica, California.

Respondent Leland B. Wagner is an officer of said corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution to dealers and others for resale to the public of previously used golf balls which have been rebuilt or reconstucted.

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

PAR. 4. In the course and conduct of their business, respondents rebuild or reconstruct golf balls, using in said process, portions of the ball which have been used and reclaimed.

Respondents do not disclose either on the ball itself, or the wrapper, on the box, or on the bags in which the balls are sometimes packed, or in any other manner, that said golf balls are previously used balls which have been rebuilt or reconstructed.

When such previously used golf balls are rebuilt or reconstructed, in the absence of any disclosure to the contrary, or in the absence of an

adequate disclosure, such golf balls are understood to be and are readily acceptable by the public as new balls, a fact of which the Commission takes official notice.

PAR. 5. By failing to disclose the fact as set forth in Paragraph Four, respondents place in the hands of uninformed and unscrupulous dealers and others, means and instrumentalities whereby they may mislead and deceive the public as to the nature and construction of their said golf balls.

PAR. 6. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as those sold by respondents.

PAR. 7. The failure of the respondents to disclose on the golf ball itself, on the wrapper, or on the box or bag in which they are packed, or in any other manner, that they are previously used balls which have been rebuilt or reconstructed, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said golf balls were, and are, new in their entirety and into the purchase of substantial quantities of respondents' products by means of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of the respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Roy B. Pope for the Commission.
Mr. Leland B. Wagner, pro se and for corporate respondent.

INITIAL DECISION AFTER REMAND BY WILMER L. TINLEY, HEARING EXAMINER

JUNE 17, 1964

The Federal Trade Commission, on August 27, 1962, issued and subsequently served its complaint charging the respondents named in the caption hereof with violating Section 5 of the Federal Trade Commission Act by selling rebuilt or reconstructed golf balls without making adequate disclosure on the balls or packaging that they are previously used balls which have been rebuilt or reconstructed. Answer was filed by the respondents on November 5, 1962, admitting, in effect, the production and sale of such golf balls, but otherwise denying the essential allegations of the complaint.

After a prehearing conference in December 1962, and hearings in Chicago, Illinois, in February 1963, an initial decision dismissing the complaint was filed by the hearing examiner on May 3, 1963. The record as then constituted did not provide an adequate basis for informed determination as to whether or not respondents' products have the appearance of new golf balls, and are understood to be, and are readily acceptable by the public as, new golf balls; and the public interest, which then appeared to be present, was not sufficient to warrant reopening the proceeding for the reception of further evidence.

On April 3, 1964 [65 F.T.C. 1295], the Commission entered its order vacating the initial decision and remanding the case to the hearing examiner on the basis of a motion and affidavit by counsel supporting the complaint with respect to newly discovered evidence. The scope of the remand was set out in the following provisions of the Commission's order:

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for the purpose of receiving such additional evidence as the parties may offer relevant to the substantiality of respondents' interstate sales of rebuilt or re-covered golf balls ordinarily used by the public in playing golf.

It is further ordered, That if the aforementioned additional evidence establishes significant interstate sales by respondents of these golf balls, such further evidence be received as the parties may offer relevant to the appearance of respondents' rebuilt or re-covered golf balls packaged in the manner in which they are sold to the public; and relevant to whether or not, in the absence of adequate disclosure to the contrary, such balls are understood to be and are readily acceptable by the public as new balls.

Thereafter, by letter dated May 12, 1964, respondents terminated the services of counsel by whom they had previously been represented in this matter, and the individual respondent undertook responsibility for their further representation.

On June 3, 1964, respondents filed a motion to withdraw their answer previously filed herein, and, in lieu thereof, to substitute an answer, annexed to said motion, stating that they elect not to contest further the allegations of fact set forth in the complaint, and that, for the purposes of this proceeding, "they admit all material allegations of the Complaint."

Also on June 3, 1964, counsel supporting the complaint and respondents filed a stipulation proposing a form of order which they considered appropriate, and which was "submitted to the hearing examiner for his consideration in connection with the disposition of this case." In the stipulation, the parties also agreed

that the testimony and exhibits introduced at the previous hearings in this case may be considered by the hearing examiner as part of the record despite the subsequent filing of the substitute answer.

By his order of June 15, 1964, the hearing examiner granted respondents' motion to withdraw their original answer and to file substitute answer, and respondents' admission answer was received in lieu of their original answer. At the same time, it was also ordered that the evidence theretofore received remain in the record for consideration in the disposition of this proceeding despite the subsequent filing of the admission answer.

The purpose and effect of the admission answer are to supply the additional evidence referred to in the Commission's remand herein with respect to "the substantiality of respondents' interstate sales of rebuilt or re-covered golf balls ordinarily used by the public in playing golf"; with respect "to the appearance of respondents' rebuilt or recovered golf balls packaged in the manner in which they are sold to the public"; and with respect "to whether or not, in the absence of adequate disclosure to the contrary, such balls are understood to be and are readily acceptable by the public as new balls."

The admission answer has, accordingly, supplied the factual deficiencies which prevented an informed decision in the original initial decision on certain of the issues, and which caused the Commission to remand the proceeding for the reception of additional evidence. In these circumstances, further hearings herein are unnecessary, and the matter has been submitted by the parties for decision on this record, with a proposed form of order which they consider appropriate.

The order proposed by the parties differs from the form of order incorporated in the "Notice" portion of the complaint by the inclusion of words which would limit the application of the order to "white, painted or unpainted," rebuilt golf balls. The clear purpose of this modification proposed by the parties is to limit the application of the order to "rebuilt or re-covered golf balls ordinarily used by the public in playing golf," to which the Commission's order of remand was limited, and to exclude from its application wholly or partly colored balls used by putting courses, and circumferentially striped balls used by driving ranges.

This is a proper limitation which is fully supported by the evidence presented during the original proceedings. The language of the order proposed by the parties, however, requires further modification so as to exclude from its coverage white balls with the characteristic circumferential striping used by driving ranges. This may be accomplished by limiting its application to rebuilt balls "of the type ordi-

narily used by the public in playing golf." With this further modification, the order proposed by the parties will be adopted.

Although the evidence previously received herein may be considered in the preparation of this initial decision, it is unnecessary, and would be inappropriate, to make detailed findings of fact with respect to basic issues which have been resolved by the admission answer. In issuing this initial decision on remand, therefore, the hearing examiner finds the facts to be essentially as alleged in the complaint with only such amplification as may be necessary to provide an appropriate basis for the limitations of the order hereinabove referred to. Specific references to supporting evidence in the record are made only in connection with findings which amplify the admitted allegations of the complaint.

FINDINGS OF FACT

1. Respondent Metropolitan Golf Ball, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 1831 Colorado Avenue, Santa Monica, California.

2. Respondent Leland B. Wagner is an individual, and is an officer of said corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

3. Respondents are now, and for some time have been, engaged in the offering for sale, sale and distribution to dealers and others for resale to the public of previously used golf balls which have been rebuilt or reconstructed.

4. In the course and conduct of their business, respondents now cause, and for some time have caused, their said products, when sold, to be shipped and transported from their place of business in the State of California to purchasers thereof located in various other States of the United States and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. In the course and conduct of their business, respondents rebuild or reconstruct golf balls by removing the covers and part of the rubber winding from used golf balls, rewinding the remaining part of the balls with rubber thread to their original size without covers, and adding new covers. The covers are manufactured of new material, and are finished with the standard pattern of dimples characteristic of substantially all new golf balls (Tr. 150–70).

6. Many golf balls are rebuilt by respondents with covers of solid

colors, such as red, green, yellow, orange or blue, or with covers which are half white and half colored. These colored balls are sold by respondents to or for the use of "miniature" or putting golf courses (Tr. 110–12, 121–6, 168–9, 188–93).

7. Respondents also rebuild golf balls with white covers having colored bands or stripes completely around their circumference, which are either unbranded, or are branded with such words as "Driving Range" or "Stolen" or with the name of the driving range. Such balls are sold by respondents to or for the use of golf practice driving ranges (Tr. 113–4, 169–70, 186–7, 190–3, 536–7).

8. Balls with colored or striped covers, as described above, which are sold by respondents to or for the use of putting courses and driving ranges, are not marked so as to identify them as rebuilt balls. They are, however, always invoiced to the customers as rebuilt balls. The operators of putting courses and driving ranges, who purchase such balls, are not deceived in any way and do not resell such balls to the golfing public (Tr. 111, 184–93).

9. Respondents also rebuild many golf balls with white covers characteristic of golf balls ordinarily used by the public in playing golf, and many of such balls rebuilt by respondents are marked with brand names (Tr. 112–15, 191, 208–9, 230–3, 500–6). The covers used by respondents in rebuilding these golf balls are made of polyethylene, a white plastic material with a relatively dull finish. Respondents experimented with various enamels and solvents in an effort to improve the gloss and luster of their white golf balls, but the cover material would not satisfactorily accept any type of coating or paint, and the effort was abandoned (Tr. 138–9, 155, 170–84, 201–5). Whether painted or unpainted, however, the covers, which are the only visible parts of these balls, are made of all new material.

10. Respondents' rebuilt white golf balls of the type ordinarily used by the public in playing golf are packaged in bags or boxes, the containers frequently being marked with brand names, and are sold by respondents to wholesalers or retailers for resale to the consuming public (Tr. 91–5, 109, 114–5, 150). On the invoices which respondents send to their customers, and on their price lists, their golf balls are identified as rebuilt (Tr. 184-93), but these invoices and price lists are not for the information of the consuming public.

11. Respondents do not disclose on their rebuilt white golf balls of the type ordinarily used by the public in playing golf, or on the bags, boxes, or wrappings in which they are packaged, that they are previously used balls which have been rebuilt or reconstructed. In the absence of any disclosure to the contrary, or in the absence of an adequate

disclosure, such golf balls are understood to be and are readily acceptable by the public as new balls.

12. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as those sold by respondents, and with others engaged in the sale of new golf balls (Tr. 109).

CONCLUSIONS

1. The failure of the respondents to disclose on their rebuilt white golf balls of the type ordinarily used by the public in playing golf, or on the bags, boxes or wrappings in which they are packaged, or in any other manner, that they are previously used balls which have been rebuilt or reconstructed, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said golf balls were, and are, new in their entirety, and into the purchase of substantial quantities of respondents' products by means of said erroneous and mistaken belief.

2. By failing to make such disclosure, respondents have placed, and now place, in the hands of uninformed or unscrupulous dealers and others the means and instrumentalities whereby they may mislead and deceive the public as to the nature and construction of said golf balls.

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

ORDER

It is ordered, That respondent Metropolitan Golf Ball, Inc., a corporation, and its officers, and respondent Leland B. Wagner, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of white rebuilt or reconstructed golf balls of the type ordinarily used by the public in playing golf, whether painted or unpainted, do forthwith cease and desist from:

1. Failing clearly to disclose on the bags, boxes, or other containers in which such golf balls are packaged, on the wrappers, and on said golf balls themselves, that they are previously used balls which have been rebuilt or reconstructed.

2. Placing any means or instrumentalities in the hands of others whereby they may mislead the public as to the prior use and rebuilt nature and construction of such golf balls.

FINAL ORDER

The hearing examiner having filed his initial decision herein containing an order to cease and desist, which order conforms in substance to the order proposed by the parties, and no appeal having been taken therefrom; and

The Commission having determined that the hearing examiner's order should be modified with a provision permitting respondents to omit markings disclosing prior use on their golf balls themselves if respondents establish that the disclosure on the bags, boxes or other containers and/or wrappers of such golf balls adequately informs retail customers at the point of sale of that fact:

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

It is ordered, That respondent Metropolitan Golf Ball, Inc., a corporation, and its officers, and respondent Leland B. Wagner, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of white rebuilt or reconstructed golf balls of the type ordinarily used by the public in playing golf, whether painted or unpainted, do forthwith cease and desist from:

1. Failing clearly to disclose on the bags, boxes, or other containers in which such golf balls are packaged, on the wrappers, and on said golf balls themselves, that they are previously used balls which have been rebuilt or reconstructed. Provided, however, that disclosure need not be made on the golf balls themselves if respondents establish that the disclosure on the bags, boxes or other containers and/or wrappers is such that retail customers, at the point of sale, are informed that the golf balls are previously used and have been rebuilt or reconstructed.

2. Placing any means or instrumentality in the hands of others whereby they may mislead the public as to the prior use and rebuilt nature and construction of their golf balls.

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

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

IN THE MATTER OF

HUGH J. McLAUGHLIN & SON, INC., ET AL.

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

Docket 8529. Complaint, Aug. 28, 1962—Decision, July 31, 1964

Order making effective desist order of June 12, 1964, 65 F.T.C. 992, which required a manufacturer of golf balls in Crown Point, Ind., to cease selling rebuilt or re-constructed golf balls without disclosure on the packaging and on the balls themselves that they were previously used and rebuilt.

FINAL ORDER

By its decision of June 12, 1964 [65 F.T.C. 992], the Commission modified and adopted the initial decision as modified but suspended enforcement of the cease and desist order contained therein until further notice. The Commission has determined, in the light of its final order in *Metropolitan Golf Ball, Inc., et al.*, Docket No. 8528, that the order to cease and desist should be made effective. Accordingly,

It is ordered, That the order to cease and desist contained in the decision of the Commission issued June 12, 1964 [65 F.T.C. 992], shall become effective with the issuance of this order.

It is further ordered, That respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the provisions of the order issued June 12, 1964.

IN THE MATTER OF

UNITED STATES RUBBER COMPANY

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

Docket 8586. Complaint, July 18, 1963—Decision, July 31, 1964

Order dismissing—on evidence that the challenged practices had been abandoned several years prior to issuance of the complaint, with no likelihood of resumption—complaint charging a leading manufacturer of rubber and

plastic products with deceptively representing its thermoplastic product Kralastic as "rubber," "hard rubber," "rubber-resin," etc.

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

PARAGRAPH 1. Respondent United States Rubber Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 1230 Avenue of the Americas, New York, New York.

Respondent owns, operates and controls a division of its business known as Naugatuck Chemical Division, with offices and place of business located at Naugatuck, Connecticut and an additional plant located at Baton Rouge, Louisiana.

PAR. 2. Respondent, through its Naugatuck Chemical Division, is now and for some time last past has been, engaged in the manufacture, advertising, sale and distribution of, among other things, thermoplastic materials under the name of "Kralastic."

Said thermo plastic materials are manufactured in various compositions and under various patents and for the ultimate use by manufacturers in production of various parts and commodities for resale to the purchasing public.

PAR. 3. Respondent causes its said products, when sold, to be transported from its plants located in the States of Connecticut and Louisiana to purchasers thereof located in various States of the United States other than, as well as in, the States of Connecticut and Louisiana. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the conduct of its business, and at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals engaged in the manufacture, advertising, sale and distribution of products of the same general kind and nature as sold by respondent.

PAR. 5. In the course and conduct of its business, respondent has disseminated, and caused to be disseminated, advertisements concerning its said thermoplastic materials under the name "Kralastic," including but not limited to advertisements inserted in magazines, brochures, circulars and letters, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said thermoplastic materials.

PAR. 6. By means of adverstisements as aforesaid and by oral statements of sales representatives and by statements in writing to customers and prospective customers, respondent has represented, directly or by implication:

1. That its "Kralastic" raw material is a hard rubber compound for use in the manufacture of combs, and that combs made of said material are in fact "rubber" and "hard rubber" and are correctly branded as such.

2. That its "Kralastic" raw material is a synthetic rubber or a "modified rubber."

3. That combs made of its Kralastic material are made of rubber-resin and are appropriately branded for resale to the consuming public under such designation.

4. That its Kralastic material is a resin-rubber blend and thus differs from plastics used in connection with the manufacture of various end products.

PAR. 7. In truth and in fact:

1. Respondent's "Kralastic" material as sold to comb manufacturers is not a hard rubber compound as the terms rubber or hard rubber are understood in the trade in connection with combs for use on human hair. Combs made from said materials are not vulcanized and are not composed of rubber or hard rubber as the words are understood in the trade.

2. Respondent's "Kralastic" material is not a synthetic rubber nor is it a "modified" rubber and does not have the same properties of rubber.

3. The combs made of Kralastic material are not rubber-resin as the ingredients of same are predominantly a thermo plastic resin and composed of different ingredients other than vulcanized rubber as the term is understood in the trade.

4. Said Kralastic material is not a rubber-resin blend that has non-thermoplastic properties of vulcanized rubber nor does it have the properties of hard rubber; said Kralastic material is in fact a thermoplastic.

Therefore, the statements and representations set forth in Paragraph Six were, and are, false, misleading and deceptive.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's thermoplastic "Kralastic" materials by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Charles S. Cox for the Commission.

Arthur, Dry, Kalish, Taylor & Wood, New York, N.Y., by *Mr. Walter Barthold* for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

MARCH 24, 1964

The complaint in this matter charges the respondent, United States Rubber Company, a corporation, with misrepresenting a thermoplastic material manufactured and sold by it, in violation of the Federal Trade Commission Act. A substantial volume of evidence, both in support of and in opposition to the complaint, has been received. Proposed findings and conclusions have been submitted by the parties and the case has been argued orally before the hearing examiner. Any proposed findings or conclusions not included herein have been rejected as not material or as not warranted by the evidence.

The thermoplastic material in question is manufactured, and marketed in interstate commerce, by respondent's Naugatuck Chemical Division, which has plants in Naugatuck, Connecticut; Baton Rouge, Louisiana; and elsewhere. The material is advertised and sold under the trade name "Kralastic". It is manufactured in a number of different types and grades. The material is sold by respondent in bulk to other manufacturers, who use it in the production of a wide variety of end products. Respondent makes no sales of the material to consumers. The two types of the material involved in the present case are known as "Kralastic D" and "Kralastic MM."

The complaint charges that respondent has falsely represented the material as "rubber," "hard rubber," "synthetic rubber," and "modified

rubber," and also as "resin-rubber" and "rubber-resin." Actually, the complaint charges, the material is none of these things but is merely a thermoplastic.

A novel feature of the complaint is that it does not challenge the correctness of any of the above designations except where the material is to be employed in the manufacture of combs for use on human hair. Any doubt on this point is removed by reference to the proposed order included in the complaint, which is identical with the form of order requested by complaint counsel in his proposed findings and conclusions.

Respondent does not manufacture combs, nor has it ever done so. It does sell the material to comb manufacturers; such sales, however, represent only a negligible portion of its total sales of the material. During each of the years 1959–1963 (only the first six months of 1963 are included), sales of the material to comb manufacturers accounted for only about 1 percent or less of respondent's total sales of the material (RX 76; Tr. 538–541).

The evidence fails to establish that respondent has ever advertised or otherwise referred to the material as rubber or hard rubber or synthetic rubber. In the case of one customer (to be referred to later) it did for a time invoice the material as modified rubber.

The designations resin-rubber and rubber-resin were freely and widely used by respondent in its advertising up until about the year 1960 when, for business reasons, it began to discontinue the use of such terms and to adopt other designations for the material. Respondent's position is that it was entirely warranted in referring to the material as resin-rubber or rubber-resin, that that is precisely what the material is. Thus the principal issue in the proceeding centers around the use of these terms. Complaint counsel insists that, at least insofar as combs are concerned, use of the word rubber to describe the material is false and misleading, regardless of whether the word is used alone or in conjunction with the word resin.

Kralastic D, the first of the two types of the material here involved, was placed on the market by respondent in about 1948. It was manufactured and sold for some ten or twelve years, when it was replaced by the second type, Kralastic MM.

Kralastic D consisted of a physical blend or mixture which contained 13 percent, by weight, of acrylonitrile-butadiene and 85 percent of acrylonitrile-styrene. The remaining 2 percent consisted of various minor compounding ingredients. Acrylonitrile-butadiene is a synthetic rubber frequently referred to as nitrile rubber. Acrylonitrile-

styrene is a resin. Kralastic D, therefore, was in fact a blend of resin and rubber (CXs 8A–B, 30; Tr. 130–32, 152–53, 365, 370, 448–51).

The principal effect of including nitrile rubber in the product was to increase its impact resistance. Plastics usually are brittle; they tend to crack or break easily. The inclusion of the nitrile rubber in Kralastic D served to toughen the finished product, to increase very materially its impact resistance (Tr. 443, 455).

Kralstic MM consists of a mixture of two materials. The first of these is a chemical graft of polybutadiene on acrylonitrile and styrene, and the second is acrylonitrile-styrene. As with Kralastic D, the product also contains certain minor compounding ingredients. Polybutadiene is a synthetic rubber. The amount of polybutadiene which goes into the making of Kralastic MM is approximately 6 percent, by weight, of the total ingredients (CXs 8A–B, 30; Tr. 88, 130, 365–67, 454).

The answer to the question whether Kralastic MM may properly be referred to as resin-rubber or rubber-resin is attended with greater difficulty than in the case of Kralastic D. This is because the rubber ingredient (polybutadiene) which goes into the making of Kralastic MM is chemically grafted on acrylonitrile and styrene, and as a result of the grafting process the polybutadiene probably is no longer present in its original form; that is, polybutadiene, as such, probably is not present in the final product Kralastic MM (CX 8A–B; Tr. 153–54, 454–55, 479–80).

However, the essential properties of the polybutadiene are present in Kralastic MM. Just as the nitrile rubber in Kralastic D contributed materially to the impact resistance of that product, so do the properties of polybutadiene add substantially to the impact resistance of Kralastic MM (Tr. 455).

There is a difference of opinion among experts testifying in the proceeding as to whether in these circumstances Kralastic MM may properly be referred to as resin-rubber or rubber-resin. Testifying at the instance of complaint counsel, Dr. Emanuel Horowitz, Dr. Robert D. Stiehler, and Dr. Lawrence A. Wood, all of the National Bureau of Standards, apparently are of the opinion that as there probably is no rubber, as such, present in Kralastic MM, it is improper and misleading to use the terms resin-rubber or rubber-resin to describe the product (Tr. 98–104, 152–56, 164).

On the other hand, Dr. William Cummings of respondent's chemical research staff, Dr. Field H. Winslow of the Bell Telephone Laboratories, and Dr. Herman F. Mark, Dean of the Faculty of the Polytechnic Institute of Brooklyn, are of the opinion that as poly-

butadiene, a synthetic rubber, goes into the making of Kralastic MM and performs an important function therein, the final product may properly be referred to as resin rubber or rubber-resin, even though the polybutadiene content, as such, may not be present in the finished product (Tr. 457–58, 487–88, 512–13).

The experts on both sides seem to agree that frequently in the field of chemistry products are described by the important ingredients which go into their manufacture, even though some of the ingredients may not be present, as such, in the finished product. Among the examples given by the witnesses were rubber hydrochloride, which contains no rubber, as such; nitro-cellulose, which actually contains no cellulose; and chrome steel and vanadium steel which, respectively, do not actually contain chrome or vanadium (Tr. 141–44, 456–57, 489, 514–16).

In the hearing examiner's opinion the more reasonable and realistic view is that use of the term resin-rubber or rubber-resin to refer to Kralastic MM is not inappropriate or misleading. It must be remembered that we are not dealing here with an ingredient which serves merely a minor or insignificant purpose in the final product. On the contrary, the rubber ingredient which goes into Kralastic MM serves a very real and important function in that its presence adds very materially to the impact strength of the product.

Included in the record are a number of patents, as well as treatises and articles appearing in scientific and trade publications. This evidence refers to products such as Kralastic D and Kralastic MM as resin-rubber and rubber-resin materials. While evidence of this kind is not decisive, it is persuasive in that it indicates wide acceptance and use of the terms in both science and industry (RXs 51, 53–57, 59, 62–64, 81, 82, 85–94).

It is urged by complaint counsel that whatever may be the correct view generally, when the word rubber appears on a comb, even though it may be accompanied by other words, this means to the public that the rubber is hard rubber, that is, vulcanized hard rubber.

The difficulty with this position is that there is no evidence in the record that such is the understanding of the public. True, some of the experts from the National Bureau of Standards, speaking as experts, did testify that to them the word rubber on a comb conveys that meaning. But, the witnesses were speaking only for themselves and as experts; there is nothing to indicate that their view is representative of that of the general public.

Care must be taken to distinguish the present case from that of Vulcanized Rubber and Plastics Company, Docket No. 6222, 53 F.T.C.

920; 258 F. 2d 684; 288 F. 2d 257 (*cert. den.* 368 U.S. 821). In that case, combs made of Kralastic D were branded by the comb manufacturer as "rubber" or "hard rubber" and there was substantial evidence that to the public these terms meant vulcanized hard rubber.

In the present case, the record fails to establish that respondent has ever represented Kralastic D or Kralastic MM as rubber or as hard rubber. Respondent makes no such claims for the materials. The issue here is not whether Kralastic D or Kralastic MM are rubber or hard rubber, but whether they may properly be designated resin-rubber or rubber-resin.

For this reason evidence in the present record to the effect that Kralastic D and Kralastic MM are not rubber or hard rubber would appear to be of little assistance. The most important item of such evidence is that relating to certain tests on some twenty-five combs made by the National Bureau of Standards at the request of the Commission, the tests having been made in April or May 1961 (Tr. 53, 70–80). The combs were made of Kralastic D or Kralastic MM (the record does not disclose which). The most established by the tests was that the combs were not made of rubber or hard rubber. The tests did not purport to determine whether the combs contained synthetic rubber such as that which went into the manufacture of Kralastic D or that which now goes into the manufacture of Kralastic MM.

In summary, it is concluded that the record fails to establish that use of the terms resin-rubber and rubber-resin to describe Kralastic D and Kralastic MM is false or misleading. It is undisputed that Kralastic D contained 13 percent, by weight, of nitrile rubber, and that such rubber content performed a significant and important function in that it contributed very materially to the impact strength of the product.

In the case of Kralastic MM, a more difficult question is presented, due to the fact that apparently the polybutadiene content is not present, as such, in the finished product. There is, however, no doubt that 6 percent, by weight, of polybutadiene, a synthetic rubber, does go into the making of the product, and that this ingredient performs a highly important function in that it adds substantially to the impact strength of the finished product.

As already indicated, respondent in the case of one customer did for a time invoice Kralastic MM as "modified rubber". The customer was Vulcanized Rubber and Plastics Company. In 1961 this company was engaged in the defense of a civil penalty proceeding growing out of alleged violation of the cease and desist order issued against the company by the Commission. Thinking that it would be of assistance

in the defense of the penalty proceeding if respondent would invoice Kralastic MM to it as "modified rubber" the company requested respondent to invoice the material in that way. Respondent acceded to the request and several invoices from respondent to Vulcanized Rubber and Plastics Company in 1961 designated the material as "modified rubber" (CXs 3A–C, 5B–G).

Kralastic MM is not modified rubber and respondent's use of the term in the invoices was unwarranted and misleading. In light, however, of the circumstances under which the representation was made, the fact that this was the only instance of that kind, and the absence of any likelihood that the representation will be repeated in the future, it is concluded that there is insufficient public interest in the matter to warrant issuance of an order forbidding use of the representation.

Finally, respondent interposes the defense of abandonment or discontinuance of use of the terms resin-rubber and rubber-resin to describe Kralastic. During the last several years materials such as Kralastic have come to be known more and more in the industry by the general designation "ABS" (for acrylonitrile-butadiene-styrene). Respondent's current practice, which has obtained for some three or four years, in its advertising and labeling of Kralastic, is to refer to it by its trade name alone or to describe it by such designations as "ABS Resin," "ABS Plastic," "ABS Compound," etc. The terms resin-rubber and rubber-resin are no longer used in advertising the product. However, in answer to specific inquiries as to the composition of the material, respondent does refer to the rubber ingredient.

In view of the conclusion reached on the merits, it appears unnecessary to determine whether the defense of abandonment or discontinuance has been sustained.

ORDER

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

OPINION OF THE COMMISSION

JULY 31, 1964

By REILLY, *Commissioner:*

The complaint herein charges respondent with violating Section 5 of the Federal Trade Commission Act by falsely and deceptively representing its product "Kralastic," a thermo-plastic material used in the manufacture of numerous products, including combs, as "rubber," "hard rubber," "modified rubber," "synthetic rubber," "rubber-

resin," and "resin-rubber." The hearing examiner held in his initial decision that the allegations had not been sustained and ordered that the complaint be dismissed. Counsel supporting the complaint has appealed from this decision.

The product involved in this proceeding is manufactured and marketed by respondent's Naugatuck Chemical Division and was introduced in 1948 as "Kralastic D." In 1958 or shortly thereafter "Kralastic D" was replaced by "Kralastic MM." "Kralastic D" consisted of a blend or mixture of 13% synthetic rubber (acrylonitrile-butadiene) and 85% resin (acrylonitrile-styrene) and was therefore literally a resin-rubber blend. "Kralastic MM" consists of a blend or mixture of (1) a chemical graft of polybutadiene on acrylonitrile and styrene and (2) acrylonitrile-styrene (a resin). Although synthetic rubber (polybutadiene) is one of the ingredients which goes into the making of "Kralastic MM" (it is 6% by weight of the total ingredients), it is probably not present in its original form in the final product. In other words, the synthetic rubber ingredient undergoes a change in form as a result of the grafting process and therefore "Kralastic MM" probably contains no rubber as such and is literally not a blend of rubber and resin.

As recognized by the hearing examiner, the principal issue in this proceeding is whether the terms "rubber," "hard rubber," "modified rubber," "synthetic rubber," "rubber-resin" and "resin-rubber" have the capacity or tendency to mislead or deceive purchasers or prospective purchasers as to the nature or composition of "Kralastic" when this product is employed as the raw material in the manufacture of combs.[1] Or stated more simply, the issue is whether the public may be led to believe by these terms that combs made from "Kralastic" are made from hard rubber.[2]

The examiner held that there was no evidence that respondent ever advertised or otherwise referred to "Kralastic" as "rubber" or "hard rubber" or "synthetic rubber." He further held that although respondent had invoiced the material as "Modified Rubber" it had done so in only one instance and that there was no likelihood that this representation would ever be repeated. The examiner also found that respondent had described its product as "rubber-resin" and "resin-

[1] "A novel feature of the complaint is that it does not challenge the correctness of any of the above designations except where the material is to be employed in the manufacture of combs for use on human hair." I.D. page 391.

[2] "Hard rubber" is a product made by vulcanizing rubber with sulfur. It has been commonly used as a raw material in the manufacture of combs and combs made therefrom have been designated "rubber" and "hard rubber."

rubber" but held that there was no proof that such terms when so used were inappropriate or misleading.

In view of the disposition we propose to make of this proceeding, we will consider only the examiner's ruling concerning respondent's use of the terms "rubber-resin" and "resin-rubber."

The examiner held in this connection that counsel supporting the complaint had failed to sustain the allegation on this point since there was no evidence in the record to indicate that the public would understand these terms, when used on a comb, to mean that the comb was composed of vulcanized hard rubber. He further ruled that although experts from the Bureau of Standards had testified that these terms on a comb conveyed that meaning to them, such witnesses were speaking only for themselves and as experts and that there was nothing to indicate that their view was representative of that of the general public.

While it is not entirely clear from the initial decision, the examiner's position appears to be that counsel supporting the complaint could show the likelihood of deception only by calling consumer witnesses to testify as to their understanding of the words "rubber-resin" and "resin-rubber." If this was the basis for his holding, he was, of course, in error. It is well settled that the Commission is not required to sample public opinion in order to determine the meaning conveyed by an advertisement. *Royal Oil Corporation* v. *F.T.C.*, 262 F. 2d 741 (1959); *New American Library of World Literature* v. *F.T.C.*, 213 F. 2d 143 (1954). In holding that the Commission was not required to call consumer witnesses the court in *Zenith Radio Corporation* v. *F.T.C.*[3] stated "The Commission had a right to look at the advertisements in question, consider the relevant evidence in the record that would aid it in interpreting the advertisements, and then decide for itself whether the practices engaged in by the petitioner were unfair or deceptive, as charged in the complaint."

It appears from our examination of the record that complaint counsel not only failed to call consumer witnesses but offered little else in the way of evidence to establish probable deception, being content to rest his case on the Commission's decision *In the Matter of Vulcanized Rubber & Plastics Co.*[4] wherein it was held that the designation of combs made of "Kralastic D" as "hard rubber" or "rubber" was false, misleading and deceptive. Despite the weakness of the evidence adduced in support of the complaint, there is nevertheless sufficient evidence in the record to indicate that respondent's description

[3] 143 F. 2d 29 (1944).
[4] 53 F.T.C. 950 (1957).

of "Kralastic" as "rubber-resin" or "resin-rubber" was misleading when the product was sold for use in the manufacture of combs.

In this connection, respondent points out in its proposed findings that it never at anytime material to this proceeding called Kralastic D or Kralastic MM "rubber," "hard rubber" or any name indicating or implying that the material did not contain resin as well as rubber. It appears, however, that comb manufacturers buying these materials as "rubber-resin" and "resin-rubber" from respondent advertised and labeled their products as "rubber" and "hard rubber." And there is evidence indicating that at least some of these manufacturers may have been under the impression that the product was actually rubber or hard rubber. For example, one customer made the following comments in a letter dated July 17, 1958, to respondent's Naugatuck Chemical Division:

> We have been using, for some time, your rubber material trade name "Kralastik". We have subcontracted the molding of combs, from this material, with our own molds, and have marked them rubber and/or hard rubber.
>
> It is my understanding that your Kralastik is a rubber compound, and when molded into combs can be stamped rubber or hard rubber * * *.
>
> All the data and information that you can furnish us with, in reference to Kralastik as a rubber material, will be greatly appreciated.

It further appears that this customer did not become convinced that Kralastic was a plastic and not hard rubber until 1961. The following report of a telephone conversation with this customer was made by one of respondent's employees on December 26, 1961:

> Mr. Leon called regarding the composition of KRALASTIC. Kee Products has the opportunity to bid on a Government contract for molding combs. This contract requires that the material be hard rubber having a certain vulcanizable component. He wondered if KRALASTIC could be considered such a material. I told him definitely not. While KRALASTIC contains a rubber component it is not vulcanizable either in our processes or during the molding process. Further, a KRALASTIC customer who was labeling his combs hard rubber was made to desist in this labeling by a government agency. Mr. Leon seemed convinced by these arguments that KRALASTIC was not hard rubber.

We think that such evidence indicating that a manufacturer using Kralastic in the production of combs was actually misled as to the composition of this material, which as found by the examiner, was designated "rubber-resin" and "resin-rubber," would support the conclusion that there was a reasonable likelihood that the public might also have been deceived by such terms when used by respondent or its customers in connection with the sale of combs manufactured from Kralastic.

Although we believe that the examiner erred in dismissing the alle-

gations concerning respondent's use of the terms "rubber-resin" and "resin-rubber" for the reasons stated in his initial decision, we are nevertheless of the opinion that the complaint should be dismissed in its entirety on other grounds. Respondent contended before the hearing examiner that the practices challenged in the complaint had been abandoned and adduced evidence in support of this plea. The record shows in this connection that several years prior to the issuance of the complaint respondent discontinued using the designations "rubber-resin" and "resin-rubber" and adopted the designation "ABS" for its Kralastic materials. There is also testimony that the designation "ABS" is now the generally accepted name for materials such as Kralastic and has been sanctioned by the American Society for Testing Materials. There is also in the record the following testimony from one of respondent's representatives:

> We started actually using it ["ABS"] ourselves in news releases and advertising in late 1959 and throughout 1960 there was a transitional period in which we used both ABS and resin-rubber or rubber-resin but since 1960 there has been only one ad in which we used the term rubber-resin, and that was just based on an old format. Everything has been ABS since then.
>
> * * * * * * *
>
> * * * the use of the term rubber or resin-rubber or rubber-resin offers us no advantage currently. In fact, when the term ABS became available we were very happy that there was a new and very distinctive term which we could adopt for our material and be very aggressive in promoting its use generally. We are happy that it has been adopted generally and we intend to keep on using it.

Counsel supporting the complaint does not dispute this testimony nor has he offered any evidence to rebut the showing made by respondent. We are satisfied therefore that respondent has discontinued using the challenged representations and that the circumstances of such discontinuance do not indicate a likelihood of resumption. Since we have no reason to believe that there will be a recurrence of the practice, no order to cease and desist is necessary. The complaint will therefore be dismissed.

To the extent indicated herein the appeal of counsel supporting the complaint is granted and is otherwise denied. The initial decision will be vacated and set aside and the complaint will be dismissed. An appropriate order will be entered.

Commissioner Elman is of the opinion that the complaint should be dismissed for failure of proof.

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 thereof and in opposition thereto, and the Commission having rendered its decision denying the appeal:

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

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

Commissioner Elman is of the opinion that the complaint should be dismissed for failure of proof.

IN THE MATTER OF

GALAXY PUBLISHING CORPORATION ET AL.

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

Docket C-798. Complaint, July 31, 1964—Decision, July 31, 1964

Consent order requiring a New York City publisher of "Galaxy," "Worlds of Tomorrow," "If" and "Magabook" magazines to cease discriminating in paying promotional payments among distributors of its publications by favoring certain distributors with promotional payments which were not available on proportionally equal terms to all other customers of respondent competing with favored distributors.

COMPLAINT

The Federal Trade Commission has reason to believe that the above-named respondents have been and are now violating subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Section 13), as amended; and therefore, pursuant to Section 11 of said Act, it issues this complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Galaxy Publishing Corporation is a corporation organized and doing business under the laws of the State of New York, with its principal office and place of business located at 421 Hudson Street, New York, New York. Said respondent, among other things, has been and is now engaged in the business of publishing and distributing various publications including magazines under copyrighted titles including "Galaxy," "Worlds of Tomorrow," "If," and "Magabook." Respondent's sales of such publications have been and are substantial.

Respondents Robert Guinn and Sol Cohen are the principal officers

of respondent Galaxy Publishing Corporation, their address is the same as that of said corporation, and they formulate, direct and control the acts, practices and policies of said corporation.

PAR. 2. Magazines published by respondent Galaxy Publishing Corporation (hereinafter referred to as Galaxy) are distributed by it through its national distributor, Kable News Company. Kable News Company acts as a conduit or intermediary for respondent Galaxy in arranging for the distribution of such publications to local wholesalers located throughout the United States. Said local wholesalers act as conduits or intermediaries for respondent Galaxy in arranging for the distribution of such publications to retailer outlets located in their respective trading areas.

PAR. 3. Respondent Galaxy, through its conduits or intermediaries, Kable News Company and local wholesalers located throughout the United States, has sold and distributed and now sells and distributes its publications in substantial quantities in commerce, as "commerce" is defined in the Clayton Act, as amended, to competing customers located throughout the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent Galaxy has paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale, or offering for sale of publications sold to them by said respondent. Such payments or allowances were not made available on proportionally equal terms to all other customers of said respondent competing in the distribution of such publications. Among the customers receiving such payments were several companies engaged in the business of operating chains of retail outlets handling magazines among other products. Such payments were made pursuant to negotiations with the favored customers which were either conducted by or approved by respondent Guinn and by respondent Cohen.

PAR. 5. The acts and practices of respondents as alleged above are in violation of the provisions of subsection (d) of Section 2 of the Clayton Act, as amended.

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 Restraint of Trade proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of subsection (d) of Section 2 of the Clayton Act, as amended; 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 subsection (d) of Section 2 of the Clayton Act, as amended, 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 Galaxy Publishing Corporations 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 421 Hudson Street, in the city of New York, State of New York.

Respondents Robert Guinn and Sol Cohen are officers of said corporation and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondent Galaxy Publishing Corporation, a corporation, its officers and directors, and respondents Robert Guinn and Sol Cohen, individually and as officers of said corporation, and respondents' respective employees, agents and representatives, directly or through any corporate or other device, in connection with the distribution, sale, or offering for sale of publication including magazines and paperback books in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

Paying or contracting for the payment of an allowance or anything of value to, or for the benefit of, any customer as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the handling, offering for sale, sale or distribution of publications including magazines. and paperback books published, distributed, sold or offered for sale by respondents, unless such payment or consideration is affirmatively offered and otherwise made available on proportionally

equal terms to all other customers competing with such favored customer in the distribution of such publications.

The word "customer" as used above shall be deemed to mean anyone who purchases from a respondent, acting either as principal or agent, or from a distributor or wholesaler where such transaction with such purchaser is essentially a sale by such respondent, acting either as principal or agent.

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

JACQUELINE'S, INC., ET AL.

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

Docket C-799. Complaint, July 31, 1964—Decision, July 31, 1964

Consent order requiring retail furriers in Portland, Ore., to cease violating the Fur Products Labeling Act by failing, on invoices of fur products, to show the true animal name of fur used; failing to disclose in invoicing and in newspaper advertising when fur was artificially colored and to use the term "natural" to describe furs which were not bleached or dyed; advertising "½ Price and Less—fur stoles, Mink, Fox, Squirrel, $98 up" when such offer was not bona fide and there were no products in respondents' establishment for sale at $98, and representing falsely through such statements as "Consolidation Sale," that they consolidated the advertised fur products with products from other sources; failing to maintain adequate records as a basis for pricing claims; and failing in other respects to comply with requirements of the Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Jacqueline's, Inc., a corporation, and Harry X. Bergman, Eva Bergman and Shirley H. Engleman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would

be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Jacqueline's Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon.

Respondent Harry X. Bergman, Eva Bergman and Shirley H. Engleman are officers of the corporate respondent and formulate, direct and control the acts, practices and policies of the said corporate respondent.

Respondents are retailers of fur products with their office and principal place of business located at 900 S.W. Morrison, Portland, Oregon.

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

PAR. 3. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

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

2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 4. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

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

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

PAR. 5. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or in-

directly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements but not limited thereto, were advertisements of respondents which appeared in issues of the Sunday Oregonean, a newspaper published in the city of Portland, State of Oregon.

Among such false and deceptive advertisements, but not limited thereto, were advertisements which failed to show that the fur contained in the fur product was bleached, dyed or otherwise artificially colored, when such was the fact.

PAR. 6. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein respondents falsely and deceptively advertised fur products in violation of Section 5(a)(5) of the Fur Products Labeling Act in that said advertisements represented through such statements as "½ price and Less—fur stoles, Mink, Fox, Squirrel, $98 up," either directly or by implication, that respondents were making a genuine, bona fide offer to sell such Mink, Fox and Squirrel fur products for $98 and up. In truth and in fact the offer to sell fur products for $98 and up was not a genuine, bona fide offer to sell such described fur products but an effort to induce prospective customers into the establishment for the purpose of selling higher priced garments. There were no products thus advertised for sale at $98 in the respondents' establishment.

PAR. 7. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein respondents falsely and deceptively advertised fur products in violation Section 5(a)(5) of the Fur Products Labeling Act in that said advertisements represented through such statements as "Consolidation Sale" either directly or by implication, that respondents consolidated the advertised fur products with fur products from other sources when in truth and in fact the proposed respondents had not consolidated the advertised fur products with fur products from other sources.

PAR. 8. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products, in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder inasmuch as the term "Natural" was not used to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of the said Rules and Regulations.

PAR. 9. In advertising fur products for sale, as aforesaid, respondents made pricing claims and representations of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Regulations under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain full and adequate records disclosing the facts upon which such pricing claims and representations were based, in violation of Rule 44(e) of the said Rules and Regulations.

PAR. 10. The aforesaid acts and practices of 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.

DECISION AND ORDER

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

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

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

1. Respondent Jacqueline's, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon, with its office and principal place of business located at 900 S.W. Morrison, Portland, Oregon.

Respondents Harry X. Bergman, Eva Bergman and Shirley H. Engleman are officers of said corporation and their address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

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

A. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices as the term "invoice" is defined in the Fur Products Labeling Act showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

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

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

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

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

2. Represents that said fur products are offered for sale when such offer is not a bona fide offer to sell the merchandise, so and as, offered.

3. Represents directly or by implication that fur products offered for sale are consolidated with fur products from other sources when such fur products are not consolidated with fur products from other sources.

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

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

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

IN THE MATTER OF

J. C. WINTER & CO., INC., ET AL.

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

Docket C-800. Complaint, Aug. 3, 1964—Decision, Aug. 3, 1964

Consent order requiring distributors of cigars to wholesale and retail dealers for resale, with headquarters in Red Lion, Pa., to cease representing falsely, by use of the brand names "Havana Blunts," "Winters Havana Special" and "Blended with Havana" and other descriptive matter that their cigars are made entirely from or contain a substantial amount of tobacco grown in Cuba.

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 J. C. Winter & Co., Inc., a corporation, and Amelia C. Winter and W. H. Matthews, individually and as officers of said corporation, and as former officers of G. W. Van Slyke & Horton, Inc., a dissolved corporation, and R. C. Jacobs, an individual doing business as G. W. Van Slyke & Horton, and

as a former officer of said G. W. Van Slyke & Horton, Inc., 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 J. C. Winter & Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located in the city of Red Lion, State of Pennsylvania.

Respondents Amelia C. Winter and W. H. Matthews are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent and their business address is the same as that of the corporate respondent.

Respondents Amelia C. Winter, W. H. Matthews, and R. C. Jacobs, formerly were officers of G. W. Van Slyke & Horton, Inc., a Pennsylvania corporation, now dissolved, which was operated as a sales subsidiary of J. C. Winter & Co., Inc., R. C. Jacobs, an individual, is now trading as G. W. Van Slyke & Horton, with his principal office and place of business located in the city of Red Lion, State of Pennsylvania.

PAR. 2. Respondents have been engaged in the advertising, offering for sale, sale and distribution of cigars to distributors, wholesalers, dealers and retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents have caused their said products, when sold, to be shipped from their place of business in the State of Pennsylvania to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for purpose of inducing the sale of their cigars, the respondents have made, or caused to be made, numerous statements and representations in connection with the advertising of their cigars through the use of brand names and other descriptive and identifying matter and materials which purport to indicate the composition, formulation or contents of their cigars.

Typical and illustrative of the aforesaid statements and representations are the following:

HAVANA BLUNTS, WINTERS HAVANA SPECIAL, and BLENDED WITH HAVANA.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import not specifically set out

herein, the respondents have represented in instances where the terms "Havana Blunts" and "Winters Havana Special" were employed, that said cigars were made entirely from tobacco grown on the Island of Cuba. By and through the use of the above-quoted statements and representations, and others of similar import not specifically set out herein, the respondents have represented in instances where the term "Blended with Havana" was employed, that said cigars contained a substantial amount of tobacco grown on the Island of Cuba.

PAR. 6. In truth and in fact, respondents' cigars bearing designations such as "Havana Blunts" and "Winters Havana Special" and other similar terms were not made entirely from tobacco grown on the Island of Cuba but contained substantial amounts of tobaccos which were not grown on the Island of Cuba; and, respondents' cigars bearing designations such as "Blended with Havana" did not contain a substantial amount of tobacco grown on the Island of Cuba.

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

PAR. 7. By the aforesaid practices, respondents have placed in the hands of distributors, wholesalers, dealers and retailers, means and instrumentalities by and through which they may have misled the public as to the composition, formulation and origin of their cigars.

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

PAR. 9. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had 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 respondents' products by reason of said erroneous and mistaken belief.

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

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 J. C. Winter & Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located in the city of Red Lion, State of Pennsylvania.

Respondents Amelia C. Winter and W. H. Matthews are officers of said corporation, and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents J. C. Winter & Co., Inc., a corporation, and Amelia C. Winter and W. H. Matthews, individually and as officers of said corporation, and as former officers of G. W. Van Slyke & Horton, Inc., a dissolved corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of cigars or any other products, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "Havana," or any other term or terms indicative of tobacco grown on the island of Cuba, either alone or in conjunction with any other terms, to describe, designate or in any way refer to cigars not made entirely from tobacco grown on the island of Cuba; except that cigars containing a substan-

tial amount of tobacco grown on the island of Cuba may be described, designated, or referred to as "blended with Havana," or by any term of similar import or meaning, provided that the words "blended with," or other qualifying word or words, are set out in immediate connection or conjunction with the word "Havana," or other term indicative of tobacco grown on the island of Cuba, in letters of equal size and conspicuousness.

2. Placing in the hands of distributors, wholesalers, dealers and retailers, and others, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning any merchandise in the respects set out above.

It is further ordered, That respondent R. C. Jacobs, an individual doing business as G. W. Van Slyke & Horton, and as a former officer of G. W. Van Slyke & Horton, Inc., a dissolved corporation, and respondent's agents, representatives and employees, directly or through any corporate or other devise, in connection with the offering for sale, sale or distribution of cigars or any other products, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "Havana," or any other term or terms indicative of tobacco grown on the island of Cuba, either alone or in conjunction with any other terms, to describe, designate or in any way refer to cigars not made entirely from tobacco grown on the island of Cuba; except that cigars containing a substantial amount of tobacco grown on the island of Cuba may be described, designated, or referred to as "blended with Havana," or by any term of similar import or meaning, provided that the words "blended with" or other qualifying word or words, are set out in immediate connection or conjunction with the word "Havana," or other term indicative of tobacco grown on the island of Cuba, in letters of equal size and conspicuousness.

2. Placing in the hands of distributors, wholesalers, dealers and retailers, and others, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning any merchandise in the respects set out above.

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.

Complaint

IN THE MATTER OF

REGINA CIGAR COMPANY, INC., ET AL.

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

Docket C-801. Complaint, Aug. 3, 1964—Decision, Aug. 3, 1964

Consent order requiring Philadelphia distributors of cigars to cease representing falsely by use of the brand names "Havana Palmas," "Parkworth Havana Palmas," and "Clear Havanas," and otherwise, that their cigars are made from tobacco grown in Cuba.

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 Regina Cigar Company, Inc., a corporation, and Samuel A. Peters, Philip Peters and Jerome Josephs, individually and as officers of said 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 Regina Cigar Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 726 North 3rd Street in the city of Philadelphia, State of Pennsylvania.

Respondents Samuel A. Peters, Philip Peters and Jerome Josephs 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 business address is the same as that of the corporate respondent.

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

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their cigars, the respondents

have made numerous statements and representations in connection with the advertising of their cigars through the use of brand names and other descriptive and identifying matters and materials which purport to indicate the composition, formulation or origin of their cigars.

Typical and illustrative of the aforesaid statements and representations are the following:

HAVANA PALMAS, PARKWORTH HAVANA PALMAS, and CLEAR HAVANAS.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import not specifically set out herein, the respondents represented that said cigars were made entirely from tobacco grown on the Island of Cuba.

PAR. 6. In truth and in fact, respondents' cigars bearing designations such as "Havana Palmas," "Parkworth Havana Palmas" and "Clear Havanas" and other similar terms were not made entirely from tobacco grown on the Island of Cuba but contained substantial amounts of tobaccos which were not grown on the Island of Cuba.

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

PAR. 7. By the aforesaid practices, respondents place in the hands of distributors, wholesalers, dealers and retailers, means and instrumentalities by and through which they may mislead the public as to the composition, and formulation, origin of their cigars.

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

PAR. 9. The use by the 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 respondents' products by reason of said erroneous and mistaken belief.

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

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 Regina Cigar Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 726 North 3rd Street, in the city of Philadelphia, State of Pennsylvania.

Respondents Samuel A. Peters, Philip Peters and Jerome Josephs are officers of said corporation, and their address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Regina Cigar Company, Inc., a corporation, and its officers, and Samuel A. Peters, Philip Peters and Jerome Josephs, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of cigars or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "Havana," or any other term or terms indicative of tobacco grown on the island of Cuba, either alone or in

conjunction with any other terms, to describe, designate or in any way refer to cigars not made entirely from tobacco grown on the island of Cuba; except that cigars containing a substantial amount of tobacco grown on the island of Cuba may be described, designated, or referred to as "blended with Havana," or by any term of similar import or meaning, provided that the words "blended with," or other qualifying word or words, are set out in immediate connection or conjunction with the word "Havana," or other term indicative of tobacco grown on the island of Cuba, in letters of equal size and conspicuousness.

2. Placing in the hands of distributors, wholesalers, dealers and retailers, and others, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning any merchandise in the respects set out above.

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

VINCENT RUILOVA TRADING AS VINCENT CIGAR COMPANY ET AL.

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

*Docket C-802. Complaint, Aug. 3, 1964—Decision, Aug. 3, 1964**

Consent order requiring manufacturers of cigars and a mail-order seller of their cigars of Tampa, Fla., to cease representing falsely in advertising and labeling that their cigars are manufactured in Cuba from tobacco grown in Cuba by the use of the terms "Havana Wrapped," "Havana Blend," "Blended Havana Filler," and "Habana."

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 Vincent Ruilova trading as Vincent Cigar Company; Villazon & Company, Inc., a corporation, and Frank Llaneza and Jose Llaneza, Jr., individually

*Order modified on Jan. 14, 1965.

and as officers of said corporation; and, The House of Delmage, Inc., a corporation, and Fred R. Dulmage, A. F. Fernandez and W. E. Renberg, individually and as officers of said 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 Vincent Ruilova is an individual trading as Vincent Cigar Company with his principal office and place of business located at 2511 21st Street in the city of Tampa, State of Florida, hereinafter called Vincent.

Respondent Villazon & Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 2511 21st Street in the city of Tampa, State of Florida, hereinafter called Villazon.

Respondents Frank Llaneza and Jose Llaneza, Jr., 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 business address is the same as that of the corporate respondent, Villazon & Company, Inc.

Respondent The House of Delmage, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 405 South 22nd Street in the city of Tampa, State of Florida, hereinafter called Delmage.

Respondents Fred R. Dulmage, A. F. Fernandez and W. E. Renberg 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 business address is the same as that of the corporate respondent, The House of Delmage, Inc.

PAR. 2. Respondents Vincent and Villazon are now, and for some time last past have been, engaged in the manufacturing, advertising, offering for sale, sale and distribution of cigars to distributors, wholesalers, dealers and retailers for resale to the public.

Respondent Delmage obtains cigars manufactured by the respondents Vincent and Villazon which it advertises and sells principally through the medium of direct mail order sales at retail.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their products, when sold, to be shipped from their respective places of business in the State

of Florida to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their cigars, the respondents have made numerous statements and representations in connection with the advertising of their cigars by and through the use of language appearing on their packaging, labels and other identifying material which purport to disclose the composition, formulation, origin and place of manufacture of their cigars.

Typical and illustrative of the aforesaid statements and representations are the following:

HAVANA WRAPPED, HAVANA BLEND, BLENDED HAVANA FILLER, AND HABANA.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import not specifically set out herein, the respondents represented that said cigars were made entirely from tobacco grown on the island of Cuba and manufactured on the island of Cuba.

PAR. 6. In truth and in fact, respondents' cigars bearing descriptions and designations such as "HAVANA WRAPPED," "HAVANA BLEND," "BLENDED HAVANA FILLER" and "HABANA" and other similar terms were not made entirely from tobacco grown on the island of Cuba but contained substantial amounts of tobacco which were not grown on the island of Cuba, nor were such cigars manufactured on the island of Cuba.

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

PAR. 7. By the aforesaid practices, respondents place in the hands of distributors, wholesalers, dealers and retailers, means and instrumentalities by and through which they may mislead the public as to the composition, formulation, origin and place of manufacture of their cigars.

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

PAR. 9. The use by the 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 respondents' products by reason of said erroneous and mistaken belief.

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

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 Vincent Ruilova is an individual trading as Vincent Cigar Company with his principal office and place of business located at 2511 21st Street, in the city of Tampa, State of Florida.

Respondent Villazon & Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 2511 21st Street, in the city of Tampa, State of Florida.

Respondents Frank Llaneza and Jose Llaneza, Jr., are officers of

said corporation, and their address is the same as that of said corporation.

Respondent The House of Delmage, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 405 South 22nd Street, in the city of Tampa, State of Florida.

Respondents Fred R. Dulmage, A. F. Fernandez and W. E. Renberg are officers of said corporation, and their address is the same as that of said corporation.

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

ORDER

It it ordered, That respondent Vincent Ruilova, an individual trading as Vincent Cigar Company, Villazon & Company, Inc., a corporation, and its officers, and Frank Llaneza and Jose Llaneza, Jr., individually and as officers of said corporation, and The House of Delmage, Inc., a corporation, and its officers and Fred R. Dulmage, A. F. Fernandez and W. E. Renberg, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of cigars or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the term "Havana" or any other term or terms indicative of tobacco grown on the island of Cuba, either alone or in conjunction with any other terms, to describe, designate or in any way refer to cigars not made entirely from tobacco grown on the island of Cuba; except that cigars containing a substantial amount of tobacco grown on the island of Cuba may be described, designated, or referred to as "blended with Havana," or by any term of similar import or meaning, provided that the words "blended with," or other qualifying word or words, are set out in immediate connection or conjunction with the word "Havana," or other term indicative of tobacco grown on the island of Cuba, in letters of equal size and conspicuousness.

2. Representing, directly or by implication, that cigars which are made in the United States are made in Cuba or in any other country.

3. Using any foreign words, terms or depictions indicative of

Cuban or other foreign origin in connection with cigars which are not manufactured in Cuba or other foreign country, unless it is clearly and conspicuously revealed in immediate conjunction therewith that such cigars are made in the United States.

4. Failing to disclose clearly and conspicuously the country or countries of origin of all constituent tobacco in the product where the tobacco therein is directly or indirectly represented as having been grown in a country or place other than the United States.

5. Placing in the hands of distributors, wholesalers, dealers and retailers, and others, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning any merchandise in the respect set out above.

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

NATIONAL TOGS, INC.

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

*Docket C-803. Complaint, Aug. 3, 1964—Decision, Aug. 3, 1964**

Consent order requiring a New York City seller of wearing apparel, to cease violating Sec. 2(d) of the Clayton Act by such practices as granting substantial promotional allowances, for the advertising of its products, to certain department stores and other favored customers purchasing for resale, while not making proportionally equal payments available to all competitors of favored customers. The effective date of the order has been postponed until further order of the Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe the respondent named in the caption hereof has violated and is 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, Section 13), and it appearing to the Commission that a proceeding by it in respect

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*This order was made effective on Aug. 9, 1965, see *Abby Kent Co., Inc.*, et al., Docket No. C-328, et al., Aug. 9, 1965.

thereto is in the interest of the public, the Commission hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. The respondent is a corporation engaged in commerce, as "commerce" is defined in the amended Clayton Act, and sells and distributes its wearing apparel products from one State to customers located in other States of the United States. The sales of respondent in commerce are substantial.

PAR. 2. The respondent in the course and conduct of its business in commerce paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services and facilities furnished by or through such customers in connection with their sale or offering for sale of wearing apparel products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing with favored customers in the sale and distribution of respondent's wearing apparel products.

PAR. 3. Included among, but not limited to, the practices alleged herein, respondent has granted substantial promotional payments or allowances for the promoting and advertising of its wearing apparel products to certain department stores and others who purchase respondent's said products for resale. These aforesaid promotional payments or allowances were not offered and made available on proportionally equal terms to all other customers of respondent who compete with said favored customers in the sale of respondent's wearing apparel products.

PAR. 4. The acts and practices alleged in Paragraphs One through Three are all in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and subsequently having determined that complaint should issue, and the respondent having entered into an agreement containing an order to cease and desist from the practices being investigated and having been furnished a copy of a draft of complaint to issue herein charging it with violation of subsection (d) of Section 2 of the Clayton Act, as amended, and

The respondent having executed the agreement containing a consent order which agreement contains an admission of all the jurisdictional facts set forth in the complaint to issue herein, and a statement that the signing of the said agreement is for settlement purposes

only and does not constitute an admission by the respondent that the law has been violated as set forth in such complaint, and also contains the waivers and provisions required by the Commission's rules; and

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

1. Respondent National Togs, Inc., is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business located at 1370 Broadway, New York.

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

ORDER

It is ordered, That respondent National Togs, Inc., a corporation, its officers, directors, agents and representatives and employees, directly or through any corporate or other device, in the course of its business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of the respondent as compensation or in consideration for advertising or promotional services, or any other service or facility, furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel products manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

It is further ordered, That the effective date of this order to cease and desist be and it hereby is postponed until further Order of the Commission.

IN THE MATTER OF

THE DAYTON RUBBER COMPANY

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

Docket 7604. Complaint, Oct. 1, 1959—Decision, Aug. 5, 1964

Order requiring a Dayton, Ohio, manufacturer of rubber and other products, including automotive replacement parts made from rubber, to cease discrimi-

nating in price in violation of Sec. 2(a) of the Clayton Act by selling its products at net prices higher than the net prices charged other direct purchasers who in fact compete in the resale of such products with purchasers paying the higher price; and also to cease violating the Federal Trade Commission Act by putting into effect any merchandising plan entered into with resellers of its products which has the effect of fixing the prices at which such products may be resold.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption thereof and hereinafter more particularly designated and described has violated and is now violating the provisions of subsection (a), Section 2, of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Section 13), and Section 5 of the Federal Trade Commission Act (U.S.C., Title 15, Section 45), hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT ONE

PARAGRAPH 1. Respondent, The Dayton Rubber Company, 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 2342 West Riverview, Dayton 1, Ohio.

PAR. 2. Respondent is now, and for many years last past has been, engaged in the manufacture, sale and distribution of a line of rubber and other products, including automotive products such as fan and other belts, radiator and other hose and tubing, mats and rugs, electrical tape, and merchandising aids such as cabinets and display racks.

Respondent's total sales of all products for the year 1957 were approximately $84,000,000, and of automotive products, approximately $4,300,000.

PAR. 3. Respondent manufactures its products at its factory located in Dayton, Ohio, from which point such products are, when sold, transported either directly or through field warehouses to several hundred franchised wholesalers located throughout the United States, some of said franchised wholesalers being mere bookkeeping devices by means of which groups of purchasers in effect purchase directly from respondent. Such wholesalers in turn resell such products to dealers and to jobber wholesalers for resale to dealers. Respondent exercises such a degree of control over sales by said franchised wholesalers to said jobber wholesalers as to render such sales in all essential respects

sales by respondent. Said dealers either use such products or resell them to consumers.

There is and has been at all times mentioned herein a continuous current of trade and commerce in said products across state lines between their point of origin and respondent's customers. Said products are sold and distributed for use, consumption and resale within various states of the United States and the District of Columbia. Thus respondent is engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, respondent is now and during the times herein mentioned has been in substantial competition with other corporations, partnerships, individuals and firms engaged in the manufacture, sale and distribution of automotive products.

Respondent's franchised wholesalers are competitively engaged with each other, with their customers, and with each other's customers in the resale of said products within the various trading areas in which they are engaged in business.

PAR. 5. Respondent, in the course and conduct of its business, as above described, has been for many years last past, and now is, discriminating in price, directly or indirectly, between different purchasers of automotive products, who are in competition with each other, by selling said products of like grade and quality to some of such purchasers at substantially higher prices than to other of such purchasers.

PAR. 6. Among the methods by which respondent discriminates between said purchasers are the following:

(a) Granting rebates and allowances of up to 20% off its wholesaler price schedule to some of its direct wholesaler purchasers while denying such rebates and allowances to other such wholesaler purchasers; and

(b) Charging its indirect wholesaler purchasers prices which are up to approximately 25% higher than the prices it charges its direct wholesaler purchasers.

PAR. 7. The effect of such discriminations in price as alleged herein may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and its customers are respectively engaged; or to injure, destroy or prevent competition with respondent or with purchasers therefrom who receive the benefit of such discriminations.

PAR. 8. The aforesaid acts and practices of respondent constitute

violations of the provisions of subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U.S.C., Title 15, Sec. 13).

COUNT TWO

PAR. 9. The allegations of Paragraphs One through Four, inclusive, of Count I of this complaint are hereby adopted, and incorporated herein by reference and made a part of this Count II as if they were repeated herein verbatim.

PAR. 10. In the course and conduct of its business, respondent has required, and does require, its customers, both direct and indirect, to enter into, and they have entered into, agreements or understandings with respondent to resell such products at prices fixed by respondent.

PAR. 11. In the course and conduct of its business, respondent likewise has required, and does require: (1) its direct customers to enter into, and they have entered into, agreements or understandings with respondent to resell said products only to such purchasers as are approved by respondent; (2) its indirect customers to enter into, and they have entered into, agreements or understandings with respondent to purchase said products only from certain direct customers; and (3) some of its direct customers to enter into, and they have entered into, agreements or understandings with respondent to resell said products only to wholesalers.

PAR. 12. Respondent has enforced, or attempted to enforce, the foregoing agreements or understandings through, and by means of, various acts and practices. The specific results or effects thereof have been or may be:

(1) To eliminate or severely restrict price competition between respondent's customers, both direct and indirect;

(2) To prevent respondent's direct customers from exercising their free choice in selecting their customers;

(3) To restrain competition, including price competition, in the sale of respondent's products between said direct customers;

(4) To prevent respondent's indirect customers from exercising their free choice in selecting their suppliers; and

(5) To restrain competition, including price competition, between, on the one hand, respondent's direct customers and, on the other hand, other sellers of respondent's products and sellers of similar products produced by other manufacturers.

PAR. 13. In the manner above described, and otherwise, respondent has entered into and maintained agreements and understandings with

its customers, both direct and indirect, which have had and do have a tendency of unduly hindering and restraining competition, including price competition, and trade in the sale and distribution of said products.

PAR. 14. Said agreements and understandings and the acts and practices, performed thereunder or pursuant thereto, as alleged, are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Brockman Horne for the Commission.

Pickrel, Schaeffer and Ebeling, Dayton, Ohio, by *Mr. Norman L. Schwartz* and *Mr. Gordon H. Savage*, for the respondent.

INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER

JUNE 11, 1963

The Federal Trade Commission, on October 1, 1959, issued and subsequently served its complaint charging The Dayton Rubber Company with price discriminations in violation of subsection (a) of Section 2 of the Clayton Act, as amended; and with requiring its customers to enter into agreements with it which restrained competition, including price competition, in the resale of its products, in violation of Section 5 of the Federal Trade Commission Act. On May 2, 1960, after various motions and extensions of time, answer was filed on behalf of Dayco Corporation (the present name of respondent corporation), denying the violations alleged in the complaint.

Pursuant to notice filed by counsel for the parties, an order was filed on September 8, 1961 by the Director, Hearing Examiners, transmitting the proceeding to the Secretary of the Commission for reference to the Office of Consent Orders. Thereafter the proceeding was returned to the Director, Hearing Examiners, and on November 16, 1961 the present hearing examiner was designated in the place and stead of the hearing examiner originally designated.

On March 8 and 9, 1962, a prehearing conference was held in Washington, D.C., the transcript of which, by agreement of counsel, was made a part of the public record herein. Hearings were thereafter held in support of the complaint in Dayton, Ohio, on April 9, 10, and 11, 1962. On motion by counsel supporting the complaint, over the opposition of counsel for respondent, the hearing examiner, on June 14, 1962, entered an order taking official notice of certain facts, and granting the parties opportunity, in the regular course of presenting evi-

dence, to disprove such facts, or to prove that they have other or special meanings or applications for the purposes of this proceeding. Without further hearings, counsel supporting the complaint then rested his case-in-chief on July 20, 1962.

On August 9, 1962, counsel for respondent filed a motion to dismiss the complaint, supported by a memorandum filed on August 30, 1962, which was opposed by counsel supporting the complaint in an answer filed September 19, 1962. On October 9, 1962, the hearing examiner entered an order denying the motion to dismiss the complaint. Defense hearings, previously postponed on motion by counsel for respondent, were held in Dayton, Ohio, on January 22, 1963. At the request of counsel for respondent, a continuance was allowed pending the outcome of an appeal from the hearing examiner's denial of an application for issuance of a subpoena duces tecum to the Secretary of the Commission. The Commission's order denying said appeal was served on March 6, 1963, and no application for further hearings having been filed, the record was closed for the reception of evidence as of March 13, 1963.

Only two witnesses testified in this proceeding, the sales manager of the Automotive Wholesalers Department, Dayco Corporation, and the senior member of the law firm representing respondent. The transcript of testimony, including the prehearing conference, covers 423 pages. The evidence includes stipulations by counsel, the testimony of two witnesses, extensive documentary evidence, and facts which were officially noticed. Proposals and replies thereto have been timely filed by the parties.

After having carefully considered the entire record in this proceeding and the proposals and contentions of the parties, the hearing examiner issues this initial decision. The limited specific citations to the transcript of testimony (abbreviated Tr.) and to the exhibits (abbreviated CX or RX) are intended to be convenient guides to certain of the evidentiary support of particular findings, and do not represent complete summaries of the evidence which was considered. Findings proposed by the parties, which are not adopted herein, either in the form proposed or in substance, are rejected as not being supported by the record or as involving immaterial matters.

FINDINGS OF FACT

1. Respondent Dayco Corporation (formerly known as The Dayton Rubber Company) 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 333 West First Street,

Dayton, Ohio. The name of the respondent was changed from The Dayton Rubber Company to Dayco Corporation after the complaint was issued, but before the answer thereto was filed. For convenience and consistency, respondent will be referred to herein as Dayco, including references to the period before its name was changed.

2. Dayco is now and for many years has been engaged in the sale and distribution of a line of rubber and other products, including automotive products. The total sales of all products by Dayco for the year 1957 were approximately $84,000,000, and of automotive products, approximately $4,300,000. Besides automotive products, the products sold by Dayco include heavy duty belting, industrial hose, foam rubber, plastics and aircraft seating.

3. The Automotive Wholesalers Department (formerly known as the Mechanical Goods Division) of the Rubber Products Division of Dayco sells automotive fan and other belts, automotive radiator and other hose and tubing, fractional horsepower belts, automotive mats and rugs, electrical tape, and merchandising aids such as cabinets and display racks. Its sales of automotive products are for replacement purposes, and not for original equipment. The great bulk of its total sales is represented by belts and hoses (Tr. 282, 353–4), and its line of products consists of items of only one grade and quality (Tr. 64). The products sold by this department will be referred to herein generally as automotive products.

4. The gross sales of the Automotive Wholesalers Department for the respective years ending October 31st were $7,061,533.58 in 1958; $5,316,401.24 in 1959; $5,315,543.77 in 1960; and $5,379,188.85 in 1961 (CX 28). At the present time the sales of the Automotive Wholesalers Department represent approximately 8% to 9% of the total sales of all products by Dayco (Tr. 399). The operations of that department have not been very profitable in the past several years, an actual loss having occurred in 1960, which was described as a "disastrous year" (Tr. 281–2).

5. Prior to 1950, Dayco had 15, and it now has 6 warehousing points located throughout the United States, from which its automotive products are distributed. From factories located in Springfield, Missouri, and Waynesville, North Carolina, and from other locations, Dayco ships automotive products either directly to its customers located in the various States of the United States, or to its warehousing points, from which it then ships said products to its customers.

6. There is, and has been at all times mentioned herein, a continuous current of trade and commerce in said products across State lines between their point of origin and Dayco's customers. Said prod-

ucts are sold and distributed for use, consumption and resale within the various States of the United States and the District of Columbia. Dayco is engaged in commerce as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act.

7. In the course and conduct of its business, Dayco is now, and during the times herein mentioned has been, in substantial competition with other corporations, partnerships, individuals and firms engaged in the manufacture, sale and distribution of automotive products. Dayco's customers are competitively engaged with each other, with their customers, and with the customers of each other in the resale of said products within the various trade areas in which they are engaged in business.

8. Dayco's principal competitor accounts for approximately 60% to 65% of the total sales volume of the market in which the Automotive Wholesalers Department of Dayco competes. Dayco's Automotive Wholesalers Department is second in that market with approximately 15% of the sales volume. The balance of that market is represented by several smaller competitors (Tr. 396).

9. The evidence herein with respect to the acts and practices of Dayco relates only to the operations of the Automotive Wholesalers Department of its Rubber Products Division. The personnel in that department who determine questions of prices and distribution have nothing to do with such matters in other departments of the company. The products sold by that department and the customers to which it sells are also different from the products and customers of the other divisions and departments of Dayco (Tr. 399–400). The issues herein, accordingly, relate only to the activities of the Automotive Wholesalers Department, and, unless otherwise specifically indicated, further references herein to Dayco are intended to refer only to its Automotive Wholesalers Department.

10. For a substantial period of time prior to September, 1958, Dayco sold its automotive products directly to jobbers or distributors (CX 27). Some of its direct customers resold the products only to other jobbers who, in turn, resold to dealers, such as gasoline stations and garages, who supply the products to consumers. Others of its direct customers sold only to dealers, and still others sold both to other jobbers and to dealers. Dayco did not make any sales directly to dealers. Sales by Dayco to its direct customers were made at the same list prices with no variation based on quantity, but with certain discounts or rebates, referred to herein as service credits, on products resold to other jobbers.

11. Dayco's direct customers, classified as "AA Jobbers," received a service credit on most items of 15% on sales which they made to other jobbers, classified as "A Jobbers," at prices not more than 5% above their list prices from Dayco. The service credit was only 10% on some items such as car rugs, but, since the great bulk of Dayco's sales is represented by the items to which the 15% service credit applied (Tr. 87–8, 351–4), the discussion herein will relate only to that credit. No service credit was allowed by Dayco on sales by its direct customers to dealers.

12. In order to obtain the service credit, Dayco's direct customers were required to make periodic reports to Dayco showing their sales to other jobbers, which reports showed the jobbers to whom, and the prices at which, such sales were made. If the sales were made at prices more than 5% above Dayco's list prices to its direct customers, the service credit was not allowed because the higher price indicated sales to a dealer and not to a jobber. If the sales were made at lower prices, the service credit was allowed, but Dayco discouraged such sales by pointing out to its direct customers in those instances that the lower price was causing their profit to disappear.

13. The direct customers of Dayco who sold only to other jobbers, normally received a service credit on all of their sales of Dayco's automotive products. In May, 1958, Dayco eliminated reports of sales to other jobbers by such customers, and started billing them at net prices which reflected deduction of the 15% service credit (CX 6A–L; Tr. 89–91, 384–5). The direct customers of Dayco, who sold only to dealers, did not receive the service credit on any of their sales of Dayco's automotive products. The direct customers of Dayco, who sold both to jobbers and to dealers, normally received the service credit only on sales of Dayco's automotive products which they made to other jobbers as shown by their period reports to Dayco.

14. It is apparent, therefore, that all of Dayco's direct customers purchased its products at the same prices for resale to other jobbers; and that indirect jobbers, that is, jobbers who purchased from Dayco's direct customers, normally paid a price 5% higher for Dayco products than the jobbers who purchased directly from Dayco.

15. In September, 1958, Dayco made changes in its system of distribution and prices which have continued in effect since that time. Under the system then adopted Dayco classified as warehouse distributors its direct customers who sell its products only to wholesalers and who make no sales of such products to dealers; and it classified as wholesalers its direct customers who sell its products only to

dealers or both to dealers and to other wholesalers, referred to as non-direct wholesalers (CX 26).

16. Warehouse distributors make all of their purchases from Dayco at the warehouse net price schedule, which contains prices approximately 20% lower than Dayco's prices to wholesalers. Since Dayco is satisfied that they sell only to wholesalers, it does not require them to make reports showing that all of their sales of its products are made to wholesalers. When direct wholesalers report sales of Dayco products to non-direct wholesalers, Dayco grants them a service credit of 20% on such sales.

17. It is apparent, therefore, that in selling to non-direct wholesalers, warehouse distributors and direct wholesalers purchase Dayco products at the same prices; and that in selling to dealers, direct and non-direct wholesalers purchase Dayco products at the same prices. The major effects of the changes made in September, 1958, were to increase the service credit for resales to other jobbers from 15% to 20%, and to eliminate the 5% price differential between indirect jobbers and Dayco's direct customers who resold its products to dealers.

Price Differential Between Direct and Indirect Jobbers

18. Counsel supporting the complaint contends that the 5% price differential on Dayco products between direct and indirect jobbers who competed with each other in selling such products to dealers constituted price discrimination by Dayco in violation of Section 2(a) of the Clayton Act.

19. Counsel for respondent contend that there is a failure of proof on this issue because: (a) the record does not show contemporaneous sales to competing direct and indirect jobbers; (b) the record does not show the proscribed effects of the 5% differential; and (c) the indirect jobber cannot be considered a customer of Dayco, since the record establishes that Dayco did not control the terms upon which indirect jobbers purchased from direct jobbers. Counsel for respondent also contend that this 5% differential is not relevant to this proceeding because it was discontinued in September, 1958, and has not been resumed.

20. During the period before September, 1958, Dayco had about 4,000 direct customers. About 150 of its direct customers sold only to jobbers, and the others sold only to dealers, or both to other jobbers and to dealers (Tr. 92–3, 96).

21. From the evidence as a whole, it is clear that each of the direct customers of Dayco who sold both to jobbers and to dealers, operated in a particular trading area, frequently embracing a city or metropolitan

area, or cities and towns in geographic proximity, and that in many instances the trading areas of two or more of them coincided or overlapped. The testimony discloses that such direct customers were selling to other jobbers and to dealers at the same time (Tr. 94), and that the line of Dayco products which they sold consisted of items of only one grade and quality (Tr. 64). It must necessarily be inferred that both the indirect jobbers and the dealers to whom each such direct customer of Dayco sold were located throughout the particular trading areas involved.

22. It was officially noticed that "Automotive parts jobbers located in the same cities and metropolitan areas, and in cities and towns in geographic proximity, are in competition with each other" (Section 3(a), Official Notice Order, 6/14/62, abbreviated ON 3(a)). Direct customers of Dayco who sold both to jobbers and to dealers were, therefore, in competition with their jobber customers in selling Dayco products of the same grade and quality to dealers. Such direct customers of Dayco received 5% lower prices on such products than the indirect jobbers with whom they competed in selling to dealers.

23. The evidence does not show contemporaneous sales of specific items of the Dayco line to competing direct and indirect jobbers. From the evidence as a whole, however, it is clear that both the direct and indirect jobbers were being supplied with Dayco products on a prompt, efficient and continuing basis as needed, and that they were not required to purchase in any particular quantities or to carry large inventories. In such circumstances, it necessarily follows that contemporaneous sales of Dayco products were regularly made to competing direct and indirect jobbers. Such sales involved a line of products, primarily belts and hoses, consisting of items of only one grade and quality, and constitute contemporaneous sales of products of like grade and quality. (*Moog Industries, Inc.* v. *F.T.C.*, 238 F. 2d 43, decided 1956.)

24. It was officially noticed that the automotive parts industry is a highly competitive business involving small margins of profit; that typically automotive parts jobbers realize a net profit after taxes of less than 5%; and that discounts as small as 2% are of the utmost economic importance to such jobbers' competitive existence (ON 3(b)). In the absence of countervailing evidence, such officially noticed facts establish that the effect of the 5% differential herein question may be substantially to lessen competition between competing direct and indirect jobbers of Dayco products.

25. Counsel for respondent argue, however, that "Jobbers who purchased at the higher price could, in effect, have a lower net cost of acquisition due to not having to purchase directly from Dayco" (CR

proposal #25). This contention is based upon testimony to that effect by Dayco's sales manager, who discussed in some detail his opinion concerning the advantages and economies to jobbers of buying indirectly rather than directly from Dayco.

26. These advantages were pointed out by Dayco to direct jobbers in an effort to persuade them to buy from other jobbers rather than directly from Dayco, and thus to reduce the number of Dayco's direct customers. The Dayco official testified that at one time the company had 4,000 direct customers, and that it was able to convince all but 1,000 to become indirect jobbers and to buy their goods locally (Tr. 368–9). He also testified, however, that just prior to the elimination of the 5% differential in September, 1958, Dayco was selling to approximately 4,000 direct customers, of which 150 sold only to jobbers (Tr. 92–3, 96). It is apparent, therefore, that it was not until after the 5% differential was eliminated that the dramatic reduction in the number of Dayco's direct customers occurred.

27. The record does not contain cost studies or other reliable data to show that by buying Dayco products indirectly jobbers effected economies which eliminated the competitive disadvantages of the 5% higher price which they paid. The contention with respect to such economies is based entirely upon the opinion testimony of an official of Dayco. This, of course, cannot be accepted as a reliable analysis or appraisal of economies which may have been effected by Dayco's customers.

28. The only reasonable inference which can be drawn from the evidence in the record is that many of Dayco's direct jobbers were unwilling to become indirect jobbers until the price disadvantage of indirect jobbers was eliminated. Thereafter, there was a substantial reduction in the number of Dayco's direct customers and presumably a substantial increase in the number of indirect jobbers. These circumstances support the showing that the effect of the 5% differential may be substantially to lessen competition between competing direct and indirect jobbers of Dayco products.

29. Dayco granted a 15% service credit to its direct customers on their sales to jobbers at prices not more than 5% above their list prices from Dayco. This service credit effectively prevented sales by Dayco's direct customers to indirect jobbers at prices higher than 5% above Dayco's list prices to its direct customers.

30. By agreement with both the direct and indirect jobbers, Dayco established the prices at which its products would be sold to, and purchased by, the indirect jobbers; and by correspondence and consultation it actively discouraged its direct jobbers from selling to indirect

jobbers at lower prices. Although Dayco did not disallow the service credit or discontinue selling to direct jobbers who sold at lower prices, it was in relatively few instances that direct jobbers continued to sell to indirect jobbers at prices lower than the 5% differential after being discouraged from doing so by Dayco (Tr. 383–4, 406–10).

31. The record establishes, therefore, that Dayco effectively controlled the prices at which indirect jobbers purchased from its direct customers. As will appear in a later section of this decision, Dayco also participated in soliciting the business of, and in negotiating with, indirect jobber accounts, and in assisting its direct customers in selling to them. The indirect jobbers were, accordingly, indirect customers of Dayco, and were "purchasers" within the meaning of Section 2(a) of the Clayton Act. (*American News Co., et al.* v. *F.T.C.*, 300 F. 2d 104, February 7, 1962, and the cases there cited.)

32. The 5% differential on Dayco products between direct and indirect jobber customers of Dayco who competed with each other in selling such products to dealers, constituted price discrimination by Dayco between different purchasers in violation of Section 2(a) of the Clayton Act.

33. Counsel for respondent contend, in effect, that the price differential between direct and indirect jobbers has been discontinued and is not likely to be renewed. They urge that the changes in Dayco's sales and pricing policies in September, 1958, which, among other things, eliminated the 5% price differential between direct and indirect jobbers, were made prior to any knowledge by Dayco that it was being investigated by the Federal Trade Commission; that the record indicates "that there would be no inclination, desire, or intention of Dayco to return to those practices which have been discontinued"; and that an order based on such practices would not be in the public interest (CR proposals, p. 4).

34. The record indicates that the first contact by a representative of the Commission with Dayco in the investigation which resulted in this proceeding was on September 8, 1958 (CX 24 and 25), and, so far as the record discloses, this is the first knowledge respondent had that its sales and pricing policies were being questioned by the Commission. The changes in Dayco's pricing and marketing system were made effective on September 17, 1958, and it is apparent that such changes had been under discussion at least a week before that date (CX 13 and 14).

35. Counsel supporting the complaint points to certain very persuasive considerations tending to indicate that Dayco did not decide to make the changes until after it had knowledge that its sales and

pricing practices were being questioned by the Commission (CSC proposals, pp. 38–41). These are, however, circumstantial considerations, and there is no direct evidence that Dayco did not decide to change such practices until after it was aware of the Commission's investigation.

36. In a letter dated September 17, 1958, the senior member of the law firm representing Dayco advised the attorney of the Commission who made the inquiry that "a new plan has been adopted prior to any inquiry from the Federal Trade Commission" (CX 24A). On the same date, Dayco's attorney also wrote to a member of the Commission, stating in part: "Now it so happens that prior to the knowledge of our client to such investigation, it had changed its entire method of distribution and was now following an entirely new and different pattern altogether" (CX 25B). The same attorney of Dayco testified as a defense witness in this proceeding, but he was not questioned concerning the foregoing statements in his letters to the Commissioner and the Commission's attorney.

37. In direct contradiction of the circumstantial considerations discussed by counsel supporting the complaint, a reputable and responsible attorney representing Dayco, in reply to an official inquiry by the Commission, made definite statements to the effect that the changes in question had been adopted prior to Dayco's knowledge of the Commission's investigation. Certainly he was in position to know whether or not those statements were accurate, they were made in a context which disclosed that he considered them to be material and important, and no question has been raised concerning his honesty. In such circumstances, the statements made by Dayco's attorney during the early stages of the Commission's investigation, which were put in evidence by counsel supporting the complaint, must be accorded greater weight and probative value than the circumstantial considerations to the contrary.

38. The record shows, therefore, that Dayco was in the process of changing its sales and pricing policies and practices, and that it had decided to eliminate the 5% price differential between its competing direct and indirect jobbers, prior to its knowledge of an investigation of its practices by the Commission. The record does not show that the 5% differential was eliminated because Dayco considered it to be unlawful or otherwise improper, but the nature and extent of the changes made at that time make it improbable that such differential will be renewed in the same form in future. There is nothing to indicate, however, that changes which may be made in the sales and pricing policies of Dayco at some future time, will not result in similar price differences between competing purchasers of its products.

Buying Groups

39. Counsel supporting the complaint contends, in effect that Dayco has discriminated in price among jobbers who compete in selling its products to dealers by selling to what are commonly known as buying groups of jobbers at prices 15% to 20% lower than to other jobbers who sell such products to dealers.

40. One such buying group of jobbers was Automotive Jobbers, Inc., Dallas, Texas (sometimes herein referred to as AJI), a membership organization formed in 1954 and operated by and for its jobber members (ON 1(d)). It was operated for the purpose of inducing the granting or allowance of lower and more favorable prices by manufacturers and sellers of automotive products and supplies, and it served only jobber members. Participation of said jobber members in the net income of AJI was based on a percentage of their individual purchases through the group organization (ON 1(e)).

41. In actual practice, members of the group purchased and sold most of the particular manufacturers' lines accepted and handled by the group (ON 1(f)). Purchase transactions between the supplier and the individual jobber members were billed to and paid for through AJI, but it served only as agent for the several jobber members, and as a bookkeeping device for facilitating the inducement and receipt by the jobber members of the prices, discounts and rebates concerned (ON 1(g)).

42. When a jobber member purchased products from a line stocked in the group warehouse an order was sent to AJI, which either procured the merchandise from the supplier or filled the order from its own warehouse stock. Sometimes a jobber member would receive a so-called "slot" shipment, that is, merchandise shipped by the supplier to the AJI warehouse, and immediately shipped by AJI to the jobber member in the same package. Many suppliers also "drop shipped" directly to the jobber members. The jobber members of AJI were charged a warehous fee of 5% on purchases made from the group warehouse, and 2% on "slot" shipments, to help offset the cost of operating the warehouse (ON 1 (k)).

43. The jobber members of AJI demanded to be classified as a warehouse distributor (ON 1(l)). The warehouse distributor's discount was a discount paid to distributors on automative products resold to other jobbers. The warehouse distributor's discount or rebate on the aggregate purchases of said jobber members was paid to AJI which, in turn, distributed the net after deduction of operating expenses to the jobber members in proportion to their individual purchases (ON 1(m)).

44. Dayco began dealing with AJI on August 9, 1954, and continued to do so until February 1, 1962, when AJI combined with another buying group to become Alto Warehouse, Dallas, Texas (CX 33). The record shows the total sales of Dayco to AJI in each of the years 1957 through 1960, such sales amounting in 1957 to over $57,000, and in each of the other three years to approximately $40,000. In 1957 and 1958, all of Dayco's sales to AJI were shipped directly to the several members. In 1959 its shipments directly to the members amounted to $12,018, and to the AJI warehouse, $27,778; and in 1960, its shipments directly to the members amounted to $21,784, and to the warehouse, $19,149 (CX 34A; Tr. 200–02).

45. During the years 1957 through 1960, all sales by Dayco were made to AJI at the prices applicable to Dayco's direct customers for resale to other jobbers, sometimes referred to as the warehouse distributor's price. On the great bulk of its sales, these prices prior to September, 1958 were 15% less than Dayco's prices to its direct jobbers for resale to dealers, and approximately 20% less than the prices paid by its indirect jobbers; and after September, 1958, these prices were 20% less than Dayco's prices to its direct and indirect jobbers for resale to dealers (Tr. 215–19). The record shows in detail for the years 1958, 1959 and 1960 the amount of Dayco's total sales to AJI, the service credit or net prices applicable to such sales, and the amount of Dayco's direct shipments to each of the several members of AJI (CX 35A–B; Tr. 202–20).

46. In 1958, all of Dayco's sales to AJI were shipped directly to its members, but in 1959 over two-thirds, and in 1960 approximately half of its sales to AJI were shipped to the AJI warehouse (CX 34A; Tr. 200–02). In 1958, therefore, the total purchases of Dayco products by each member of AJI are shown in the direct shipments on CX 35A, but in 1959 and 1960 some or all of the members purchased Dayco products in addition to the direct shipments to them shown on CX 35A.

47. It is clear from the record that many jobber members of AJI purchased Dayco products in 1958, 1959 and 1960, and that on all such purchases they received substantially lower prices than other direct or indirect jobbers who did not receive the service credits, or equivalent net prices, on Dayco products. Such price advantages on the bulk of Dayco products were from 15% to 20% before September, 1958, and 20% thereafter, less such warehouse and "slot" shipment fees and operating expenses as were deducted by AJI. The extent of these deductions is not specifically shown, but, in view of the purposes of AJI, and the scope and nature of its operations, it must be inferred

that the net price advantages of its jobber members on Dayco products were substantial.

48. Thirteen automotive parts jobbers were officially noticed as members of AJI "In September, 1959, and for a substantial period of time since its organization, * * *." (ON 1(c)). Counsel for respondent objects that such official notice departs from the initial decision on which it is based by referring to the time of membership of such jobbers as September, 1959 "and," instead of "or," for a substantial period of time since its organization (CR proposals, p. 19). This departure from the initial decision on which it was based was intentionally made in the official notice order because it appeared correctly to reflect the meaning of the initial decision insofar as it was relevent to this proceeding. Counsel for respondent offered no evidence to show that such officially noticed facts were not accurate.

49. Counsel supporting the complaint contends, on the other hand, that two additional jobbers should have been officially noticed as members of AJI (CSC proposals, fn. p. 20). The reasons for not doing so are set out in the hearing examiner's order of October 9, 1962.

50. Upon a more critical examination of the record herein, it is apparent that the membership of AJI during all or part of the period 1958 through 1960 included at least seven jobbers in addition to those officially noticed. It was officially noticed that AJI "is a membership corporation serving only jobber members" (ON 1(e)). CX 35A contains "a list of accounts serviced by Automotive Jobbers, Inc., and direct shipments made to such accounts for the years 1958 through '60" (Tr. 203). That is a list of twenty accounts, including the thirteen officially noticed members of AJI and the two additional jobbers referred to by counsel supporting the complaint. Since AJI served only jobber members, the record establishes that all of the accounts listed on CX 35A were jobber members of AJI when they received direct shipments from Dayco in 1958, 1959 and 1960.

51. CX 35A discloses that in one or more of the years 1958, 1959 and 1960 five members of AJI were located in Dallas, and one was located in each of the cities or towns of Garland, Fort Worth, Lubbock, Hillsboro, and San Angelo, Texas, and Shreveport, Louisiana. It also discloses that members of AJI were located in other places not here relevant.

52. CX 35C discloses that in 1958 two direct customers of Dayco who made substantial sales of its products to dealers, and who were not members of AJI, were located in Dallas, one was located in Fort Worth and two were located in Lubbock, and that those customers

also made some sales to jobbers. CX 35C also discloses that in 1959 six direct customers of Dayco who made substantial sales of its products only to jobbers, and who were not members of AJI, were located in Dallas, two were located in Fort Worth, and two were located in Lubbock; and that in 1960 seven such direct customers were located in Dallas, three in Fort Worth, and two in Lubbock.

53. CX 35D discloses that three direct customers of Dayco who made substantial sales of its products to dealers in one or more of the years 1958, 1959 and 1960, and who were not members of AJI, were located in Dallas, two were located in Fort Worth, one was located in Slaton, and one in Cleburne, Texas, and one was located in Shreveport, Louisiana.

54. Undoubtedly the direct customers of Dayco shown on CX 35C and D who sold Dayco products to other jobbers, made a substantial part of such sales to jobbers in the same trading areas (Tr. 209), and at prices substantially higher than the prices paid by members of AJI for such products.

55. The members of AJI located in Dallas and Garland, Texas, who purchased Dayco products, resold such products to dealers in competition with the direct and indirect jobbers of Dayco located in Dallas. The member of AJI located in Fort Worth, Texas, who purchased Dayco products, resold such products to dealers in competition with the direct and indirect jobbers of Dayco located in Fort Worth; such member located in Lubbock resold in competition with such jobbers located in Lubbock and Slaton, Texas; such member located in Hillsboro resold in competition with the direct jobber located in Cleburne, Texas; and such member located in Shreveport, Louisiana, resold in competition with the direct jobber located in Shreveport (ON 3(a)(1)-(7)).

56. Counsel supporting the complaint also contends that the AJI member located in San Angelo, Texas, competed with an indirect jobber in San Angelo, Moore Parts, shown on CX 43B (CSC proposals, pp. 19–21). The contract with the direct jobber, Duncan & Company, Fort Worth, Texas, who sold to Moore Parts, is dated February 21, 1952, however, and there is no showing or sound basis for an inference that Dayco products were sold to Moore Parts by Duncan in 1958, 1959 or 1960 (CX 43A and B; Tr. 175–6, 418–19).

57. The record discloses, therefore, that during the years 1958, 1959 and 1960 members of AJI, who sold Dayco products to dealers, were in substantial competition with direct and indirect jobbers who also sold Dayco products to dealers. AJI members received from Dayco net prices on Dayco products which were substantially lower than the

prices received directly or indirectly from Dayco by the jobbers with whom they competed in selling such products to dealers.

58. The automotive parts industry is a highly competitive business involving small margins of profit, and discounts as small as 2% are of the utmost economic importance to the competitive existence of automotive parts jobbers (ON 3(b)). The effect of Dayco's price discriminations in favor of members of AJI, therefore, may be substantially to lessen competition between such members and other direct and indirect jobbers of Dayco products. Such price discriminations, accordingly, constituted violations of Section 2(a) of the Clayton Act.

59. Counsel for respondent contend, in effect, that Dayco dealt with AJI as principal, and not as an undisclosed agent for its members, and that Dayco should not be charged with knowledge of the relationship between AJI and its jobber members (CR proposals, p. 24). Counsel and the record make it clear, however, that Dayco has long been aware of the "buying group problem," and that Dayco has endeavored to determine how it could deal with buying groups without violating the law (CR proposals, p. 26; Tr. 310–13, 336–49).

60. The Dayco official who testified displayed considerable familiarity with the buying groups of jobbers and how they operate. He was aware that Dayco sold to so-called buying groups, he was able to name several of its accounts which he understood to be buying groups, including AJI, and to the best of his knowledge and belief the sixteen accounts of Dayco listed on CX 33 were buying groups (Tr. 190–200, 389–92). While he was not familiar with the details of their internal organizations, he had a general familiarity with their purposes and methods of operation.

61. The essential thrust of the argument by counsel for respondent is not that Dayco is unable to identify buying groups with reasonable confidence, but that it must be a "vigorous competitor," and that it cannot compete "backing up." It is argued that "Mere suspicions cannot realistically serve as the criteria for Dayco to make judgments which may determine whether they shall survive in this fiercely competitive market," and it is urged that Dayco has been unable to ascertain "criteria by which to judge the Commission's view as to the legality of concerns who want to buy Dayco's products" (CR proposals, pp. 26–27).

62. It is argued, in effect, that Dayco must sell to buying groups on their terms, or not sell to them. The dilemma thus confronted by Dayco is undoubtedly a serious one. It was estimated that 20% to 25% of its sales are made to the buying groups listed on CX 33; that, if Dayco did not sell to these groups at prices applicable to products for

resale to jobbers, its competitors would do so; and that in such event Dayco would be eliminated as a competitor in the sale of automotive products (Tr. 310–13, 395–7). The dilemma confronted by Dayco, however, cannot be resolved by permitting it to continue to violate the law because its competitors may be doing so.

63. In dealing with AJI, Dayco was aware that it was a buying group of jobbers, and that serious questions had been raised as to whether or not the granting of quantity and warehouse discounts to such groups constituted unlawful price discriminations. It clearly had reason to believe that its prices to AJI may be unlawful.

64. Insofar as suppliers continue to grant discounts in such circumstances, and buying groups continue to induce and receive them, the legality of the prices involved in particular situations must be determined on a case-by-case basis. This proceeding involves such a situation, and it has established that the prices granted by Dayco to AJI are unlawfully discriminatory. An appropriate order terminating the violations is, therefore, required.

65. Counsel supporting the complaint persuasively argues that the record also shows that Dayco sold its products to fifteen other buying groups at the same prices and under the same terms and conditions as to AJI, and with similar competitive effects (CSC proposals, pp. 6–9). The record does not contain any reliable evidence, however, showing the internal organizations and methods of operation of such other buying groups. The testimony and other evidence provide a basis for suspecting that the other buying groups operate in much the same fashion as AJI; and that, in selling to them at prices applicable to products for resale to jobbers, Dayco granted similar price advantages to their members with similar competitive effects. But the record does not, either directly or by sound inference, establish such suspicions as facts. Accordingly, it cannot be concluded on this record that Dayco has granted unlawful price discriminations to other buying groups or their members.

Count II

66. Count II of the complaint charges that Dayco required its direct and indirect customers to enter into agreements or understandings with it to resell its products at prices fixed by Dayco; that it required its direct customers to enter into agreements or understandings with it to resell such products only to purchasers approved by Dayco; that it required its indirect customers to enter into agreements or understandings with it to purchase such products only from certain direct customers; and that it required some of its direct customers to enter

into agreements or understanding with it too sell such products only to wholesalers. It also charges that Dayco enforced or attempted to enforce such agreements or understandings by various acts and practices; that the effects have been or may be to restrain competition in several ways; and that such agreements and understandings and the various acts and practices pursuant thereto violate Section 5 of the Federal Trade Commission Act.

67. Prior to September, 1958, Dayco entered into agreements with its direct customers, appointing them as its representatives and granting them the right to buy and sell Dayco automotive products (CX 9). With its direct customers who resold such products only to jobbers, designated as 100% redistributors, this agreement was supplemented with a letter agreement (CX 10A–B; Tr. 107–8) which, in effect, provided, among other things, that the customer would distribute Dayco products only to outlets approved by Dayco; that salesmen of Dayco and of the customer would participate and assist in obtaining such outlets and in closing agreements with them; that the forms for such agreements would be supplied by Dayco; that sales to such outlets would be made at the Dayco recommended schedule of prices in effect at the time of the sale; that a quarterly report would be made to Dayco indicating the dollar value of sales of Dayco products to each outlet; and that Dayco have authority to check the records of the customer.

68. During the same period, Dayco supplied agreement forms to its direct customers to be entered into with other jobbers to whom they sold Dayco products (CX 11; Tr. 100–06, 255–62, 361–7). These agreements were used by all of Dayco's direct customers who sold its products to other jobbers, including those who sold both to jobbers and dealers, referred to as partial redistributors, as well as those who sold only to jobbers, referred to as 100% redistributors. Dayco's direct customers were designated as "AA Jobbers," and the jobbers to whom they resold Dayco products were designated "A Jobbers."

69. The agreements entered into with "A Jobbers" (CX 11) provided, among other things:

> 4. The Jobber agrees to purchase his requirements of Dayton Automotive Products through sources of supply as designated. In consideration of this agreement, the Jobber is entitled to prices in effect for "A" Jobbers at time of shipment. It is mutually agreed, however, that The Dayton Rubber Company reserves the right to change its prices or terms at any time without notice.
>
> 5. The Jobber shall designate one or two sources of supply and confine his purchases of Dayton Automotive Products to the suppliers named. No change in these suppliers shall be made until The Dayton Rubber Company, Dayton, Ohio, is notified by the Jobber and acknowledgement is made accepting the change.

70. Dayco allowed its "AA Jobbers" a service credit of 15% on their sales of Dayco products to "A Jobbers." In order to obtain this credit, the "AA Jobbers," both 100% redistributors and partial redistributors, were required to file reports of their sales to "A Jobbers," together with copies of their invoices covering such sales (Tr. 356; CX 10B and 20). Whether copies or lists of such invoices were actually filed (Tr. 357), it is clear that Dayco required proof of sales to "A Jobbers," and the prices at which they were made, as a basis for allowance of the service credit. In May, 1958, Dayco eliminated reports of sales to "A Jobbers" by its 100% redistributors, and started billing them at net prices which reflected deduction of the service credit (CX 6A–L; Tr. 89–91, 384–5).

71. If the reports or other information obtained by Dayco disclosed that sales to "A Jobbers" were made at prices more than 5% above Dayco's list prices to its "AA Jobbers," the service credit was not allowed. If sales were made at lower prices, the service credit was allowed, but Dayco discouraged such sales by pointing out to its direct customers in those instances that the lower prices were causing their profits to disappear (Tr. 358–61).

72. Refusal by Dayco to grant the service credit on such sales effectively prevented sales to "A Jobbers" at prices higher than 5% above Dayco's list prices to "AA Jobbers"; and by its agreements and active discouragement, Dayco effectively prevented sales to "A Jobbers" at lower prices in all but a relatively few instances (Tr. 383–4, 406–10). Dayco did not disallow service credits because of sales below its suggested prices to jobbers, and it did not discontinue dealing with "AA Jobbers" because of such sales; but by the reports of its own representatives and others in the trade, and by the periodic reports of its direct customers, it kept in close touch with the prices at which "AA Jobbers" sold to "A Jobbers" and actively discouraged sales at prices lower than its suggested schedule of prices (Tr. 372–6, 380).

73. Dayco salesmen worked with the salesmen of the "AA Jobbers" in locating, soliciting and signing agreements with "A Jobbers" (Tr. 103–6). Each such agreement typically would be signed by the "A Jobber" and by one or two "AA Jobbers." The "AA Jobbers" signing the agreement were the designated sources of supply of Dayco products for the "A Jobber." The agreement would also be signed and submitted to Dayco by its local district manager or salesman, and would be "accepted" by Dayco through the signature of its sales manager.

74. It is Dayco's position that its representatives' signatures to these agreements did not constitute Dayco as a party to the agreements, but that they constituted recognition by Dayco only that the "A Job-

bers" were legitimate jobbing houses (Tr. 105–6, 361–3). We are not here concerned primarily with the legal significance of the agreements, but with the nature, extent and practical effect of Dayco's participation in preparing and negotiating them, and their influence upon the competitive activities of the participating parties.

75. The agreements with "A Jobbers" promise that the "A Jobber" is "entitled to prices in effect for 'A' Jobbers at time of shipment." Both the "AA Jobber" and Dayco participated in the negotiation and execution of these agreements. In view of Dayco's active discouragement of sales at lower prices, such agreements clearly constituted agreements or understandings by the "AA Jobbers" with Dayco, as well as with the "A Jobbers," that they would sell Dayco products to the "A Jobbers" at Dayco's recommended schedule of prices applicable to such jobbers. Although the record does not disclose a specific agreement such as CX 10A–B between Dayco and its direct customers who are partial redistributors, it is clear that such partial redistributors also entered into understandings with Dayco that they would sell its products to their jobber customers at Dayco's recommended schedule of prices.

76. The number of Dayco "AA Jobbers" operating in the same trading area varied widely in different cities and territories (Tr. 253–4, 308–9). Dayco's representatives were active in calling upon and helping the "AA Jobbers" generally in distributing its products and in working with them not only in signing agreements, but also in selling to "A Jobbers" and in seeing that their business was channeled to their designated sources of supply (Tr. 127–32, 252, 298, 380–2). A great deal of sales effort was also put in by the Dayco representatives at the dealer level in order to create a demand for its products, which demand moved up to the "A Jobber" and, in turn, to the "AA Jobber" (Tr. 252–3). The Dayco salesman was paid commissions only on the basis of the orders of the "AA Jobbers" in his territory, and was not compensated on the basis of business done by "A Jobbers" (Tr. 254–5, 380).

77. Dayco considered the agreement with the "A Jobber" to be a "selling tool" to make the indirect jobber feel closer to Dayco, to ask him to do business with the direct jobber who had found the account, and to establish that he was a legitimate jobber and not simply a dealer (Tr. 255–8). It was used to encourage a direct jobber to sign up additional indirect jobbers so that he could feel they were his accounts, and it provided an indirect jobber an easy way to reject competitive salesmen by saying he was already signed up with another direct jobber (Tr. 260–1, 363–6).

78. As a matter of practice, the orders of indirect jobbers almost always went to the direct jobbers designated in their agreements. "They didn't indiscriminately change around" (Tr. 297, 366–7). Although Dayco did not enforce the provision in the agreements with "A Jobbers" that they would confine their purchases of its products to the designated "AA Jobbers," it is apparent that, except in rare instances, the provision was effective in accomplishing its stated requirement.

79. The record discloses, therefore, that Dayco required its direct jobbers, including 100% redistributors and partial redistributors, to enter into agreements or understandings with it to resell Dayco products to other jobbers at prices fixed by Dayco; and that it required its indirect jobbers to enter into agreements or understandings with it and with one or two direct jobbers to purchase such products only from the direct jobbers who signed the agreements at prices fixed by Dayco. The requirement that indirect jobbers would purchase Dayco products only from the designated direct jobbers sharply limited the sources of supply available to indirect jobbers, and limited competition among direct jobbers in selling to them. It also made more effective the requirement fixing the prices at which Dayco products would be resold by direct to indirect jobbers.

80. Compliance with these agreements was actively encouraged by Dayco, and they were generally adhered to by the participating jobbers. These agreements, and Dayco's activities in furtherance of them, resulted in substantially restraining competition, including price competition, among its direct customers in selling Dayco products to other jobbers.

81. The agreements referred to in the foregoing discussion were used by Dayco prior to September, 1958. At that time Dayco adopted a new form of agreement with its direct customers who sold only to jobbers, and changed the designation of such customers from "AA Jobbers" to warehouse distributors (CX 30). It also adopted a new form of agreement with its direct and indirect customers who sold only to dealers or both to dealers and jobbers, and designated such customers as wholesalers (CX 31). These new forms of agreements did not contain provisions of the earlier agreements with respect to requiring sales to indirect jobbers at prices fixed by Dayco, and requiring indirect jobbers to purchase Dayco products from designated sources of supply. Dayco now sells to approximately 300 warehouse distributors and approximately 700 wholesalers (Tr. 96).

82. When new direct or indirect accounts were signed by Dayco after September, 1958, the new forms of agreements were used.

Dayco made no concerted attempt, however, to sign direct or indirect customers to the new agreements, and many of the agreements used prior to the change continued in effect (CR proposal #37; Tr. 111, 155). Even under the new agreements, warehouse distributors and direct wholesalers continue to sell to non-direct wholesalers or sub-wholesalers at prices suggested by Dayco (Tr. 386); and direct wholesalers who sell to non-direct wholesalers continue to report such sales and prices to Dayco for service credit (Tr. 134–5, 156, 220).

83. It is apparent, therefore, that when Dayco made changes in its system of distribution and prices in September, 1958, it did not effectively eliminate essential features of its former system which substantially restrained price and other competition among its direct customers. Dayco's agreements in restraint of competition, and its activities in furtherance thereof, which have continued in effect to a substantial extent, constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

84. Before September, 1958, Dayco's agreements with its 100% redistributors provided that they would distribute Dayco products only to outlets approved by Dayco (CX 10A); and since then its agreement with warehouse distributors provides that they will sell only to franchised wholesalers approved by Dayco and only to the wholesale level of distribution (CX 30). Dayco granted a service credit, formerly 15%, and now 20%, on all sales of its products by these accounts because all such sales were to other jobbers.

85. The limitations in the agreements with these accounts that they would sell Dayco products only to outlets or wholesalers approved by Dayco, although consistent with the restrictive provisions discussed above, were primarily for the purpose of assuring Dayco that the service credit on all of the purchases of these accounts was granted only on sales to legitimate jobbers, and not on sales to dealers. Any of Dayco's direct customers who desired to do so could sell both to dealers and to jobbers. Those who elected to sell to dealers and jobbers were formerly classified as partial redistributors, and presently as wholesalers, and were allowed a service credit on their sales to jobbers on the basis of their reports of such sales to Dayco.

86. In such circumstances, it appears that these provisions in the agreements did not materially restrict the freedom of these direct accounts to sell Dayco products to customers of their own choice. Dayco's approval of outlets or wholesalers was conditioned only upon the fact that such outlets or wholesalers were legitimate jobbers. Dayco's direct customers were free to choose whether they would sell only to jobbers or both to jobbers and dealers, and in either case they

purchased from Dayco at the same prices all of its products which they sold to jobbers. The difference was essentially in form and procedure, rather than in competitive freedom.

87. The record does not disclose, therefore, that the provisions in Dayco's agreements with its direct customers who sold only to jobbers, that they would resell its products only to "outlets" or "wholesalers" approved by Dayco, or that they would resell its products only to wholesalers, substantially restrained competition.

88. Counsel supporting the complaint seeks a conclusion, based on inference, that Dayco also required its direct and indirect jobbers to agree to resell its products to dealers at prices fixed by Dayco (CSC proposals, pp. 32–5). The record discloses that Dayco supplied its jobbers with price lists which it suggested be followed in sale to dealers. There is no evidence, however, that it required such jobbers to agree to adhere to the suggested dealer prices or that it took any other action to see that they did so. This contention by counsel supporting the complaint, accordingly, is not supported by the evidence.

CONCLUSIONS

1. For a substantial period of time before September, 1958, indirect jobbers purchased Dayco products at prices 5% higher than jobbers who purchased such products directly from Dayco. Dayco effectively controlled the prices at which indirect jobbers purchased from its direct customers, and it participated in negotiating with indirect jobbers and in assisting its direct customers in selling to them. The indirect jobbers were, accordingly, indirect customers of Dayco, and were "purchasers" within the meaning of Section 2(a) of the Clayton Act.

2. Dayco products are a line of automotive products, primarily belts and hoses, consisting of items of only one grade and quality. Contemporaneous sales of such products were made to direct and indirect jobber customers of Dayco who competed with each other in reselling them to dealers. The sale of automotive products is a highly competitive business, involving small margins of profit; and the effect of the 5% price differential between competing direct and indirect jobber customers of Dayco may be substantially to lessen competition between such customers in the sale of Dayco products to dealers.

3. The 5% price differential between direct and indirect jobber customers of Dayco who competed with each other in selling Dayco products to dealers constituted price discrimination by Dayco between different purchasers in violation of Section 2(a) of the Clayton Act. That differential was discontinued in September, 1958, and it is

improbable that it will be renewed in the same form; but there is no assurance that future changes which may be made in the sales and pricing policies of Dayco will not result in similar price differences between competing purchasers of its products. An order prohibiting such price discriminations is warranted.

4. During the years 1957 through 1960, Dayco made substantial sales of its products to Automotive Jobbers, Inc. (AJI), a buying group of jobbers, and through it to many of its members. Such sales were made at net prices which, prior to September, 1958, were 15% less than Dayco's prices to its direct jobber customers for resale to dealers, and approximately 20% less than the prices paid by its indirect jobber customers for resale to dealers; and which, after September, 1958, were 20% less than Dayco's prices to its direct and indirect jobber customers for resale to dealers. AJI purchased such products on behalf of its jobber members, and after deduction of operating expenses certain warehouse and shipping fees, distributed the discounts which it received to the jobber members in proportion to their individual purchases.

5. During the years 1958, 1959 and 1960, certain jobber members of AJI were in substantial competition with direct and indirect jobber customers of Dayco in selling Dayco products to dealers. The net prices received from Dayco by such jobber members of AJI were substantially lower than the prices on such products received directly or indirectly from Dayco by the jobbers with whom they competed in selling such products to dealers. The effect of the price advantages received by such AJI members may be substantially to lessen competition between them and other direct and indirect jobber customers of Dayco in selling such products to dealers. The price advantages on Dayco products received by jobber members of AJI over competing jobbers, accordingly, constituted price discrimination by Dayco in violation of Section 2(a) of the Clayton Act.

6. In dealing with AJI, Dayco was aware that it was a buying group of jobbers, and that serious questions were involved concerning the legality of warehouse discounts to such groups. While the record does not disclose that it had detailed knowledge of the internal organization of AJI, Dayco was sufficiently familiar with the method of operation of AJI generally to have reason to believe that its prices to AJI may be unlawful.

7. For a substantial period of time prior to September, 1958, Dayco required its direct jobber customers to enter into agreements or understandings with it to resell its products to other jobbers at prices fixed by Dayco; and required its indirect jobber customers to enter

into agreements or understandings with it to purchase Dayco products only from certain direct customers. Compliance with these agreements was actively encouraged by Dayco, and they were generally adhered to by the participating jobbers. These agreements, and Dayco's activities in furtherance of them, resulted in substantially restraining competition, including price competition, among Dayco's direct customers in the sale of Dayco products to other jobbers.

8. In September, 1958, Dayco adopted new forms of agreements which did not contain the foregoing requirements. Thereafter, when new direct or indirect jobber customers were acquired by Dayco, the new forms of agreements were used. Dayco made no concerted attempt, however, to sign direct or indirect jobber customers to the new agreements, and many of the old agreements continued in effect. Even under the new agreements, although not specifically required to do so, Dayco's direct customers generally continued to sell to indirect jobbers at prices suggested by Dayco.

9. When Dayco made changes in its system of distribution and prices in September, 1958, it did not effectively eliminate essential features of its former system which substantially restrained price and other competition among its direct customers. Dayco's agreements in restraint of competition and its activities in furtherance thereof, which have continued in effect to a substantial extent, constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

10. The provisions in Dayco's agreements with its direct customers who sold only to jobbers that they would sell its products only to purchasers or wholesalers approved by Dayco, or only at the wholesale level of distribution, although consistent with the restrictive provisions referred to above, were primarily for the purpose of assuring Dayco that the service credit on all of the purchases of these accounts was granted only on sales to legitimate jobbers. Any of Dayco's direct customers who desired to do so were free, upon entering into appropriate agreements, to sell both to dealers and to jobbers and to receive the service credit on their sales to jobbers. These provisions in the agreements, therefore, did not materially restrict the freedom of these direct accounts to sell Dayco products to customers of their own choice, and did not substantially restrain competition.

11. Dayco supplied its jobbers with price lists which it suggested be followed in sales to dealers. The evidence, however, does not sustain the contention that Dayco required such jobbers to agree to adhere to the suggested prices in reselling to dealers, or that it took any other action to see that they did so.

12. The respondent named in the complaint herein, is The Dayton Rubber Company, a corporation. Subsequent to the issuance of the complaint, however, the name of that corporation was changed to Dayco Corporation. The order to cease and desist should, accordingly, identify the respondent by its present name, Dayco Corporation.

ORDER

It is ordered, That respondent, Dayco Corporation, a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device in, or in connection with, the sale or distribution of automotive parts and related products in commerce, as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act, do forth with cease and desist from:

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

2. Putting into effect, continuing or maintaining any merchandising or distribution plan or policy under which agreements or understandings are entered into with resellers of such products which have the purpose or effect of:

(a) Fixing, establishing or maintaining the prices at which such products may be resold; or

(b) Limiting or restricting the persons from whom any purchaser may purchase such products.

OPINION OF THE COMMISSION

AUGUST 5, 1964

By DIXON, *Commissioner:*

This case is before the Commission on respondent's[1] appeal from the hearing examiner's initial decision in which respondent was found to have discriminated in price, in violation of Section 2(a) of the Clayton Act, as amended,[2] and restrained trade through agreements to fix resale prices and limit customers and sources of supply, in violation of Section 5 of the Federal Trade Commission Act.[3] Although

[1] When the complaint was issued, respondent was incorporated as The Dayton Rubber Company. That name has since been changed to "Dayco Corporation."

[2] 15 U.S.C. 13(a).

[3] 15 U.S.C. 45(a)(1).

respondent is engaged in the production of a broad line of rubber and plastic products, this proceeding is concerned solely with the distribution practices of the Automotive Wholesalers Department of its Rubber Products Division. That department, which accounts for approximately 8 to 9 percent of Dayco's total sales, is engaged in the manufacture and sale of various types of automotive replacement parts made from rubber, such as fan belts, rubber hose and tubing, and mats and rugs. At the time of the hearings, Dayco ranked second in national sales in that field with a share of approximately 15 percent of the market.

The facts concerning respondent's marketing system are not in dispute. Prior to September of 1958, all purchasers who acquired products directly from the respondent were termed "AA" jobbers. These "AA" jobbers are broken down into three categories. The "100% redistributor" sold exclusively to other jobbers or wholesalers. The "partial redistributor" sold not only to wholesalers or jobbers, but also made some sales directly to dealers. The third type of "AA" jobber sold exclusively to dealers. The purchaser who acquired respondent's products from "AA" jobbers and resold them to dealers was classified by respondent as an "A" jobber and, by definition, was in competition with the direct purchasing "AA" jobbers who made sales to dealers.

Respondent issued suggested resale price lists for all levels of distribution. The prices which it charged the direct purchasing "AA" jobbers were published on a blue sheet. Those "AA" jobbers who subsequently sold products to "A" jobbers and thus engaged either totally or partially in redistribution reported that fact to the respondent and were granted a redistribution discount of 15% on most items. A pink price sheet suggested the prices which the "AA" jobbers should charge the "A" jobbers. These pink sheet prices were 5% higher than those established by the blue sheet. Thus, an "A" jobber acquiring respondent's products for resale to a dealer purchased the products at the pink sheet prices and paid 5% more for these products than did an "AA" jobber who was able to acquire the same products for resale to a dealer at the blue sheet prices. Both classes of jobbers resold respondent's products to dealers at the same prices.

In September of 1958, the nomenclature of the various jobbers was altered. The "AA" jobber selling exclusively to "A" jobbers became a "warehouse distributor." The remaining "AA" jobbers—those who sold both to "A" jobbers and to dealers, and those who sold only to dealers—were termed "direct wholesalers." The "A" jobbers were re-

named "subwholesalers" or "non-direct wholesalers." In addition, respondent ceased using the pink price list to establish the prices charged the "A" jobbers. Thereafter, the "A" jobbers, now known as non-direct wholesalers, purchased respondent's products from warehouse distributors and direct wholesalers for resale to dealers at the prices established by the blue sheet. Since the direct wholesalers who resold to dealers also purchased at the blue sheet prices, the disparity in the cost of acquisition between competing customers at this point in respondent's distribution system was eliminated. The redistribution discount granted by respondent on products which it sold to warehouse distributors and direct wholesalers for resale to non-direct wholesalers was increased from 15% to 20% of the blue sheet prices. Thereafter, the warehouse distributors were relieved of reporting their subsequent sales to non-direct wholesalers and were invoiced at the net or discounted price. However, the direct wholesalers who sold to non-direct wholesalers were required to continue reporting such sales as a condition precedent to receiving the discount.

Respondent also made sales to several group buying associations, and granted to them the redistribution discount, which, on most items, was 15% prior to September of 1958 and 20% thereafter. Evidence was offered that one of these groups, Automotive Jobbers, Inc., of Dallas, Texas, dealt only with its members and that it was wholly owned, controlled, and operated by these members.

Count I of the complaint charged respondent with price discrimination. The examiner concluded that respondent had discriminated in price in two particulars. First, he found discrimination in price prior to September of 1958 through sales of products to "AA" jobbers for resale to dealers at a price 5% lower than that made available to competing indirect purchasing "A" jobbers. Secondly, the examiner found that respondent's sales to Automotive Jobbers, Inc., the group buying association, permitted its jobber members to acquire products at a net price lower than that available to competing non-affiliated jobbers, and that such sales were unlawful price discriminations.

Count II of the complaint charged respondent with violations of Section 5 of the Federal Trade Commission Act. The examiner concluded that respondent had illegally restrained competition among its direct customers in their sales to non-direct customers through the use of contracts with both classes of customers which set the price at which its products were sold by the direct purchasers to the non-direct purchasers, and which limited the direct purchaser's selection of customers and the non-direct purchaser's selection of sources of supply.

I

During the trial of the case, counsel supporting the complaint filed a written motion requesting that official notice be taken of certain facts and presumptions relative to the price discrimination charges under Count I of the complaint.[4] Respondent was given the opportunity of filing a written opposition to that motion and did so. The examiner subsequently granted the motion in substantially all of its aspects. Respondent has had ample opportunity to present evidence rebutting the facts officially noticed,[5] but has attempted to do so in only one regard.[6] Instead, respondent asserts that official notice under the circumstances of this case is improper. Since the proof of several essential elements of both price discrimination charges hinges upon whether the examiner acted correctly in taking official notice, that question will be discussed before we turn to the other questions raised on this appeal.

On the basis of the Commission's extensive experience in the automotive parts industry, as manifested in numerous past cases,[7] the examiner took official notice of certain general background facts concerning competition in that industry.[8] The examiner noticed that competition in the automobile parts industry is keen and that a small profit margin exists. Specifically, he noticed that the typical net profit margin after taxes is less than 5%, and that the 2% cash discount, prevalent in the industry, is considered to be of the utmost economic importance and is carefully taken. The examiner also took notice of the fact that automobile parts jobbers located in the same cities and metropolitan

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[4] The Administrative Procedure Act, 60 Stat. 237, 241 (1946), 5 U.S.C. 1006(d), provides for official notice in Section 7(d) thereof

"* * * Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary."

The Commission's Rules of Practice, Section 3.14(d), implement in substantially the same words the provisions of the Administrative Procedure Act.

"When any decision of a hearing examiner or of the Commission rests, in whole or in part, upon the taking of official notice of a material fact not appearing in evidence of record, opportunity to disprove such noticed fact shall be granted any party making timely motion therefor."

[5] Formal hearings were begun in this case on April 9, 1962, in Dayton, Ohio, and continued through April 11, 1962. During this period, complaint counsel presented testimony and exhibits in support of the complaint. The motion for taking official notice was filed May 16, 1962, and respondent's opposition thereto was filed June 11, 1962. The examiner granted the motion on June 14, 1962. Respondent thereafter presented its case in defense of the charges on January 22, 1963, in Dayton, Ohio.

[6] The evidence in rebuttal will be discussed in Sec. III, *infra*.

[7] The motion was predicated upon twenty cases in the automobile parts field, seven of which had been appealed to the courts and affirmed. All but one of the remaining thirteen were later consent settlements.

[8] Order Taking Official Notice, June 14, 1962, pars. 2, 3.

areas, and in cities and towns in geographic proximity, are in competition with each other.[9]

Offical notice of this type is similar to that approved by the Commission in *Manco Watch Strap Co.*, Docket No. 7785, 60 F.T.C. 495 (March 13, 1962). There, on the basis of numerous past decisions in which the matter had been litigated, the Commission took official notice of a belief on the part of the buying public that a product which was not clearly marked otherwise was made in the United States, and of a preference by buyers for the American-made product. Respondent seeks to distinguish the present situation from *Manco* by pointing out that the Commission's experience in the automobile parts industry is not as extensive as its experience in foreign origin cases, and that the contested automobile parts cases relied upon were litigated in the early and middle 1950's.[10] However, the Commission has been concerned with and considering in detail the manifold problems of this industry for more than a decade. Our investigation and research involving this industry have been continuous and unrelenting over that period. Although we are aware that there have been certain changes in the methods of distribution during this period, the basic facts concerning competition and its intensity have remained unchanged, as has the size of the profit margin. To require a detailed relitigation of these basic facts in each successive case would unduly hamper the Commission in its enforcement of the laws, and would unnecessarily lengthen the proceedings, thus increasing costs for all concerned. We conclude that the facts and propositions above listed have become generally accepted, and the Commission's knowledge concerning them has reached sufficient proportions to permit official notice thereof to be taken in this case. *Cf.*, *Manco Watch Strap Co.*, *supra.* As required by the Administrative Procedure Act, such noticed facts are subject to rebuttal. It should be emphasized that the Commission is not taking official notice of ultimate conclusions from previous cases, but is instead noticing basic facts upon which to predicate the final conclusions which must be made in the present case.

[9] Extending this latter premise, the examiner noticed that jobbers in certain specific cities competed with each other. These facts could have been inferred from the general premise. Thus, if it was proper to take official notice of the general premise, notice of the fact that jobbers in specific cities compete with each other was also proper.

[10] *Moog Industries, Inc.* v. *Federal Trade Commission,* 238 F. 2d 43 (8th Cir. 1956), *aff'd,* 355 U.S. 411 (1958) ; *Whitaker Cable Corp.* v. *Federal Trade Commission,* 239 F. 2d 253 (7th Cir. 1956), *cert. denied,* 353 U.S. 938 (1957) ; *E. Edelmann & Co.* v. *Federal Trade Commission,* 239 F. 2d 152 (7th Cir. 1956), *cert. denied,* 355 U.S. 941 (1958) ; *C. E. Niehoff & Co.* v. *Federal Trade Commission,* 241 F. 2d 37 (7th Cir. 1957), *aff'd,* 355 U.S. 411 (1958) ; *P. & D. Mfg. Co.* v. *Federal Trade Commission,* 245 F. 2d 281 (7th Cir. 1957), *cert. denied,* 355 U.S. 884 (1957) ; *P. Sorensen Mfg. Co.* v. *Federal Trade Commission,* 246 F. 2d 687 (D.C. Cir. 1957) ; *Standard Motor Products, Inc.* v. *Federal Trade Commission,* 265 F. 2d 674 (2d Cir. 1959), *cert. denied,* 361 U.S. 826 (1959).

The examiner also took official notice of the organizational structure and purchasing policies of Automotive Jobbers, Inc., a group buying association in Dallas, Texas. Among other things, the examiner noticed that Automotive Jobbers, although incorporated, was a membership organization maintained, managed, controlled, and operated by and for its members with the announced purpose of inducing the granting or allowance of lower and more favorable prices by manufacturers and other sellers of automobile products and supplies. He took official notice of the fact that its membership was composed of particular jobbers located in and near Dallas, Texas, and of the internal procedures used in purchasing automotive products and distributing the discounts and rebates to the member jobbers. In addition, notice was taken of the fact that the net profits of some of the jobber members and of some competing non-affiliated jobbers were between 1 and 4 percent after taxes.[11]

The basis for these noticed facts was the Commission's decision in *Automotive Jobbers, Inc.*, Docket No. 7590, 60 F.T.C. 19 (January 4, 1962). That was a proceeding under Section 2(f) of the Clayton Act, as amended, in which the examiner held that Automotive Jobbers was merely a bookkeeping device for its jobber members and that the members had induced and received discriminatory prices from suppliers and manufacturers of automotive products through the fiction of the group buying association. The examiner's decision was not appealed to the Commission and on January 4, 1962, that decision was adopted by the Commission as its decision. The instant respondent was not a party to that proceeding, but there was evidence therein that it was one of the suppliers which had made sales to Automotive Jobbers.

Courts have stated in broad terms that they may take judicial notice of their own records. *Bienville Water Supply Co.* v. *Mobile*, 186 U.S. 212 (1902); *Dimmick* v. *Thompkins*, 194 U.S. 540 (1904); *Freshman* v. *Atkins*, 269 U.S. 121 (1925); *National Fire Insurance Co.* v. *Thompson*, 281 U.S. 331 (1930); *United States* v. *Pink*, 315 U.S. 203 (1942); *Market Street Railway Co.* v. *Railroad Commission of Calif.*, 324 U.S. 548 (1945); *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515 (1946). However, with but one exception, notice in each of these cases was taken of facts which had been established in previous proceedings involving the same parties.[12] In *United States* v. *Pink*, the

[11] Order Taking Official Notice, June 14, 1962, par. 1.

[12] Where there is a second action between the same parties on a different cause of action, the doctrine of collateral estoppel prevents relitigation of matters which were actually litigated and determined during the first proceeding. *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591 (1948). On this basis, judicial notice of facts proved in the first proceeding is obviously permissible.

Supreme Court took judicial notice of crucial background facts in a record in a previous case in which neither of the parties in *Pink* had been involved. The facts in the prior case were parallel to those in *Pink* and the issues were identical. Further, the facts in *Pink* were not contested, and there was no objection to the Court's action in taking judicial notice. The court, after noting that the decision in the previous case was not *res judicata* to the parties in *Pink*, utilized the noticed facts as a basis for certain findings and conclusions.

There do not appear to be any cases in which the courts have explicitly determined whether notice may be taken of facts litigated in prior cases involving other parties, where the parties in the current case contest the facts or the court's action in taking judicial notice. In *Funk* v. *Commissioner of Internal Revenue*, 163 F. 2d 796 (3d Cir. 1947), this question was raised, but was not expressly decided. There, the facts were contested. The question, as stated by the court of appeals, was "* * * whether the Tax Court may take judicial notice of its records in another case involving the same trusts but not the same taxpayer so as to make a critical fact finding in the instant litigation." This was a proceeding to determine the liability of the wife for taxes on the income of four trusts established by the husband with the wife as trustee. In the proceeding against the wife, the Tax Court took judicial notice of certain facts concerning the husband which had been established in an earlier case against the husband, where the trusts had been a subject. In remanding the case to the Tax Court, the Court of Appeals seemed primarily concerned with the facts that the Tax Court had utilized the earlier findings in its decision without specifically making them a part of the record or granting the wife an opportunity to present rebuttal evidence.

Although there have been statements indicating that official notice on the part of an administrative agency is merely the counterpart of a court's power to take judicial notice, it would appear that an administrative agency, through its recognized ability to accumulate expertise in particular fields, has a somewhat broader power than that of a court to notice facts beyond the record immediately before it. However, in interpreting the official notice provision of the Administrative Procedure Act, the courts have not resolved the precise issue with which we are herein faced.[13] The question arose, but was not expressly decided in *National Labor Relations Board* v. *Townsend*, 185 F. 2d 378 (9th Cir. 1950), *cert. denied*, 341 U.S. 909 (1951). There, the National Labor Relations Board took official notice of a prior case involving

[13] See generally Davis, 2 *Administrative Law Treatise* 338–434; Annotation: "Administrative Official Notice," 3 L. Ed. 2d 1630.

Hudson Sales Corporation, in which Townsend, a Hudson dealer, was not a party to establish that Hudson automobiles were transported into California from other states. Although the Board's rules of practice provided for objection to the receipt of such evidence, Townsend made no objection before the administrative agency, but raised the question for the first time before the Court of Appeals. In ordering enforcement of the Board's order, the court, after recognizing a general power in administrative agencies to take official notice, termed notice under these circumstances "questionable" but held that Townsend's failure to contest the issue before the Board precluded the subsequent objection on appeal.

In *Bakers of Washington, Inc., et al.*, Docket No. 8309, 64 F.T.C. 1079 (February 28, 1964), the Commission took official notice of the corporate organization and internal operation of Continental Baking Company, one of the respondents, while the case was on appeal before the Commission. These facts had been litigated in an earlier proceeding by the Commission against Continental [14] and were utilized in *Bakers* to show that Continental's deliveries in the State of Washington of bread baked in that state possessed interstate characteristics. This conclusion was prerequisite to a holding that certain local bakeries engaged solely in intrastate sales were amenable to and had violated Section 5 of the Federal Trade Commission Act by conspiring with Continental to fix prices. Although Continental had the opportunity to meet and attack this evidence in the earlier proceeding, the co-conspirators not parties in the earlier case had not been granted the opportunity of such a direct attack. However, we stated that any of these parties could by appropriate motion, request a hearing to present rebuttal evidence.[15]

The notice employed herein is akin to that in *Bakers of Washington*, *supra*. Notice of facts by an administrative agency under such circumstances is beneficial to the public interest, for it eliminates the necessity of recalling witnesses who have been called in prior cases for the purpose of repeating their testimony and of reintroducing evidence recently utilized in earlier cases until there has been an indication that the issue is genuinely disputed. In essence, it relieves Commission counsel of reproving facts already proved in related cases, unless the respondent seriously desires to contest them. By this procedure, the Commission's effectiveness is greatly increased, while the time and expense consumed by the Commission and respondents are substan-

[14] *Continental Baking Co.*, Docket No. 7630, 63 F.T.C. 2071 (December 31, 1963).

[15] Continental's request to reopen the proceedings for this purpose was granted. *Bakers of Washington, Inc.*, Docket No. 8309, Order Reopening Procedure (May 21, 1964) [65 F.T.C. 1308].

tially reduced. A respondent not a party to the proceeding which is the source of the noticed facts is not prejudiced by this procedure, nor is he denied a fair hearing. Such a respondent is specifically informed of the facts to be noticed. If the respondent seriously desires to contest the accuracy of the facts noticed or their applicability in the proceeding in which it is a party, there is the opportunity of presenting evidence rebutting the noticed facts or showing their inapplicability. This procedure does not transfer to the respondent the burden of disproving the charge. To the contrary, it merely shifts to the respondent the initiative of going forward with a portion of the evidence. If, in rebuttal, the respondent introduces evidence which is inconsistent with the noticed facts, thereby casting a reasonable doubt upon their accuracy, or which indicates that they may not be applicable to the proceeding in which they are being employed, it becomes incumbent upon Commission counsel to demonstrate their accuracy or applicability by the introduction of further evidence.

The instant respondent has made no effort to rebut the facts derived from the decision in *Automotive Jobbers, Inc., supra*, although there has been ample opportunity. Moreover, although objecting to the examiner's act in taking official notice, respondent has not taken the position that the facts noticed are incorrect or inapplicable to the present proceeding, nor has there been a showing that if the case were remanded for taking of evidence on these points, the respondent would profit from an opportunity to cross-examine whatever witnesses counsel in support of the complaint might call.[16] To the contrary, the sales manager of respondent's automotive wholesalers department stated that he was aware that Automotive Jobbers was a "buying group" as that term is defined in the trade.[17] Considered in this light, remand for the purpose of adducing testimony or other evidence in place of the facts noticed would be an unnecessary act which would not be particularly beneficial to the respondent, and would unduly lengthen the proceedings.

Respondent further objects to the examiner's notice of the initial decision in the *Automotive Jobbers* case on the ground that said decision is identical with the initial decision in *Ark-La-Tex Warehouse Distributors, Inc.*, Docket No. 7592 [62 F.T.C. 1557], a companion case

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[16] In considering whether an administrative agency has improperly noticed facts, the courts require the respondent to demonstrate prejudice as the result of notice before reversal is ordered. *Market Street Railway Co.* v. *Railroad Commission of Calif., supra; United States* v. *Pierce Auto Freight Lines, Inc., supra; Paramount Cap Mfg. Co.* v. *National Labor Relations Board,* 260 F. 2d 109 (8th Cir. 1958); *cf., National Labor Relations Board* v. *Johnson,* 310 F. 2d 550 (6th Cir. 1962).

[17] Tr. 193.

in which the proceeding was remanded to the examiner for the introduction of new evidence and the preparation of a new initial decision in the light of the decision of the Court of Appeals in *Alhambra Motor Parts et al.* v. *Federal Trade Commission*, 309 F. 2d 213 (1962). The thrust of respondent's argument is that if the examiner's findings and decision in *Ark-La-Tex* were insufficient, the identical findings and decision made by the examiner in *Automotive Jobbers*, which were adopted by the Commission prior to the decision of the court in *Alhambra*, suffer from the same defects. The order of remand in *Ark-La-Tex* required the examiner to consider several questions not previously considered, such as whether there were contemporaneous sales of goods of like grade and quality to competing customers and whether the jobber members of the group were the actual purchasers. The purport of the order was that if the record in that case provided a basis for findings on these questions, such findings should be made: if not, new evidence should be received on them. It should be noted that the Commission, in its use of evidence from the *Automotive Jobbers* case, has considered such evidence, insofar as it relates to the instant respondent, in the light of the above questions, and has made its own separate findings and conclusions thereupon. The Commission emphasizes that it is not noticing ultimate findings and conclusions from the *Automotive Jobbers* case, but is instead noticing basic facts from that case which are used in conjunction with other facts from the present record to support our findings upon the above and other questions. Our decision in regard to the legality of respondent's sales to Automotive Jobbers, Inc., is thus not predicated solely upon facts derived from our earlier proceeding against that company, but rests partly on these facts and partly upon other evidence which was not a part of the record in the *Automotive Jobbers* case.

II

The examiner concluded that respondent had discriminated in price prior to September of 1958 by selling its products to the direct purchasing "AA" jobbers for resale to dealers at a price which was 5% less than the price charged the non-direct purchasing "A" jobbers for goods resold to dealers. As previously noted, the "AA" jobbers acquired respondent's products at the blue sheet prices, while the "A" jobbers paid the prices "suggested" by the pink sheet, which were 5% higher than the blue sheet prices. The examiner held that the "A" jobbers, who acquired respondent's products from redistributing "AA" jobbers, were "indirect purchases" from respondent, and that the price difference between these purchasers and the direct buying "AA" job-

bers was a price discrimination which was prohibited by Section 2(a) of the amended Clayton Act.

The examiner also found that respondent had eliminated this price difference after September of 1958 by abolishing the pink sheet and substituting in its place the blue price sheet, so that all jobbers selling to dealers acquired respondent's products at the same prices. In addition, the examiner found that the price differential was discontinued by respondent prior to knowledge of the Commission's investigation into its marketing system, and that there was little probability that the differential would be resumed in the same form. However, the examiner also found that there was nothing in the record to indicate that changes in respondent's pricing policies might not at some future time result in similar price differences between competing purchasers, and on that basis issued the order to cease and desist.

The Commission does not agree with the examiner that an order requiring respondent to cease and desist from discriminating in price between direct and non-direct purchasers is necessary in this case. There is every reason to believe that a resumption of the practice is improbable. While the discrimination existed, there were approximately 4,000 direct purchasing "AA" jobbers. At the same time, there were 1,000 non-direct purchasers acquiring respondent's products at the higher pink sheet prices. Respondent had attempted to persuade some of its direct purchasers to become non-direct purchasers, but had been unsuccessful. When the pricing system was revamped so that both classes of customers could purchase at the same prices, the number of direct purchasers declined to about 1,000 and the number of indirect purchasers increased to 4,000.[18] In view of this material alteration in respondent's distribution system, resumption of a price difference between competing direct and non-direct purchasers is highly improbable. This conclusion is strengthened by the fact that this price difference was abolished some six years ago and has not existed since that time. Since respondent abolished this difference in price prior to learning that the Commission was investigating its activities, we conclude that it has abandoned price differences between its direct and non-direct purchasers. Thus, even if the examiner was correct in his holding that this price difference violated Section 2(a) of the amended Clayton Act, the charge must be dismissed. In view of this conclusion, we find it unnecessary to consider the correctness of the examiner's holding that the price difference which existed between the direct and non-direct purchasers was a statutory price discrimination,

[18] Tr. 93, 96, 168.

or to discuss respondent's objections thereto. Accordingly, those portions of the examiner's initial decision containing findings of fact and conclusions of law in support of the holding of price discrimination between direct and non-direct purchasers are not adopted.[19]

III

The examiner concluded that Automotive Jobbers, Inc., the group buying association in Dallas, Texas, was a mere bookkeeping device for its jobber members,[20] and that respondent's sale of products to these individual jobbers through the association at a net price which included a redistribution discount was a price discrimination. Prior to September of 1958, the redistribution discount on the majority of items amounted to 15% of the purchase price established by the blue pricing sheet. Thereafter, the discount was 20% of that price.

Several questions arise in respect to this determination. First, the evidence must demonstrate that the members themselves rather than the group were the true purchasers from the respondent. The record reveals that Automotive Jobbers, which deals only with its jobber members, was organized by these members and that they maintained control and participated in operational decisions. Its purpose was to obtain lower and more favorable prices from manufacturers and suppliers of automotive products.[21] A majority vote by the members was necessary before a seller's line was approved and adopted as a group line.[22] When the jobber members purchased from a supplier, orders were made on a standard form, under the association's name. At times, the suppliers "drop shipped" the merchandise directly to the jobber members.[23] During 1957 and 1958, 100% of the merchandise purchased through Automotive Jobbers was "drop shipped." [24] In 1959, the percentage of merchandise "drop shipped" decreased to approximately 30%, but in 1960, that amount was slightly in excess of 50%.[25] On other occasions, the jobbers received "slot shipments," where the merchandise was shipped to the Automotive Jobbers' warehouse and then immediately reshipped to the jobber member in the same package.[26] At all times the suppliers billed the group, which in turn billed the individual members. On "drop shipments," the jobber members were billed in the same manner that the group was billed by the sup-

[19] Initial Decision, Findings of Fact, pars. 18–32 ; Conclusions, pars. 1–3.
[20] Initial Decision, Findings of Fact, par. 41.
[21] Order Taking Official Notice, pars. 1(b), (e)–(g).
[22] *Id.*, par. 1(f).
[23] *Id.*, pars. 1(h), (1).
[24] CX 34A ; tr. 200, 201.
[25] *Ibid.*
[26] Order Taking Official Notice, *op. cit.*, par. 1(k).

plier, thus indicating that the members paid the price charged the group. On "slot shipments" the jobber members were assessed a service charge of 2%, and on purchases from the warehouse stock they were charged a 5% fee.[27] Any net earnings or surplus accumulated by the group was returned to the individual members in proportion to their purchases through the group.[28]

Moreover, the contracts and classification system utilized by respondent prior to September of 1958 indicate that the respondent itself considered the members to be direct rather than indirect purchasers. If the group had been the actual buyer, it would appear that the members would have occupied the same status as the indirect purchasing "A" jobbers heretofore discussed, and would have received similar treatment. Such was not the case, however. Normally, indirect purchasers signed contracts designated for "A" jobbers, while customers who purchased directly from respondent signed "AA" jobber contracts. Indirect purchasers were assigned the code classification number 450, while direct purchasers were given the classification number 460.[29] However, the jobber members of the group signed "AA" contracts and were given the code classification 460.[30] Dayco did not assign individual identifying customer numbers to its indirect purchasers, but its direct purchasers were given such numbers. The jobber members of the group were given such numbers.[31] When Dayco salesmen called on customers, they were required to fill out a time sheet on which they indicated whether the customer was an "A" jobber or an "AA" jobber. Two such time sheets showing calls on jobbers in the Dallas, Texas, area during July and August of 1957 are a part of the record.[32] Several members of the group are classified on these sheets as "AA" jobbers. All of these facts indicate that Dayco considered the jobber members of the group to be "AA" jobbers and thus by its own definition to be direct rather than indirect customers.

These facts are sufficient to support the conclusion that the individual members rather than the group were the actual purchasers from the respondent and we so find. This is obviously true as regards those products "drop shipped" directly to the jobber members, since in those instances AJI served no function other than that of a central billing agency. It is also true for the "slot" shipments, where the merchandise was reshipped to the jobber member in the same package

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[27] *Ibid.*, par. 1(k).
[28] *Id.*, par. 1(e).
[29] Tr. 109–112; CX 1, 29; CX 15A, B; CX 39, 40.
[30] See CX 15A, B; CX 16 A–C; CX 17 A–C.
[31] Tr. 113, 165.
[32] CX 7 B-C.

in which it was received from the supplier. The remainder of the member jobbers' purchases were acquired from the warehouse operated by Automotive Jobbers in much the same manner that non-affiliated jobbers obtained merchandise from independent warehouse distributors. However, we have recently held that although a buying group warehouse may perform essentially the same function as an "independent" warehouse distributor, this fact is not crucial in deciding whether the individual jobber members or the group itself are the true purchasers. Instead, the determinative factors are those of ownership and control of the group by the individual members—factors clearly present in this case. As the Commission stated in *National Parts Warehouse*, Docket No. 8039, 63 F.T.C. 1692, 1722 (December 16, 1963):

> * * * [I]t may be true that NPW actually performs the same *warehousing* function that "other" warehouse distributors perform. But we do not see how that affects the question of whether NPW is a "purchaser" in its own right, or a mere agent of its owner jobbers. The mere ownership and operation of physical facilities cannot convert an agent into a principal. It is the fact that these jobber partners of NPW own it outright, and "control" the flow of its income from the partnership coffers to their own pockets, that establishes the principal-agent relationship, and makes them responsible for its acts. The clothing of their creature with the trappings of a "warehouse distributor" does not cause the parties to cease being principal and agent, and become, instead, "seller" and "buyer."

A second problem to be considered is whether respondent's action in granting the redistribution discount to the individual members through the group resulted in a price difference between these members and non-affiliated jobbers. As previously noted, direct purchasing jobbers engaged in redistribution to other jobbers were entitled to the redistribution discount.[33] If the members of the group sold exclusively to other jobbers rather than selling to dealers, such as garages and service stations, they would have been entitled to the redistribution discount in their own right; and respondent's action in granting them that discount through the buying group would not have resulted in a price difference between them and non-affiliated jobbers. On the other hand, if the members made some or all of their sales to dealers, they would not have been entitled to the discount on such sales. The receipt of that discount through the group on these latter sales would thus result in a price difference between the group members and non-affili-

[33] Prior to September of 1958, jobbers purchasing directly from respondent who engaged either totally or partially in redistribution were termed "AA" jobbers. Subsequent thereto, those engaged exclusively in redistribution were labeled "warehouse distributors," while those engaged partially in redistribution were called "direct wholesalers."

ated jobbers who were not granted any discount for their sales to dealers.

The record in the present case reveals that Dayco sold its products to certain jobber members of Automotive Jobbers, Inc., and made direct shipments to these jobbers.[34] Relying on the decision in *Automotive Jobbers, Inc., supra*, the examiner took official notice of the fact that the group's membership was composed of "corporations, partnerships, firms, and individuals whose business consists of the jobbing of automotive products and supplies." [35] An examination of the transcript in that case reveals that certain jobber members of the buying group who purchased Dayco products both before and after joining the group were engaged partially in redistribution and partially in selling to dealers, such as garages and service stations, thus supporting the noticed fact.[36] Prior to joining the group, these individual jobbers could receive the redistribution discount only on those products which were subsequently resold to jobbers. After joining the group, however, the individual members paid the group price and thereby were able to receive the discount on all purchases made by the group, even though

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[34] CX 35A; tr. 202, 203. Among those listed are Carter Auto Supply of Dallas, Texas; Texas Automotive Supply of Dallas, Texas; Grove Auto Supply of Dallas, Texas; Murphy Autom. Supply of Garland, Texas; and Rex Grove Autom. Supply of Fort Worth, Texas.

[35] Order Taking Official Notice, *op. cit.*, par. 1(b).

[36] A summary of testimony from the transcript in *Automotive Jobbers, Inc., supra,* indicating such to be the case follows. We hereby take official notice of such testimony. Should respondent desire to present evidence in rebuttal, it may request to do so by appropriate motion.

1. John M. Carter, owner of Carter Auto Supply of Dallas, Texas, testified that he joined Automotive Jobbers, Inc., in 1954. He purchased and sold Dayco products both before and after joining the group. He sells products to automotive garages, service stations, car dealers, and engages in some redistribution to other automotive jobbers. At one time, redistribution accounted for over 50% of his business, but it has subsequently declined to a minor part. In his sales of Dayco products, prior to joining the group, he received the redistribution discount only on those products which he actually sold to other jobbers. He handles a full line of automobile replacement parts, including ignitions, brakes, rubber parts, batteries, and hard parts, such as internal engine and chassis parts. He sells to dealers in the Dallas metropolitan area. *Automotive Jobbers, Inc., supra*, tr. 6–16.

2. Eugene Straach, the sole owner of Grove Auto Supply of Dallas, Texas, estimated his annual sales at $130,000.00. He is an original member of Automotive Jobbers, Inc., and sells only to garages and service stations. His sales area covers all of southeastern Dallas County. He sells Dayco products, as well as a wide range of bearing and engine parts. *Automotive Jobbers, Inc., supra,* tr. 206–210.

3. Sam H. Murphy, the principal stockholder in The Sam Murphy Company, formerly Murphy Auto Supply of Garland, Texas, makes approximately 90% of his sales to other jobbers, and 10% to dealers. He is a member of Automotive Jobbers and estimates his annual sales at $400,000.00. In his redistribution, he sells to only 10 jobbers. Mr. Murphy personally owns six of the ten jobbers to which The Sam Murphy Company redistributes. *Automotive Jobbers, Inc., supra,* tr. 731–742.

4. William Rex Grove, president of Rex Grove Auto Supply Corporation, Fort Worth, Texas, sells to garages, jobbers, fleets, service stations, and industrial accounts. Approximately 30% of his sales are made to jobbers. He resells Dayco products to the above categories. He is a member of Automotive Jobbers and estimated his 1959 sales at $95,000.00. He handles ignition, rubber, and hard parts, and sells these products primarily in the east side of Fort Worth. *Automotive Jobbers, Inc., supra,* tr. 761–784.

some of the products were ultimately sold to dealers. Non-affiliated jobbers received the discount only when they made sales to jobbers and reported that fact to the respondent. Thus, a price difference existed between the affiliated and the non-affiliated jobbers. This price difference extended to all products purchased by both groups for resale to dealers.

In regard to the question of competition between the group members and the non-affiliated jobbers, the record in the present case lists nine "direct wholesalers" of respondent's products who were not members of the buying group. Three of these were located in Dallas and two were located in Fort Worth.[37] As previously noted, a "direct wholesaler" purchases directly from Dayco and resells the products either to other jobbers or to dealers, or to both. Since the three direct wholesalers in Dallas and one of those in Fort Worth received no rebates or credits, it may be inferred that they sold exclusively to dealers. The remaining wholesaler in Fort Worth made some sales to jobbers, but in 1960, the majority of his sales were made to dealers.[38] These non-affiliated jobbers are accordingly located in the same geographic areas as the previously enumerated members of the group and sell to the same types of customers—primarily dealers. The examiner noticed that jobbers in the same geographic areas competed with one another.[39] In addition, the examiner, relying on the decision in *Automotive Jobbers, Inc., supra*, took official notice of the fact that there were competitors of some of the members of Automotive Jobbers in the same trading area "purchasing products of like grade and quality from the same, and other suppliers, and who received no discount as warehouse distributors."[40] On the basis of this evidence, the Commission therefore finds that there was competition between the previously listed members of Automotive Jobbers, Inc., and the above-stated non-affiliated jobbers in Dallas and Fort Worth.

Moreover, the Commission finds that these competing customers were purchasing goods of like grade and quality manufactured by the respondent at different prices. Respondent's line was composed of products of only one grade and quality.[41] Automotive belts and hose com-

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[37] CX 35D. Fleet Equipment Co., Dallas, Texas; P-M Auto Parts, Dallas, Texas; Southern Supply Co., Dallas, Texas; Duncan & Company, Fort Worth, Texas; Fleet Equipment Company, Fort Worth, Texas.

[38] See CX 35D. In 1958, approximately 66% of Duncan & Company's sales were made to other jobbers. In 1959 and 1960, those percentages were approximately 70% and 40%, respectively.

[39] Order Taking Official Notice, par. 3(a).

[40] *Id.*, par. 1(m).

[41] Tr. 64; see CX 4.

prised a majority of the sales.[42] The price difference, which occurred through the improper granting of the redistribution discount, was not limited to belts and hose, but extended to all portions of the line.[43] It appears that all jobbers, whether independent or affiliated with a group, purchased respondent's products on a continuing basis and were not required to maintain large inventories. As indicated in *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d. 43 (8th Cir. 1956), *aff'd on other grounds*, 355 U.S. 411 (1958), the existence of these factors permits an inference that contemporaneous sales of goods of like grade and quality have occurred. There, the court stated in part:

> The real and substantive answer is that, while leaf springs, coil action parts or piston rings for a Ford sedan of 1947 may be sufficiently different from those for a Chevrolet coach of 1950 that the former could lawfully be sold for *uniform* higher or lower prices than the latter, the question here is not related to uniform different prices for different items, nor, hence, to the like grade and quality concept, because the price discriminations here did not arise from uniform different prices for particular items, but, rather, they arose solely from the cumulative annual rebate plan, which applied to the aggregate dollar volume of all sales in a particular line to a particular purchaser in the preceding year, and, therefore, necessarily discriminated in price as to all items in the line, whether exactly alike and interchangeable or not. 238 F. 2d at 50.

Respondent seeks to distinguish the present case from *Moog* on the ground that the discrimination occurred there as the result of a quantity discount, whereas in the instant case, no such discount is in issue. We believe that distinction to be immaterial. Here, as in *Moog*, the difference in price occurred on each item in the line. The favored purchasers received the lower price on each belt and hose, regardless of its particular size or the type of motor vehicle for which it was designed, in the same manner that the purchasers in *Moog* received the quantity discount on each item. Thus, we conclude that the reasoning in *Moog* is applicable here.

Respondent takes the position that certain testimony by the sales manager of its Automotive Wholesalers Department rebuts the inference that goods of like grade and quality were sold at different prices and rebuts the noticed fact that jobbers located in the same geographic areas compete. The witness stated that there were several types of jobbers and that each type tended to specialize in the sale of different products. According to his testimony, there are jobbers belonging to the Automotive Electrical Association specializing in the sale of the electrical components; there are truck or fleet jobbers; there are "TBA" jobbers selling primarily tires, batteries and related ac-

[42] Tr. 282, 353–4; CX 4.
[43] See CX 35B, C, D; tr. 87–88.

cessories; and there are "hard parts" jobbers selling the mechanical components of motor vehicles.[44]

It does not follow, however, that the above evidence is sufficient to rebut either the officially noticed fact or the inference that goods of like grade and quality were sold at different prices. In the first place, there is nothing to indicate that the various jobber categories are mutually exclusive insofar as respondent's products are concerned, and that a jobber of one specialty would not carry Dayco products handled by a jobber differently specialized. To the contrary, there was evidence that although specialized jobbers stocked some segments of the line more heavily than others, they carried the entire line.[45] Secondly, there was evidence that almost every jobber serviced at least one truck fleet.[46] When viewed with these factors, the evidence on jobber specialization is obviously not sufficient to rebut the inferences above drawn. In any event, the previously listed jobber members of the group located in the Dallas-Fort Worth area handled a wide range of automotive products and do not appear to have been "specialized" jobbers.[47] Accordingly, they would have competed with both specialized and nonspecialized jobbers for the sale of some of the same products. Thus, we conclude that respondent was charging competing customers different prices for goods of like grade and quality.

The final consideration is whether or not there is sufficient evidence to show that the price discrimination may substantially impair competition. Respondent asserts that the transcript is devoid of evidence showing whether any net income remained after the group's expenses were met, and the degree to which any remaining net income is attributable to the group's receipt of functional discounts rather than cumulative quantity discounts. Without such evidence, respondent contends, there is no way of judging the size of the price difference after it has filtered down to the individual jobbers and thus there is no way of determining whether there is any injury to competition.

The evidence in this transcript reveals that after September of 1958, respondent billed its "100% redistributors" at the net price after the redistribution discount had been deducted. Relying on the decision in *Automotive Jobbers, Inc.*, *supra*, the examiner noticed that some suppliers bill the group at the "net price" after deducting the redistribution discount,[48] and that the group in turn bills its members in the

[44] Tr. 133, 134, 256–257, 305–309.
[45] Tr. 307–308.
[46] Tr. 167.
[47] See footnote 36, *supra*.
[48] *Id.*, par. 1(h).

same manner as it is billed, adding a 5% service charge for goods obtained from the warehouse stock and 2% for "slot" shipments.[49] The transcript in *Automotive Jobbers, Inc., supra*, specifically reveals that the instant respondent sold its products to that group at the net price after subtracting the redistribution discount.[50] It is thus apparent that after September of 1958, the individual jobber members received

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[49] *Id.*, par. 1(k).

[50] In the proceeding against Automotive Jobbers, Inc., Mr. J. W. Fooshee, the supervisor or manager of that association, testified on direct examination by complaint counsel to that effect. We hereby take official notice of that testimony and, as before, offer to the respondent the opportunity to present rebuttal evidence should it so desire by making a timely request therefor.

Q. * * * The association deal, that is the arrangement that is made between Automotive Jobbers, Inc., and the Dayton Rubber Company; is that correct?

A. That is correct.

* * * * * * *

Q. Let me ask you this: On the association deal, which is twenty per cent off jobber price on certain items, and fifteen per cent off jobber price on other items; then under "Freight Policy" there is one drop shipment allowed per member each month.

Now, where the member buys from the association itself, how is he billed?

A. He is billed the cost the association is.

Q. That's what I am trying to understand. In other words, the association buys from the factory at twenty per cent off jobber price on one group of items, and fifteen per cent off jobber price on another group of items?

A. Right.

Q. Now, on billing the jobber, you billed him at the same price you paid Dayton Rubber Company?

A. That is correct, sir.

Q. Now, in that connection when you bill the jobber, is there any warehouse fee charged the jobber by the association?

A. There is.

Q. What is that fee?

A. Five per cent.

Q. Now, turning to the freight policy, which allows for the drop shipment. Now, when he orders the drop shipment, is that order direct from the factory or through the association? I mean is it ordered direct through the factory, or through the association?

A. Dayton warehouse on Crampton Street.

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Q. Does he receive the twenty per cent off jobber's price, and the fifteen per cent off jobber price on those items?

A. He does.

Q. That is taken right off the invoice by the Dayton Rubber Company?

A. Billed a net price.

Q. That reflects the twenty per cent off jobber price, and fifteen per cent off jobber price?

A. That is correct.

Q. That billing does not go through the association?

A. Yes, sir.

Q. It does go through the association?

A. It is billed to me, and I pay the bill, and bill the member.

Q. I see. In other words, then, when the drop shipment, the Dayton Rubber Company bills you?

A. Right.

Q. You bill the member?

A. Right.

HEARING EXAMINER CREEL. Do you charge the member five per cent fee in that transaction?

The WITNESS. On that shipment, I do not.

Automotive Jobbers, Inc., supra, tr. 229–232.

the benefit of the 20% redistribution discount at the time they purchased goods from the respondent. The price advantage was not dependent upon a subsequent rebate which was later distributed after deducting the jobbers' proportional share of the group's operational expenses. Even when the 5% and 2% service charges were assessed, the member jobbers at the time of purchase were receiving a substantial reduction in price not available to competing non-affiliated jobbers. Since the evidence reveals a measurable price difference occurring at the time of sale, which took into account service charges assessed on the particular items, evidence showing how much additional income was returned to the individual members at some future time or the source of such income is not necessary.

The evidence in this case shows that the average net profit margin in the automobile parts industry is less than 5% after taxes,[51] and that the net profit margins of some of the buying group members and their non-affiliated competitors are between 1 and 4 percent.[52] The keenness of competition is further demonstrated by evidence of the fact that the 2% cash discount is considered to be of great importance and is carefully taken.[53] Against this backdrop, the continuing price differential of 20% on fan belts and radiator hoses and 15% on other items is substantial. Even when the advantage is reduced by the 2% service charge for "slot" shipments and the 5% service charge for deliveries from the warehouse stock, the price advantage is significantly in excess of the average profit margin. A continuing price advantage of this magnitude in an industry characterized by profit margins of less than 5% is capable of substantially lessening competition, and we so find. The Commission thus concludes that respondent discriminated in price in violation of Section 2(a) of the Clayton Act, as amended, by selling its products to the members of Automotive Jobbers, Inc., at a net price which included the redistribution discount, when said members were not engaged in redistribution and competing non-affiliated jobbers were denied such a discount.

Respondent raises several other objections not previously discussed. It is argued that the non-affiliated jobbers could join or form group buying associations of their own and thereby obtain the more favorable prices. As a result, the lower prices were "available" to all, thus obviating any finding of price discrimination, it is urged. We reject this argument. Lower prices are not "available" where a purchaser must alter his purchasing status before he can receive them. Patently,

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[51] Order Taking Official Notice, *op. cit.*, par. 3(b).
[52] *Id.*, par. 1(o).
[53] *Id.*, par. 3(b).

a lower price is not "available" to a merchant who must, in order to qualify, purchase more goods within a given time period. The same consideration applies here.

Respondent also asserts that it was not aware that Automotive Jobbers, Inc., was a "buying group," and that any order forbidding sales to such groups should be limited to "knowing" violations. However, the manager of the Dayco department which engaged in the present discrimination stated that he was aware that several of respondent's customers, including Automotive Jobbers, Inc., were "buying groups." In addition, he listed several characteristics by which such groups could be identified. In any event, the respondent has the ultimate responsibility of determining whether its customers are legally eligible for any discounts which it grants. Since there are indicia whereby buying groups may be detected, this task is not an impossible one to perform. In addition, respondent asserts that it will be placed at a great competitive disadvantage unless the order relative to buying groups is suspended until such time as the Commission proceeds against its competitors who grant similar discounts to such groups. However, the Commission is actively proceeding against other group buying associations who have induced discriminatory prices from suppliers.[54] Accordingly, suspension of the order at this time would not be appropriate.

IV

As charged in Count II of the complaint, the examiner concluded that respondent had entered into contracts and agreements which had the effect of setting the prices at which direct purchasers would resell to indirect purchasers and which limited the direct purchasers' selection of their customers and restricted the indirect purchasers in their sources of supply in violation of Section 5 of the Federal Trade Commission Act. On this appeal, respondent urges that these contracts must not be read literally, but that their purpose and actual effect upon competition must be considered.

The facts, as found by the examiner, are as follows. Prior to September of 1958, the basic contracts between respondent and its direct customers, the "AA" jobbers, contained no reference to resale prices and made no attempt to limit the selection of customers.[55] However, the examiner found that those "AA" jobbers who sold exclusively to other jobbers were requested to enter into a supplemental contract, which,

[54] *National Parts Warehouse,* Docket No. 8039, 63 F.T.C. 1692 (December 16, 1963); *Ark-La-Tex Warehouse Distributors, Inc.,* Docket No. 7592.

[55] See CX 9.

among other things, contained an agreement to resell respondent's products to "A" jobbers at respondent's suggested resale prices and to distribute the products only to jobbers approved by Dayco.[56]

The contracts entered into between respondent and its indirect customers, the "A" jobbers, contained a clause stating that such customers were entitled to purchase respondent's products at the current suggested prices for "A" jobbers and that their source of supply was limited to certain "AA" jobbers who were parties to this contract.[57] It appears to us, as it did to the examiner, that the signatures of the direct purchasers on the "A" jobber contracts were manifestations of their assent to the terms of the contract, including the pricing stipulation that the indirect purchasers would acquire their products at the prices suggested by the respondent. Considered in this light, respondent, its direct purchasers, and its indirect purchasers have, through this agreement, entered into a conspiracy to fix the price at which the direct purchasers will resell respondent's products to the indirect purchasers.

After September of 1958, respondent adopted new forms of agreement which eliminated the objectionable provisions. However, the examiner found that there had been no attempt to renegotiate the old contracts, and that many of these contracts continued in effect. On this basis, the examiner issued an order requiring respondent to cease and desist from entering into agreements fixing the resale prices of its products and limiting or restricting the persons from whom any purchaser may acquire its products.

Vertical agreements and conspiracies to fix resale prices are illegal *per se*, unless they fall within the exemption carved out by the McGuire Fair Trade Act.[58] Since not so exempted, the clauses in respondent's supplemental agreements with its direct customers,[59] in which these direct customers agreed to sell respondent's products to indirect purchasers at the suggested resale prices, as well as the pricing clauses of the "A" jobber contracts,[60] are illegal even though they have little effect upon the prices which they purport to regulate. Since many of these contracts remain in effect, we agree with the examiner that an order prohibiting respondent from conspiring to restrain price competition by their use is necessary.

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[56] Tr. 107, 108; CX 10 A–B.

[57] See CX 11.

[58] *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States* v. *White Motor Co.*, 194 F. Supp. 562 (1961), *rev'd on other grounds, White Motor Co.* v. *United States*, 372 U.S. 253 (1963); *Simpson* v. *Union Oil Co.*, — U.S. — (April 20, 1964).

[59] See CX 10 A–B.

[60] See CX 11.

Contracts and agreements attempting to allocate customers and territories on a vertical basis are not illegal *per se*. According, we must consider the purpose and the actual effect of the clauses in respondent's contracts which limited the direct purchasers' selection of customers and the indirect purchasers' sources of supply. *White Motor Co.* v. *United States*, 372 U.S. 253 (1963). There is testimony that the various contracts were utilized to create a sense of "rapport" between respondent and its various customers, and to serve as a guide in keeping records.[61] Further, contrary to the examiner's findings, there is no evidence that any of these agreements actually limited the selection of customers or sources of supply. Direct purchasers were apparently free to resell respondent's products to any recognized Dayco jobber. Indirect purchasers could purchase through any direct purchaser, and there was some evidence that respondent cooperated in placing orders of indirect purchasers through distributors of their choice.[62] Thus, the Commission concludes that there is no basis in this record for an order requiring respondent to cease and desist from limiting or restricting the persons from whom any purchaser may acquire its products. The examiner's findings and conclusion to the contrary are not adopted.

For the aforementioned reasons, an order will issue requiring the respondent to cease and desist from those practices herein found to be violations of Section 2(a) of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act. For the reasons set forth in Section II of this opinion, the charge of price discrimination between direct and indirect jobbers prior to September of 1958 will be dismissed. In taking this action, the Commission does not express an opinion upon whether or not a violation of law has occurred. Instead, the Commission considers an order unnecessary even if a violation has occurred, since the difference in price between direct and indirect customers was discontinued some six years ago, and a resumption of such a difference is improbable. Should it appear, however, that the Commission is incorrect in its belief that price differences of this nature have been abandoned, and should subsequent developments indicate that respondent is discriminating between direct and indirect customers, the Commission will exercise its right to reconsider this problem, in connection with which it might find it desirable to reopen this proceeding. In such an eventuality, the Commission would utilize the evidence introduced in support of that charge, together with any necessary additional evidence, in reaching its conclusion. But because we are dismissing this charge, at this time, the paragraph of the ac-

[61] Tr. 255, 261.
[62] Tr. 132, 297, 298.

companying order relative to price discrimination is predicated solely upon differences in price between jobber members of group buying associations, whom we have held to be direct purchasers from respondent, and other direct purchasers. However, by discriminating among its direct purchasers, respondent has rendered itself amenable to an order prohibiting it from discriminating among direct purchasers of all categories. *Federal Trade Commisson* v. *Ruberoid Co.*, 343 U.S. 470 (1952). Accordingly, the order will not be limited to discrimination in price between buying group members and other direct purchasers, but will extend to price discrimination between or among all direct customers.

Where the initial decision of the examiner conflicts with our views as expressed in this opinion, it is modified to accord with this opinion, and, as so modified, adopted as the decision of the Commission.

Commissioner Elman dissented and has filed a dissenting opinion.

Commissioner MacIntyre concurred and has filed a concurring statement.

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

Dissenting Opinion

AUGUST 5, 1964

By Elman, *Commissioner:*

I dissent for the reasons stated in my opinions in *National Parts Warehouse*, F.T.C. Docket 8039 (December 16, 1963) [63 F.T.C. 1692, 1739]; *Purolator Products, Inc.*, F.T.C. Docket 7850 (April 3, 1964) [65 F.T.C. 8, 45]; and *Monroe Auto Equipment Co.*, F.T.C. Docket 8543 (July 28, 1964) [p. 276 herein].

I might also point out that the Commission's disposition of the price-discrimination aspect of this case is in conflict with its order of June 5, 1963, remanding *Ark-La-Tex Warehouse Distributors, Inc.*, F.T.C. Docket 7592 [62 F.T.C. 1557], to the hearing examiner in light of the decision of the Court of Appeals for the Ninth Circuit in *Alhambra Motor Parts* v. *F.T.C.*, 309 F. 2d 213 (1962). *Automotive Jobbers, Inc.*, F.T.C. Docket 7590 [60 F.T.C. 19], was a companion case to *Ark-La-Tex*, having materially the same facts, and tried before the same hearing examiner, who issued initial decisions in both cases on the same day. Respondent in Docket 7590 did not appeal the initial decision, however, and it was routinely adopted by the Commission prior to the Court of Appeals' *Alhambra* decision. If the examiner's findings in *Ark-La-Tex* were deemed insufficient by the Commission to permit

decision of that case, I fail to see how the same findings, made by the examiner in *Automotive Jobbers*, can, as the Commission in effect holds, support an order against the present respondent.

Concurring Statement

AUGUST 5, 1964

By MacIntyre, *Commissioner:*

With the decision of the Commission in this case I concur. However, I have some doubts about the position regarding "indirect purchasers." It is my view that the word "purchaser" as used in Section 2(a) of the Robinson-Patman Act has the same meaning as the word "Purchaser" as used in Section 2(e). The Supreme Court of the United States in the case of *Corn Products Refining Company, et al.* v. *Federal Trade Commission* (324 U.S. 726, 743–744) concluded that the word "purchaser" as used in 2(e) should not be defined so narrowly as to include only customers or "direct purchasers." There the Court said:

> The statute does not require that the discrimination in favor of one purchaser against another shall be provided for in a purchase contract or be required by it. It is enough if the discrimination be made in favor of one who is a purchaser and denied to another purchaser or other purchasers of the commodity.

Final Order

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, dated June 11, 1963, and upon briefs and argument in support thereof and in opposition thereto; and

The Commission having rendered its decision determining that the initial decision issued by the examiner should be modified in accordance with the views and for the reasons expressed in the accompanying opinion, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision be modified by striking the order to cease and desist issued by the examiner and substituting therefor the following:

ORDER

It is ordered, That respondent, Dayco Corporation, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in, or in connection with, the sale or distribution of automotive parts and related products

in commerce, as "commerce" is defined in the Clayton Act and in the Federal Trade Commission Act, do forthwith cease and desist from:

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

2. Putting into effect, continuing or maintaining any merchandising or distribution plan or policy under which agreements or understandings are entered into with resellers of such products which have the purpose or effect of fixing, establishing or maintaining the prices at which such products may be resold.

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

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

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

IN THE MATTER OF

GIANT FOOD INC.

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

Docket 7773. Complaint, Feb. 4, 1960—Decision, Aug. 5, 1964

Order modifying desist order of July 31, 1962, 61 F.T.C. 326, to make it conform with the language of the Commission's Revised Guides Against Deceptive Pricing.

ORDER MAKING FINAL MODIFICATIONS OF ORDER TO CEASE AND DESIST

On June 23, 1964 [65 F.T.C. 1315], the Commission issued a notice of its intention to modify the cease and desist order in the above-captioned matter. The Commission afforded respondent an opportunity to submit

any comments, argument or statement of views with respect to the proposed modifications. On July 17, 1964, respondent submitted a document entitled "exceptions and opposition to order reopening proceeding and proposing modification of order to cease and desist" and an accompanying "motion for hearing." The Commission has considered each of these documents as well as the answer filed by complaint counsel and has concluded that its proposed modification of the order should be made final.

The Commission stated in its June 23 order that despite its general rule of not expressly modifying outstanding cease and desist orders to make them conform with the language of its revised Guides Against Deceptive Pricing, it would do so in this case because of respondent's possible reliance upon certain statements contained in a letter from the Commission. The modified order that the Commission proposed on June 23 constitutes a substantial relaxation of the requirements of the order now outstanding against respondent. The Commission has nonetheless given full consideration to the respondent's various objections to such a modification of the order.

Respondent contends, first, that the proposed modification differs in some of its terms from the order that it has urged upon the Commission on several occasions subsequent to the adoption of the revised Guides. The Commission, however, has heretofore clearly informed respondent that it has made no commitment whatever to enter a modified order in the particular form requested by respondent.

Respondent further contends that the Commission's proposed modification "constitutes a substantial enlargement of the order which is now outstanding," "proscribes activity and conduct which are not typified by or cognate to the conduct and activity which were the subject of the proceeding," and is inconsistent with the revised Guides. Respondent has not advised the Commission of its specific reasons for believing the Commission's order to be subject to these objections or indicated the particular portions of the order to which the objections are intended to apply. Despite the lack of such assistance from respondent, the Commission has re-examined its proposed modifications and concluded that they correctly adapt the principles of the revised Guides to the types of unlawful conduct in which respondent engaged.

In the Commission's view no purpose would be served by affording respondent a further opportunity to argue its objections to the proposed modifications. The provision in the Commission's previous order that respondent might submit whatever comments, argument or statement of views it desired has fully satisfied the requirements of Section 5(b) of the Federal Trade Commission Act for "notice and oppor-

tunity for hearing." *Cf. Federal Communications Commission* v. *WJR, The Goodwill Station*, 337 U.S. 265 (1949). In view of the substantial public interest in this proceeding, the Commission concludes that the standards of conduct to which respondent will be expected to adhere should be clearly and definitely established without further delay. Accordingly,

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

It is further ordered, That the order to cease and desist heretofore entered in this proceeding be, and it hereby is, modified to provide as follows:

It is ordered, That respondent GIANT FOOD INC., a Delaware corporation, and its officers, directors, agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, and distribution of household electrical appliances, kitchen utensils, or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "regular price" or words of similar import to refer to any amount which is in excess of the price at which such merchandise has been sold or offered for sale in good faith by the respondent for a reasonably substantial period of time in the recent regular course of its business; or otherwise misrepresenting the price at which such merchandise has been sold or offered for sale by the respondent.

2. Using the words "manufacturer's list price," "suggested list price," "factory suggested retail price," or words of similar import, unless the merchandise so described is regularly offered for sale at this or a higher price by a substantial number of the principal retail outlets in the trade area; provided, however, that this order shall not apply to point-of-sale offering and display of merchandise which is preticketed by the manufacturer or distributor thereof and the obliteration or removal of which preticketed price is impossible or impractical.

3. Representing in any manner that by purchasing any of its merchandise, customers are afforded savings amounting to the difference between respondent's stated price and any other price used for comparison with that price, unless a substantial number of the principal retail outlets in the trade area regularly offer the merchandise for sale at the compared price or some higher price or unless respondent has offered such merchandise for sale at the

compared price in good faith for a reasonably substantial period of time in the regular recent course of its business.

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

Commissioner MacIntyre does not concur with the action of the Commission in this instance. His views on the issues raised by respondent's motion, which have been fully set forth in his statements of non-concurrence in *Clinton Watch Company, et al.* (Docket 7434, Order on Petition to Reopen Proceeding, February 17, 1964) [64 F.T.C. 1443], *The Regina Corporation* (Docket 8323, Order Reopening Proceeding and Modifying Cease and Desist Order, April 7, 1964) [65 F.T.C. 246] and his statement on the issuance of the *Revised Guides Against Deceptive Pricing* issued January 8, 1964, need no repetition here.

IN THE MATTER OF

CARPET DISTRIBUTORS, INC., DOING BUSINESS AS DELTA CARPET MILLS ET AL.

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

Docket C-804. Complaint, Aug. 5, 1964—Decision, Aug. 5, 1964

Consent order requiring Los Angeles carpet distributors to cease misbranding its textile fiber products, and furnishing false guaranties that its products are not misbranded.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission 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 Carpet Distributors, Inc., a corporation, doing business as Delta Carpet Mills, and Julius Fuchs, individually and as a former officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification Act, and 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: