Syllabus

IN THE MATTER OF

PAUL M. COOTER DOING BUSINESS AS THE COOTER COMPANY AND MART SALES COMPANY; AND RECORG SUPPLY CORPORATION ET AL.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. (c) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT APPROVED JUNE 19, 1936

Docket 5460. Complaint, Aug. 28, 1946—Decision, Dec. 13, 1951

Where an individual who (1) was engaged as a food broker and buying agent for a group of wholesale grocers; operated the "Cooter Plan" under which he offered brokerage service, market information, advertising counsel, merchandising assistance and controlled brands to some 200 wholesale food distributor customers in thirty-five states; solicited sellers' accounts on a brokerage basis; and on occasion made purchases on the same basis for his own account; and (2) in 1936, when the Robinson-Patman Antidiscrimination Act, with its brokerage section herein concerned was enacted, held office as general manager and otherwise, in Merchants Service Corporation, a corporate group-buying organization which distributed among its wholesale grocery shareholders in the form of patronage dividends the brokerage it collected from sellers, and in two other corporations closely identified therewith by common officers, wholesale grocer shareholders, interests and objectives, to wit, the Volunteer Stores of America, which it had organized and controlled, and its successor, the Recorg Supply Corporation, to which it assigned its controlled brands;

Following (1) Merchants' discontinuance of trading operations in 1936, and his employment by its successor, Recorg Supply, to supply the same range of services to it and its wholesale grocer shareholders; (2) his acquisition from Volunteer Stores of the "exclusive privilege to use the Volunteer Stores System of distribution," "together with all labels, trade-marks, insignia, store sign designs," etc., in numerous states, and subject to specific conditions as to maintenance of quality of products concerned, etc.; (3) his subsequent making of franchise arrangements with wholesalers designating each as exclusive distributor of Volunteer brands in a specified territory, to be purchased through or from him, or with his consent; and (4) the making of lease agreements with certain sponsoring wholesalers from whom said Volunteer Stores had acquired such "Volunteer" rights and who were shareholders of Volunteer Stores and of Recorg Supply, and appeared as members on said Cooter's group customer list—

(a) Entered into advertising agreements, pursuant to aforesaid arrangements, whereunder a substantial portion of the brokerage, etc., received from sellers by Cooter on each wholesaler's purchases was returned to the wholesaler in the form of payments for advertising and promotional activities in connection with said merchandise; and

(b) After the discontinuance of such payments on April 1, 1944, continued to receive brokerage payments from the sellers on merchandise packed under labels owned or controlled by him, by the seller, or by the buyer; and

Where said individual, following his said employment by said Recorg Supply and further agreement with it whereby he was granted "the exclusive right and privilege to use, develop and promote the distribution of all products, goods, wares or merchandise," which were the subject of specified "trade-marks, insignia," etc., subject to maintenance of specified standards of quality and other conditions; the making thereafter of exclusive franchise agreements with different wholesale grocer shareholders of Recorg whereby the particular wholesaler was designated as his exclusive distributor for the goods concerned, to be purchased from or through him or with his approval; and the obtaining of similar agreements from said Recorg and others with respect to other controlled private or buyer labels or brands—

(c) Entered into similar advertising authorization with each of the wholesalers concerned to whom it had thus granted exclusive territorial distribution of the brands involved, whereby brokerage, etc. received from sellers by said individual on the particular wholesaler's purchases of the merchandise involved was returned to said wholesaler in the form of payments by said individual for such wholesaler's advertising and promotional activities in connection with said merchandise; and

(d) After October 1, 1945, when such payments were discontinued, continued to receive brokerage payments from sellers on merchandise packed under aforesaid controlled labels; and

Where said individual, following (1) the acquisition during the year 1944 from Recorg Supply and others of certain private or buyers' labels or brands; (2) the making of further and superseding agreements with Recorg's wholesale grocer shareholders under which each wholesaler was given by him exclusive right to use the specified trade-marks and brands in specified territory subject to the purchase, through said individual or with his approval, of a minimum volume of merchandise under the different brands, ranging from $250 to $25,000 annually; and (3) the making of a similar lease agreement with a Minnesota concern, conditioned upon the annual volume purchase of $46,500 of products under the brands there involved—

(e) Entered into similar advertising authorizations with or for each of said leasing grocer wholesalers whereby a substantial portion of the commission or other compensation, etc., secured, received and accepted from sellers by said individual on each wholesaler's purchase of the merchandise involved in said lease arrangements was returned to or expended for each wholesaler in the form of payments by said individual for advertising and promotional activities or for such wholesaler in connection with said merchandise; and

(f) After Oct. 1, 1945, when payments under said arrangements were discontinued, continued to receive brokerage payments from the sellers on purchases by said wholesalers of merchandise packed under labels owned or controlled as aforesaid; and

Where said individual, who had therefore also purchased merchandise from sellers for his own account, by virtue of his interest in a certain wholesale grocery concern and the interest of the latter in Merchants Service and Recorg Supply; and who, more recently engaged in operating said "Cooter Plan," in the course of which he emphasized "the value of selling merchandise under buyers' labels"; solicited the accounts of sellers on a brokerage basis; submitted a group list of wholesale grocers described as his customers; upon request of customers and otherwise contacted sellers named

by the customers and canvassed the seller market in the customers' behalf and interest; employed subbrokers and furnished to his wholesale customers the purchasing, merchandising and other services described by him; and employed and paid missionary or field men, including those recommended by customers, to contact affiliated retail grocer groups in their behalf to promote the sale to such retailers of merchandise bearing the private or buyer labels or brands sponsored by said customers and owned and controlled by him—

(g) Received and accepted commissions, brokerage or other compensation from the sellers (1) on purchase orders for his own account; (2) on orders originated by him for or received from his wholesale grocer customers located throughout the various states; and (3) on purchase orders transmitted directly by his wholesale grocer customers to the seller; and

Where said Recorg Supply Corporation, which, prior to about September 22, 1943, employed said individual and his corporations to supply it and its wholesale grocer shareholders with his aforesaid services—

(h) Received and accepted commissions, brokerage, etc. from sellers on purchase orders initiated by it for or received from its wholesale grocer shareholders, from said individual or from his grocer wholesale customers; and, prior to about March 13, 1944, on transactions in which purchase orders were transmitted directly by its wholesale grocer shareholders to the sellers:

Held, That the receipt and acceptance from sellers by said individual directly and, prior to about September 22, 1943, indirectly through said Recorg Supply, of such commissions, etc., as a result of said purchase transactions in which said Cooter acted for himself, for the former wholesale grocer shareholders of Merchants Service, for respondent Recorg Supply and its shareholders, for the shareholders of Volunteer Stores, and for his own wholesale grocer customers, and in connection with which he rendered no service to the sellers, except for such incidental benefits as might have accrued to them in their not having to seek other outlets for merchandise sold through him, constituted violations of subsection (c) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act; and

That receipt and acceptance from sellers by said Recorg Supply Corporation and its officers and directors of commissions, etc., as a result of said purchase transactions in which Recorg and its officers and directors acted in fact for and in behalf of themselves, their shareholders, respondent individual and his said customers, and in connection with which no services were rendered to the sellers by said corporation and its officers and directors, likewise constituted violations of the aforesaid subsection (c) of said Act, as amended.

Mr. Eldon P. Schrup for the Commission.

Levinson, Becker & Peebles, of Chicago, Ill., for Paul M. Cooter.

Breed, Abbott & Morgan, of New York City, for all other respondents.

COMPLAINT

The Federal Trade Commission having reason to believe that the parties respondent named in the caption hereof and hereinafter more particularly designated and described, since June 19, 1936, have violated and are now violating the provisions of subsection (c), section 2

of the Clayton Act, as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. Title 15, section 13), hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Paul M. Cooter is an individual doing business under the firm names and styles of The Cooter Company and Mart Sales Company, with principal office and place of business located at 228 North LaSalle Street, Chicago, Illinois, and branch office located at 16 California Street, San Francisco, California.

Respondent Paul M. Cooter formerly did business both in his own name and under the firm name and style of the Cooter Brokerage Company, and preceding that was the president, treasurer, controlling shareholder and the general manager of the Lakeshore Brokerage Company, Inc., and successor Lakeshore Marketing & Merchandise Company, Inc., all with principal office and place of business one time located at Room 904, Merchandise Mart, Chicago, Illinois, and branch office located at 16 California Street, San Francisco, California. The Lakeshore Brokerage Company, Inc., incorporated July 11, 1936, and renamed the Lakeshore Marketing & Merchandising Company, Inc., November 13, 1936, was a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois. Said corporation's assets were sold and transferred January 8, 1938, to respondent Paul M. Cooter concurrently doing business under the firm name and style of the Cooter Brokerage Company and the aforesaid corporation was dissolved February 17, 1938.

Respondent Paul M. Cooter, prior to doing business as hereinbefore set out, was the assistant secretary, assistant treasurer and general manager of respondent Recorg Supply Corporation, the assistant secretary and assistant treasurer of Volunteer Stores, Inc., of America, and the assistant secretary, assistant treasurer and general manager of Merchants Service Corporation.

PAR. 2. Respondent Recorg Supply Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 201 North Wells Street, Chicago, Illinois. Said corporation, one time located at Room 904, Merchandise Mart, Chicago, Illinois, amongst other activities, does business as a group buying organization for its wholesale grocer shareholders. Respondent Recorg Supply Corporation was organized and is controlled by wholesale grocer shareholders formerly the controlling shareholders of Merchants Service Corporation.

Volunteer Stores, Inc., of America is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 201

t, Chicago, Illinois. Said corporation, one time
t, Merchandise Mart, Chicago, Illinois, was organ-
Service Corporation to license and provide for
Corporation sponsoring wholesale grocer share-
trolled, private or buyers' label or brand "Volun-
unteer Stores system of retail distribution for
led or branded.

e Corporation, one time located at Room 904, Mer-
ago, Illinois, with branch office located at 16 Cali-
rancisco, California, was a corporation organized,
business under and by virtue of the laws of the
Said corporation, now dissolved, amongst other
ess as a group buying organization for its whole-
ders and in so doing received and accepted com-
, and other compensation, allowances or discounts
1 sellers upon purchases from sellers for its said
s.

Herscher, the president and a director of respond-
Corporation, was formerly the president and a
ants Service Corporation. Respondent J. W.
president and a director of Volunteer Stores, Inc.,
ndent J. W. Herscher is associated with the Hub-
any, Charleston, West Virginia. The Hubbard
vas a shareholder in Merchants Service Corpora-
lder in both respondent Recorg Supply Corpora-
Stores, Inc., of America. The Hubbard Grocery
pears as a member on respondent Paul M. Cooter's
l group customer list.

H. Tyler is the vice president and a director of
Supply Corporation. Respondent Wm. H. Tyler
Tyler & Simpson Company, Gainesville, Texas.
ompany was a shareholder in Merchants Service
a shareholder in respondent Recorg Supply Cor-
Simpson Company further appears as a member on
Cooter's group customer list.

A. McKay, the secretary, treasurer and a director
g Supply Corporation, was formerly the treasurer
erchants Service Corporation. Respondent Neil
treasurer and a director of Volunteer Stores, Inc.,
ndent Neil A. McKay is associated with Bursley
ne, Indiana. Bursley & Co., Inc., was a share-
Service Corporation and is a shareholder in both
upply Corporation and Volunteer Stores, Inc., of

America. Bursley & Co., Inc., further appears as a member on respondent Paul M. Cooter's group customer list.

Respondent L. H. Joannes, a director of respondent Recorg Supply Corporation, was the secretary and a director of Merchants Service Corporation. Respondent L. H. Joannes is also the secretary and a director of Volunteer Stores, Inc., of America. Respondent L. H. Joannes is associated with Joannes Brothers Company, Green Bay, Wisconsin. Joannes Brothers Company was a shareholder in Merchants Service Corporation and is a shareholder in both respondent Recorg Supply Corporation and Volunteer Stores, Inc., of America. Joannes Brothers Company further appears as a member on respondent Paul M. Cooter's group customer list.

Respondent Max A. Kuehn is a director of respondent Recorg Supply Corporation. Respondent Max A. Kuehn is associated with Andrew Kuehn Company, Sioux Falls, South Dakota. Andrew Kuehn Company was a shareholder in Merchants Service Corporation and is a shareholder in respondent Recorg Supply Corporation. Andrew Kuehn Company further appears as a member on respondent Paul M. Cooter's group customer list.

Respondent H. L. Miller is a director of respondent Recorg Supply Corporation. Respondent H. L. Miller is associated with the New River Grocery Company, Hinton, West Virginia. New River Grocery Company was a shareholder in Merchants Service Corporation and is a shareholder in respondent Recorg Supply Corporation. New River Grocery Company further appears as a member on respondent Paul M. Cooter's group customer list.

Respondent R. B. Wiltsee is a director of respondent Recorg Supply Corporation and also is a director of Volunteer Stores, Inc., of America. Respondent R. B. Wiltsee is associated with the Gilbert Grocery Company, Portsmouth, Ohio. Gilbert Grocery Company was a shareholder in Merchants Service Corporation and is a shareholder in both respondent Recorg Supply Corporation and Volunteer Stores, Inc., of America. Gilbert Grocery Company further appears as a member on respondent Paul M. Cooter's group customer list.

Respondent Jas. A. Scowcroft is a director of respondent Recorg Supply Corporation. Respondent Jas. A. Scowcroft is associated with John Scowcroft & Sons Co., Ogden, Utah. John Scowcroft & Sons Co. was a shareholder in Merchants Service Corporation and is a shareholder in respondent Recorg Supply Corporation. John Scowcroft & Sons Co. further appears as a member on respondent Paul M. Cooter's group customer list.

PAR. 3. Merchants Service Corporation, amongst other activities, prior to its dissolution did business as a group buying organization

for its wholesale grocer shareholders, purchasing merchandise from selected sellers, either under or bearing the seller's label or brand, or under or bearing so-called private or buyers' labels or brands, which were controlled and sponsored by Merchants Service Corporation and its wholesale grocer shareholders. Sellers accepted as sources of merchandise supply for Merchants Service Corporation were selected from seller lists furnished by the various corporation shareholders to Merchants Service Corporation's Concession Committee and operating manager, respondent Paul M. Cooter, as being sellers from whom brokerage or other monetary concessions in lieu thereof could or should be obtained by the corporation. Each wholesale grocer shareholder of Merchants Service Corporation was required to post a substantial guarantee fund with the corporation towards purchases made on such shareholders' behalf by the corporation. Patronage dividends based upon the total commissions, brokerage, and other compensation, allowances, or discounts in lieu thereof, collected from sellers by said corporation, after deduction of operating expenses, were declared and proportionaly paid each corporate shareholder semiannually in ratio to the amount of the commissions, brokerage, or other compensation, allowances or discounts in lieu thereof, collected by the corporation on purchases made for said individual shareholder.

Merchants Service Corporation discontinued trading operations as of July 17, 1936, accepted the resignation of respondent Paul M. Cooter as assistant secretary, assistant treasurer and general manager, and entered into arrangements with the then recently organized Lakeshore Brokerage Company, Inc., whereunder Lakeshore Brokerage Company, Inc., purchased Merchants Service Corporation's office furniture, equipment, fixtures and supplies, assumed the office expenses, including salaries, payroll, and the rental obligations to Merchants Service Corporation's leases to 904 Merchandise Mart, Chicago, Illinois, and 16 California Street, San Francisco, California, and furnished Merchants Service Corporation's wholesale grocer shareholders the purchasing and other services formerly supplied by Merchants Service Corporation. Merchants Service Corporation further transferred its corporate records and outstanding brokerage accounts receivable for collection to respondent Recorg Supply Corporation and also assigned to said respondent Recorg Supply Corporation all the private or buyers' labels or brands controlled and sponsored by Merchants Service Corporation and its member shareholders.

Pursuant to the arrangements aforestated, Lakeshore Brokerage Company, Inc., solicited the business of Merchants Service Corporation's wholesale grocer shareholders and further, through letters addressed to Merchants Service Corporation sellers signed by respondent

Paul M. Cooter as president, Lakeshore Brokerage Company, Inc., solicited and applied for said sellers' accounts on a brokerage basis. Attached to or enclosed in said letters of application to sellers were group lists whereon appeared the names of the wholesale grocer shareholders of the dormant Merchants Service Corporation stated to have become customers of Lakeshore Brokerage Company, Inc. Such letters of application to sellers, together with attached or enclosed group customer lists, revised as required, have successively since and are now being used by respondent Paul M. Cooter in doing business as herein and hereinafter described in paragraphs following.

Merchants Service Corporation, prior to dissolution, the controlling shareholder in Volunteer Stores, Inc. of America, further sold and transferred said shares to the wholesale grocer shareholders of Merchants Service Corporation and such others as were engaged in sponsoring the Volunteer label or brand and the Volunteer Stores system of distribution. Merchants Service Corporation was dissolved and final disposition of all assets and liabilities was made August 27, 1942.

PAR. 4. Volunteer Stores, Inc., of America was organized by Merchants Service Corporation to lease from Volunteer Stores, Inc. of Tennessee the controlled private or buyers' label "Volunteer" and the Volunteer Stores system of retail distribution for the use of Merchants Service Corporation wholesale grocer shareholders. Volunteer Stores, Inc. of Tennessee is a Tennessee corporation controlled by King, Dobbs & Company, Chattanooga, Tennessee. King, Dobbs & Company was a shareholder in Merchants Service Corporation, is a shareholder in respondent Recorg Supply Corporation and Volunteer Stores, Inc. of America, and also appears as a member on respondent Paul M. Cooter's group customer list. Following the lease arrangement between Volunteer Stores, Inc. of America and Volunteer Stores, Inc. of Tennessee, all merchandise to be distributed under the "Volunteer" label or brand was to conform to a certain grade and quality and bear a label as approved and designated by the Board of Directors of Volunteer Stores, Inc. of America. All distributors operating under the Volunteer franchise were required to stock a specified number of items and it was further provided that any Merchants Service Corporation member failing to actively sponsor and promote the Volunteer Stores movement in the territory allotted would automatically forefeit the franchise to any other Merchant Service Corporation member desiring to actively sponsor and promote the Volunteer movement in such allotted territory. In addition to those Merchants Service Corporation wholesale grocer shareholders exclusively franchised for allotted territories, said label or brand was also made available to other groups of retail dealers sponsored by Merchants Service

Corporation wholesale grocer shareholders where such sponsored retail dealers displayed on their store windows the legend "Affiliated with Volunteer Food Stores."

Merchants Service Corporation on January 23, 1938, by resolution moved to dispose of and on February 15, 1938, sold and transferred its controlling shares of Volunteer Stores, Inc., of America as hereinbefore described. Prior to the said disposition, respondent Paul M. Cooter and Volunteer Stores, Inc., of America, on January 22, 1938, entered into the following agreement:

MEMORANDUM OF AGREEMENT made and entered into this 22d day of January, A. D. 1938, by and between PAUL M. COOTER, doing business under the firm name and style of Cooter Brokerage Company (hereinafter for convenience termed "Cooter"), party of the first part; and VOLUNTEER STORES, INC., OF AMERICA, a corporation duly organized and existing under the laws of the State of Delaware (hereinafter for convenience termed "Volunteer"), party of the second part:

WITNESSETH: That:

WHEREAS, Volunteer represents and warrants that it is the holder and owner of the exclusive and perpetual franchise and the right to use the Volunteer Stores System of distribution, including Volunteer labels, trade-marks, insignia, store sign designs and any and all other incidents appurtenant thereto, in the following States of the United States of America: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming, and District of Columbia; and

WHEREAS, Cooter desires to develop and promote the Volunteer Stores System of Distribution, as aforesaid, and to foster and expand the same to national proportions; and

WHEREAS, Volunteer has heretofore granted certain exclusive franchises to wholesalers in various territories (hereinafter sometimes referred to as the "Sponsoring Wholesalers");

NOW, THEREFORE, for and in consideration of the premises and the covenants hereinafter contained, the parties hereto do mutually agree as follows:

1. Volunteer does hereby grant and lease to Cooter (except as the same may have heretofore been granted to certain Sponsoring Wholesalers, as aforesaid) the exclusive privilege, franchise and right to use, develop and foster the Volunteer Stores System of distribution, as aforesaid, together with all labels, trademarks, insignia, store sign designs and any and all other incidents appurtenant thereto, in each and any of the States hereinabove set forth for a term of five (5) years from the date hereof; provided, however, that Cooter may, upon compliance with all of the terms and provisions hereof, if he so elects, renew this lease and all of its terms and provisions, for a like term, upon the giving of sixty (60) days' prior notice in writing to Volunteer. Such notice shall be deemed sufficient if deposited in the United States mail, postage prepaid, addressed to the last known address of Volunteer or to Volunteer in the care of its duly appointed or acting agent for the service of process in the State of Delaware.

2. Cooter shall pay to Volunteer the sum of Twenty-Five Hundred Dollars ($2,500.00) as rental for the exclusive privilege, franchise, and right hereinabove granted, payable in five (5) installments of Five Hundred Dollars ($500.00) each in advance upon the first day of each and every year of said term, at the principal office of Volunteer. In the event that pursuant to the provisions of Paragraph 1 hereof Cooter exercises his option to renew this lease and all of its terms and provisions, Cooter shall pay to Volunteer the sum of Five Thousand Dollars ($5,000.00) as rental aforesaid, payable in five (5) installments of One Thousand Dollars ($1,000.00) each in advance upon the first day of each and every year of said renewed term at the principal office of Volunteer.

3. In the event of the death or total disability of Cooter, this agreement, which is nontransferable and nonassignable by Cooter, shall automatically terminate. For the purposes of this agreement, total disability is defined to mean the absence from or inability to work for a continuous period of six (6) months or more.

4. Cooter agrees to assume the duties and obligations of Volunteer during the term of this agreement as imposed upon Volunteer by a certain lease agreement between Volunteer and Volunteer Stores Inc. of Tennessee, executed contemporaneously herewith.

5. Volunteer will cooperate with and assist Cooter whenever possible to obtain lease agreements with each and every sponsoring wholesaler, said lease agreements to authorize the extension of Cooter's development activities to the respective territories hereinbefore allocated to such Sponsoring Wholesalers, as aforesaid.

6. It is expressly understood and agree that each Wholesaler, whether a Sponsoring Wholesaler or otherwise, through whom the Volunteer Stores System of Distribution has developed, as aforesaid, shall be designated, and accept such designation, as an agent of Volunteer for the distribution, sale and marketing of all food products bearing such labels, trade-marks, insignia and store sign designs of Volunteer, as aforesaid. It is further expressly understood that the duties of said Wholesalers, as agents aforesaid, shall be to insure against the distribution of any food products bearing said labels, trade-marks and insignia of a standard of quality less than the minimum fixed by the Board of Directors of Volunteer.

IN WITNESS WHEREOF, Cooter has hereunto set his hand and seal, and Volunteer has caused this instrument to be executed by its duly authorized officers and its corporate seal to be hereunto affixed, all on the day and year first above set forth.

PAUL M. COOTER, doing business under the firm name and style of COOTER BROKERAGE COMPANY

VOLUNTEER STORES, INC., OF AMERICA

By _____

Following the aforesaid memorandum of agreement between Volunteer Stores, Inc., of America, and respondent Paul M. Cooter, such shareholder dividends as paid by Volunteer Stores, Inc., of America were in large part declared on lease monies obtained from respondent Paul M. Cooter as afore-described.

Pursuant to the aforesaid lease arrangement with Volunteer Stores, Inc., of America, respondent Paul M. Cooter further entered into lease agreements with various wholesalers, copy of typical lease agreement being as follows:

MEMORANDUM OF AGREEMENT made and entered into this _____ day of _____ 1938, by and between PAUL M. COOTER, doing business under the firm name and style of Cooter Brokerage Company (hereinafter for convenience termed "Cooter"), party of the first part, and _____ _____ (hereinafter for convenience termed the "Wholesaler"), party of the second part,

WITNESSETH: That,

WHEREAS, Cooter, by agreement dated January 22, 1938, made and entered into with Volunteer Stores, Inc. of America (hereinafter for convenience termed "Volunteer"), did become the holder, for a term of (5) years (with an option to renew said agreement for a like term) of the exclusive privilege, franchise, and right (except as the same may have theretofore been granted to certain sponsoring Wholesalers) to develop and foster the Volunteer Stores System of distribution, together with all labels, trade-marks, insignia, store-sign designs, and any and all incidents appurtenant thereto, in the following States of the United States of America: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming, and District of Columbia; and

WHEREAS, Cooter desires to develop and promote the Volunteer Stores System of Distribution, as aforesaid, and to foster and expand the same to national proportions; and

WHEREAS, Wholesaler desires to participate in such program of development and promotion, and to obtain the various advantages thereof;

NOW, THEREFORE, for and in consideration of the premises and the covenants hereinafter contained, and in the further consideration of the sum of One Dollar ($1.00) to Cooter paid in hand by Wholesaler, receipt of which is hereby acknowledged, the parties hereto do mutually agree as follows:

1. Wholesaler is hereby designated as the exclusive distributor for Cooter in the following described territory, to wit:

for the goods, wares, and merchandise bearing the Volunteer Stores, Inc., of America labels, trade-marks, insignia, or other designs, until January 21, 1943, or, in the event of the exercise by Cooter of his option to renew said agreements between Cooter and Volunteer, as hereinabove set forth, until January 21, 1948.

2. Wholesaler does hereby agree to attempt to increase the demand for and the use of the goods, wares and merchandise bearing the Volunteer Stores, Inc., of America labels, trade-marks, insignia, or other designs in the territory hereinabove described.

3. Cooter agrees that no goods, wares or merchandise bearing said Volunteer Stores, Inc., of America labels, trade-marks, insignia or designs, will be sold by or through Cooter, or with its consent for distribution or otherwise, in the territory of Wholesaler hereinabove described, to any person, partnership, corporation or association other than Wholesaler.

4. All goods, wares and merchandise sold by Wholesaler bearing said Volunteer Stores, Inc. of America labels, trade-marks, insignia or designs shall be purchased by Wholesaler from or through Cooter, or with its consent and approval.

IN WITNESS WHEREOF, the parties hereto have executed this agreement under seal, all on the day and year first above set forth.

PAUL M. COOTER, doing business under the firm name and style of COOTER BROKERAGE COMPANY

Respondent Paul M. Cooter upon payments of $3,400.00 and $1,125.00 on January 28, 1938, and $1,000.00 on March 8, 1938, respectively, to King, Dobbs & Company, Chattanooga, Tennessee, Grenada Grocery Company, Grenada, Mississippi, and Evans Terry Company, Laurel, Mississippi, further entered into similar memorandums of agreement with the said sponsoring wholesalers formerly holding lease agreements with Volunteer Stores, Inc., of Tennessee prior to said corporation's lease arrangements with Volunteer Stores, Inc., of America. The aforesaid leasing and sponsoring wholesalers, including both former shareholders and nonshareholders of Merchants Service Corporation, as hereinbefore described, comprise the controlling shareholders of Volunteer Stores, Inc., of America, are shareholders in respondent Recorg Supply Corporation, and also appear as members on respondent Paul M. Cooter's group customer list.

Pursuant to all the foregoing lease arrangements, respondent Paul M. Cooter entered into advertising authorizations with each of the leasing wholesalers whereunder a substantial portion of the commissions, brokerage or other compensation, allowances or discounts in lieu thereof received and accepted from sellers by respondent Paul M. Cooter on such wholesaler's purchases of Volunteer brand merchandise was returned to each wholesaler in the form of payments by respondent Paul M. Cooter for such wholesaler's advertising and promotional activities in connection with said merchandise.

PAR. 5. Respondent Recorg Supply Corporation, organized and controlled by wholesale grocer shareholders, formerly the controlling shareholders of Merchants Service Corporation, amongst other activities, does business as a group buying organization similar in style to that hereinbefore described in paragraphs preceding for the said dissolved Merchants Service Corporation. Upon the discontinuance of trading operations by Merchants Service Corporation as hereinbefore described and the resignation of respondent Paul M. Cooter on September 27, 1936, effective as of July 18, 1936, as assistant secretary, assistant treasurer and general manager of respondent Recorg Supply Corporation, respondent Recorg Supply Corporation under successive arrangements and for varying considerations since September 27, 1936,

employed the Lakeshore Brokerage Company, Inc., Lakeshore Marketing & Merchandising Company, Inc. and respondent Paul M. Cooter, individually and doing business under the firm name and style of the Cooter Brokerage Company, to supply brokerage, marketing, merchandising, advertising and other services to respondent Recorg Supply Corporation and said respondent corporation's wholesale grocer shareholders.

Respondent Recorg Supply Corporation following the acquisition of the private or buyers' labels or brands previously controlled and sponsored by Merchants Service Corporation and Merchants Service Corporation shareholders, entered into lease arrangements with respondent Recorg Supply Corporation wholesale grocer shareholders whereunder each said shareholder was allotted specified territory for the exclusive distribution therein of the private or buyers' labels or brands controlled and sponsored by respondent Recorg Supply Corporation and its said member shareholders. Pursuant to the said and hereinafter described arrangements, respondent Recorg Supply Corporation and respondent Recorg Supply Corporation wholesale grocer shareholders purchased from sellers, through or by means of respondent Recorg Supply Corporation and respondent Paul M. Cooter, individually and doing business as hereinbefore and hereinafter described, merchandise both under or bearing the sellers' labels or brands and merchandise under or bearing the hereinbefore and hereinafter described controlled, private or buyers' labels or brands.

Recorg Supply Corporation and respondent Paul M. Cooter, on January 25, 1939, made and entered into the following agreement:

MEMORANDUM OF AGREEMENT made and entered into this 25 day of January, A. D. 1939, by and between RECORG SUPPLY CORPORATION, a Delaware corporation (hereinafter for convenience termed "Recorg"), party of the first part, and PAUL M. COOTER, of the city of Chicago, county of Cook and State of Illinois, doing business under the firm name and style of Cooter Brokerage Company (hereinafter for convenience termed "Cooter"), party of the second part;

WITNESSETH: That,

WHEREAS, Recorg represents and warrants that it is the owner and holder of certain trade-marks, insignia, brands, labels and designs, more particularly described as "MOON ROSE Brand," "MICKY Brand Dog Food," "RIXEY Dog Food," "NU DRAIN," "NU BOWL," "NU CLOS," "WASHRITE," "NU CREST Brand," "BEL DINE Brand," "STRATFORD Shaving Cream and Tooth Paste."

WHEREAS, Recorg and Cooter mutually desire to promote and develop the distribution of the above-named brands;

NOW, THEREFORE, for and in consideration of the premises and the covenants hereinafter contained, the parties hereto do mutually agree as follows:

1. Recorg does hereby grant and lease to Cooter the exclusive right and privilege to use, develop, and promote the distribution of all products, goods, wares, or merchandise the subject of said trade-marks, insignia, brands, labels and designs or identified thereby, and further grants and leases to Cooter the exclusive right and privilege to use, develop the use of and advertise said trade-marks, insignia, brands, labels, and designs, for a term of five (5) years from the date hereof; provided, however, that Cooter may, upon compliance with all of the terms and provisions of this Agreement, if he so elects, renew this Agreement, and all of its terms and provisions, for a like term of five (5) years, upon the giving of sixty (60) days prior notice in writing to Recorg. Such notice shall be deemed to be sufficiently given if deposited in the United States registered mail, postage prepaid, addressed to Recorg at its last known address or to Recorg in the care of its duly appointed or acting agent for the service of process in the State of . . . . . .

2. Cooter shall pay to Recorg the sum of . . . . . $5,000.00 . . . . . as a rental for the exclusive right and privilege hereinabove granted, payable in five (5) installments of $1,000.00 . . . . . each in advance upon the first day of each and every year of said term, at the principal office of Recorg. In the event that pursuant to the provisions of Paragraph 1 hereof Cooter exercises his option to renew this agreement and all of its terms and provisions, Cooter shall pay to Recorg the sum of $7,500.00 . . . . . as rental aforesaid, payable in five (5) installments of . . . . . $1,500.00 . . . . . each in advance upon the first day of each and every year of said renewed term at the principal office of Recorg.

3. In the event of the death or total disability of Cooter, this Agreement shall automatically terminate. For the purposes of this Agreement, total disability is defined to mean the absence from, or inability to, work for a continuous period of six (6) months or more.

4. Recorg will cooperate with and assist Cooter wherever possible to obtain subordinate lease agreements with each and all of its stockholders. The right and privilege which may be hereafter conferred by Cooter in restricted territories to sell and distribute the goods, wares and merchandise bearing said trade-marks, insignia, brands, labels and designs shall be limited to, and restricted by Cooter to, stockholders of Recorg.

5. Cooter agrees that all products, goods, wares and merchandise sold bearing any of said trade-marks, insignia, brands, labels and designs shall conform to the following minimum standards of quality:

MOON ROSE Brand:

Extra standard or better grades of canned vegetables.

Choice or better grades of canned fruits, with the exception of No. 2 RSP Cherries. No. 2 RSP Cherries water grade.

All bulk dry items must be fancy grade.

Coffee must be comparable in quality to the three leading advertised brands of coffee.

All other items not hereinabove in this Paragraph 5 expressly set forth but subject to the terms of this Agreement shall conform to the standard of quality presently obtaining.

IN WITNESS WHEREOF, Recorg has caused this instrument to be executed by its officers thereunto enabled and its corporate seal to be hereunto affixed,

and Cooter has hereunto set his hand and seal, all on the day and year first above set forth.

(SEAL) RECORG SUPPLY CORPORATION

(s) (By) J. W. Herscher, *President.*

ATTEST:

(s) Maurice L. Horner, Jr.,
Secretary.

Paul M. Cooter

PAUL M. COOTER, doing business under the firm name and style of COOTER BROKERAGE COMPANY.

Following the memorandum of agreement hereinabove set out, respondent Paul M. Cooter entered into exclusive franchise agreements with respondent Recorg Supply Corporation wholesale grocer shareholders, a typical copy of said agreement being as follows:

MEMORANDUM OF AGREEMENT made and entered into this _____ day of _____ A. D., 1939, by and between PAUL M. COOTER, of the city of Chicago, county of Cook and State of Illinois, doing business under the firm name and style of Cooter Brokerage Company (hereinafter for convenience termed "Cooter"), party of the first part, and (hereinafter for convenience termed the "Wholesaler"), party of the second part;

WITNESSETH: That,

WHEREAS, Recorg Supply Corporation, a _____ corporation (hereinafter for convenience termed "Recorg") has represented and warranted to Cooter that it is the owner and holder of certain trade-marks, insignia, brands, labels and designs, more particularly described as "MOON ROSE Brand," "MICKY Brand Dog Food," "RIXEY Dog Food," "NU DRAIN," "NU BOWL," "NU CLOZ," "WASHRITE," "NU CREST Brand," "BEL DINE Brand," "STRATFORD Shaving Cream and Tooth Paste."

WHEREAS, Cooter, by agreement dated January ____, 1939, made and entered into with Recorg, did become the holder, for a term of five (5) years (with an option to renew said agreement for a like term) of the exclusive right and privilege to use, develop, and promote the distribution of all products, goods, wares or merchandise the subject of said trade-marks, insignia, brands, labels and designs or identified thereby, and further did become the holder of the exclusive right and privilege to use, develop the use of and advertise said trade-marks, insignia, brands, labels and designs, during the term of said agreement:

NOW, THEREFORE, for and in consideration of the sum of One Dollar ($1.00) to Cooter by Wholesaler paid in hand, receipt whereof is hereby acknowledged, and of the further consideration of the premises and the covenants hereinafter contained, the parties hereto do mutually agree as follows:

1. Wholesaler is hereby designated as the sole and exclusive distributor for Cooter of the goods, wares, and merchandise bearing the several trade-marks, insignia, brands, labels and designs hereinabove set forth, for a period of ten (10) years from the date hereof, in the following-described territory.

2. Cooter agrees that no goods, wares, or merchandise bearing such trade-marks, insignia, brands, labels and designs will be sold by or through Cooter, or with his consent, for distribution or otherwise, in the above-described territory, to any person or corporation other than Wholesaler.

3. Wholesaler agrees that all goods, wares, and merchandise sold by Wholesaler bearing said trade-marks, insignia, brands, labels and designs shall be purchased by Wholesaler from or through Cooter, or with Cooter's approval and consent, and further agrees to purchase from or through Cooter, or with his approval and consent, all such trade-marks, insignia, brands, labels and designs.

4. Wholesaler agrees actively to promote the sale and distribution of the goods, wares, and merchandise bearing said trade-marks, insignia, brands, labels and designs.

5. In the event that Wholesaler, its successors or assigns, disposes of its stock in Recorg Supply Corporation, adopts a program of liquidation, ceases doing business or, upon its insolvency, there is appointed a receiver for, or there is filed a petition in bankruptcy, whether voluntary or involuntary, against Wholesaler, or in any of said events, Cooter may terminate this Agreement and all of his rights or duties hereunder upon the giving of five (5) days prior notice in writing to Wholesaler, its successors or assigns. Such notice of termination shall be deemed to be sufficiently given if deposited in the United States registered mail, postage prepaid, addressed to the last known address of Wholesaler, its successors or assigns.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed under seal all on the day and year first above set forth.

PAUL M. COOTER, doing business under the firm name and style of COOTER BROKERAGE COMPANY

By ---

ATTEST

Secretary

Subsequent to and under similar lease arrangements to the January 25, 1939, memorandum agreement with respondent Recorg Supply Corporation, hereinbefore set out, respondent Paul M. Cooter additionally obtained from respondent Recorg Supply Corporation and others the following controlled, private or buyers' labels or brands:

"Jonquil" leased May 4, 1939, by respondent Recorg Supply Corporation from its shareholder Morey Mercantile Company, Denver, Colorado, for the sum of $5,000.00 and for the same consideration leased May 8, 1939, by respondent Recorg Supply Corporation to respondent Paul M. Cooter.

"Fleetwood" leased November 7, 1939, by respondent Recorg Supply Corporation, from its shareholder King, Dobbs & Company, Chattanooga, Tennessee, for the nominal sum of $1.00 and for the same consideration leased November 25, 1939, by respondent Recorg Supply Corporation to respondent Paul M. Cooter.

"Nu-Clene" leased October 25, 1939, by respondent Recorg Supply Corporation, from its shareholder Bursley & Co., Inc., Ft. Wayne, Indiana, for the nominal sum of $1.00 and for the same consideration

leased December 9, 1939, by respondent Recorg Supply Corporation to respondent Paul M. Cooter.

"Nu-Lye" leased March 10, 1941, for the nominal sum of $1.00 by respondent Recorg Supply Corporation to respondent Paul M. Cooter.

"Meal Time" leased March 10, 1941, for the nominal sum of $1.00 by respondent Recorg Supply Corporation to respondent Paul M. Cooter.

"Aunt Magda" leased December 15, 1941, for the nominal sum of $1.00 by respondent Recorg Supply Corporation to respondent Paul M. Cooter.

"Happy Host" leased October 13, 1942, for the nominal sum of $1.00 by Preferred Foods, Inc., to respondent Paul M. Cooter.

"Angel Food," "E-Z-Kreem," "Ful-E-Ripe," "Washwell," "Lady Louise," and 16 others leased March 1, 1942, for the nominal sum of $1.00 by Selected Products, Inc., to respondent Paul M. Cooter. Mr. T. G. Harrison, president of Selected Products, Inc., is the president of Winston & Newell Company, Minneapolis, Minnesota, a member appearing on respondent Paul M. Cooter's group customer list. Respondent Paul M. Cooter's lease with Selected Products, Inc., required respondent's payment for the advertising and promotion of the merchandise thereunder. Respondent Paul M. Cooter on May 1, 1942, for the nominal sum of $1.00, under similar lease provisions, as hereinbefore set out, franchised Winston & Newell Company for exclusive distribution of said merchandise in specified States.

Pursuant to all of the foregoing lease arrangements, respondent Paul M. Cooter entered into advertising authorizations with each of the leasing wholesalers, whereunder a substantial portion of the commissions, brokerage or other compensation, allowances or discounts in lieu thereof, reecived and accepted from sellers by respondent Paul M. Cooter on such wholesalers' purchases of the merchandise named in said lease arrangements, was returned to each wholesaler in the form of payments by respondent Paul M. Cooter for such wholesalers' advertising and promotional activities in connection with said merchandise.

PAR. 6. Respondent Paul M. Cooter, individually and doing business under the firm names and styles of The Cooter Company and Mart Sales Company, owns or controls the following private or buyers' labels or brands acquired as herein set out:

By assignment dated March 13, 1944, respondent Recorg Supply Corporation, for the sum of $7,500, transferred to respondent Paul M. Cooter, doing business as The Cooter Company, the trade-marks "MOON ROSE," "NU-CREST." "BEL-DINE," "JONQUIL,"

"WASHRITE," "NU-LYE," "NU-BOWL," "NU-CLOZ," "NU-DRAIN" and "MICKY."

By assignment dated March 13, 1944, respondent Recorg Supply Corporation, for the nominal sum of $1.00, transferred to respondent Paul M. Cooter, doing business as The Cooter Company, the label "MOON ROSE."

By assignment dated March 13, 1944, respondent Recorg Supply Corporation, for the nominal sum of $1.00, transferred to respondent Paul M. Cooter, doing business as The Cooter Company, the trade-marks "MEALTIME" and "AUNT MAGDA."

By assignment dated April 24, 1944, respondent Recorg Supply Corporation, for the nominal sum of $1.00, transferred to respondent Paul M. Cooter, doing business as The Cooter Company, the trade-mark "NU-CUP."

By assignment dated April 6, 1944, Selected Products, Inc., an Illinois corporation, for the nominal sum of $1.00, transferred to respondent Paul M. Cooter, doing business as Mart Sales Company, the trade-mark "ANGEL FOOD."

By assignment dated April 6, 1944, Selected Products, Inc., an Illinois corporation, for the nominal sum of $1.00, transferred to respondent Paul M. Cooter, doing business as Mart Sales Company, the trade-mark "E-Z KREEM."

By assignment dated April 6, 1944, Selected Products, Inc., an Illinois corporation, for the sum of $1.00, transferred to respondent Paul M. Cooter, doing business as Mart Sales Company, the trade-mark "FUL-E-RIPE."

By assignment dated April 6, 1944, Selected Products Company, Inc., an Illinois corporation, for the nominal sum of $1.00, transferred to respondent Paul M. Cooter, doing business as Mart Sales Company, the trade-mark "LADY LOUISE" subject to the agreement dated December 21, 1942, between Procter & Gamble Distributing Company and the said Selected Products Company, Inc.

By assignment dated April 6, 1944, Selected Products Company, Inc., an Illinois corporation, for the nominal sum of $1.00, transferred to respondent Paul M. Cooter, doing business as Mart Sales Company, the trade-mark "WASH WELL" subject to the agreement dated December 21, 1942, between Procter & Gamble Distributing Company and the said Selected Products Company, Inc. Relinquishment of the ownership of the trade-marks "LADY LOUISE" and "WASH WELL" was not made by the Procter & Gamble Distributing Company.

By assignment dated February 11 and February 17, 1944, John N. Adler, Chicago, Illinois, and Grocers Service Corporation, Chicago,

Illinois, for the nominal sums of $1.00, transferred to respondent Paul M. Cooter the label and trade-mark "HAPPY HOST."

Following the assignments hereinabove set out, respondent Paul M. Cooter entered into further agreements with respondent Recorg Supply Corporation wholesale grocer shareholders, a typical copy of said agreements being as follows:

AGREEMENT

THIS AGREEMENT, made and entered into this _____ day of _____, 1944, by and between PAUL M. COOTER, of Chicago, Illinois, doing business under the firm name and style of "THE COOTER COMPANY" (hereinafter called "Cooter"), and _____ (hereinafter called the "Wholesaler"),

WITNESSETH: That

WHEREAS, Cooter, by an agreement made and entered into with Recorg Supply Corporation, a Delaware corporation, on the 13th day of March, 1944, purchased from said Company all of its right, title and interest in and to certain trade-marks and brands, more fully set forth in Exhibit "A" attached hereto and made a part hereof (hereinafter referred to as "brands"); and

WHEREAS, the Wholesaler desires to secure from Cooter an exclusive license and right to use said brands in the hereinafter designated States of the United States;

NOW, THEREFORE, in consideration of the sum of One Dollar ($1.00) to Cooter by the Wholesaler in hand paid, receipt of which is hereby acknowledged, and in further consideration of the mutual covenants and agreements of the parties hereto, it is agreed:

1. Cooter does hereby give and grant to the Wholesaler an exclusive license and right to use the brands in the sale of merchandise in the territory described as:

for such period, and only so long as the Wholesaler during each twelve-month period, beginning with the first day of the month next succeeding the date of this contract, purchases a minimum volume of merchandise under said brands, in the amounts as enumerated opposite each brand on Exhibit "A." In the event that the Wholesaler in any such twelve-month period shall fail to purchase the minimum volume of merchandise as set forth in Exhibit "A," the Wholesaler shall, without any action to be taken by either the Wholesaler or Cooter, forfeit his right to a continuation of the exclusive license and right to use that particular brand on which the minimum volume of purchase has not been attained.

2. The Wholesaler agrees that all goods, wares and merchandise sold by the Wholesaler bearing said brands, insofar as said products are listed on Exhibit "A," shall be purchased by the Wholesaler through Cooter, and not otherwise, except with Cooter's approval and consent.

3. Cooter agrees that so long as the Wholesaler shall be entitled to the exclusive license and right to the use of the brands and shall not be in default hereunder, he will not cause any goods, wares or merchandise bearing such brands to be sold by or through Cooter, or with his consent, to any distributor in the above described territory, other than to the Wholesaler.

4. While Cooter represents that to his best knowledge and belief, full and complete ownership of the trade-mark and copyright registrations underlying the brands was vested in Recorg Supply Corporation at the time of the transfer

of such brands to Cooter, Cooter does not, by this agreement, guarantee or warrant his title to such brands, and agrees to defend the use of such brands by the Wholesaler only to the extent of any acts or doings by Cooter that would affect his ownership of the trade-mark or copyright registrations.

5. Upon the execution hereof, this contract shall supersede and cancel license contract dated _____ day of _____ 19____, between Wholesaler and Paul M. Cooter, doing business as Cooter Brokerage Company, and also cancels and supersedes license agreement dated _____ day of _____ _____ 19____, entered into between Wholesaler and Recorg Supply Corporation, and such contracts and agreements are hereby terminated.

6. This agreement shall be binding upon the Wholesaler, its successors and assigns, and likewise binding upon Cooter, his heirs and representatives.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed on the day and year first above set forth.

_____

Paul M. Cooter, doing business under the firm name and style of The Cooter Company.

_____

By _____

President.

[Corporate seal]
Attest:

_____

Secretary.

* * * *THIS CONTRACT NULL AND VOID UNLESS ONE COPY IS SIGNED BY WHOLESALER AND RETURNED TO COOTER WITHIN 20 DAYS FROM DATE HEREOF.*

The hereinabove referred to Exhibit A attached to and made a part of the afore-described lease agreements varied with each leasing wholesaler depending upon the number of brands sponsored by said wholesaler and the minimum acceptable volume purchase requirements set by respondent Paul M. Cooter for each brand ranging from $250.00 to $25,000.00 annually.

Respondent Paul M. Cooter under date of May 6, 1944, also entered into further lease agreements with the hereinbefore described Winston & Newell Company, Minneapolis, Minnesota, whereunder for the nominal sums of $1.00 said company was allotted certain territories for the exclusive distribution of merchandise under or bearing the "Happy Host," "Angel Food," "Ful-E-Ripe," "E-Z-Kreem," "Washwell" and "Lady Louise" labels or brands with total minimum annual volume purchase requirements for all said labels or brands set by respondent Paul M. Cooter at the sum of $46,500.00.

Pursuant to all the foregoing lease arrangements, respondent Paul M. Cooter entered into advertising authorizations with or for each of the leasing wholesalers, whereunder a substantial portion of the commissions, brokerage, or other compensation, allowances or discounts

in lieu thereof received and accepted from sellers by respondent Paul M. Cooter on such wholesalers' purchases of the merchandise named in said lease arrangements, was returned to or expended for each wholesaler in the form of payments by respondent Paul M. Cooter for advertising and promotional activities by or for such wholesaler in connection with said merchandise.

Respondent Paul M. Cooter, doing business as hereinbefore described, under the firm name and style of The Cooter Company, presently operates what respondent terms "The Cooter Plan," and in so doing business, distributes illustrated advertising brochures, which, among other things, state as follows:

The Cooter Brokerage plan is a nation-wide service for wholsale food distributors. It includes:

1. Brokerage Service
2. Market Information
3. Advertising Counsel
4. Merchandising Assistance
5. Controlled Brands

1. Brokerage Service:

Offices in Chicago and San Francisco. Coast to coast coverage offers advantages to manufacturers and wholesalers obtainable in no other way. Cooter customers have combined staff of over 900 salesmen serving more than 85,000 retail outlets.

To the Manufacturer it Means:

Low selling cost

Wider market for his goods

Established outlet for disposal of substantial quantities of merchandise without danger of market demoralization

To the Wholesaler it Means:

Wider selection of offerings and products

Time saved in executing purchases

Assurance of trading with reliable packers and manufacturers.

Details of purchases made through Cooter not revealed to competitors.

Cooter's office is as close as the phone on your desk. Orders may be phoned or wired in at Cooter's expense.

2. Market Information:

Up-to-the-minute reports on three fundamentals are necessary to insure a profitable pricing and supply program:

1. Crop conditions
2. Price structure
3. Available supply

Cooter gives its customers all three of these completely and quickly through *Weekly Market Letter* containing latest summary of market conditions secured primarily by wire and phone. *Daily Postings* announcing new items, price changes, and data on available quantities. Cooter's nation-wide coverage gives it unequalled opportunity for a correct weighing of all the factors affecting market conditions. Their long experience in markets from coast to coast enables them to interpret local situations and allow for any peculiarities in a particular market. Such information is most valuable to both buyer and seller.

3. Advertising Counsel:

Long recognizing the principle that successful retail operation is of vital interest to both the manufacturer and wholesaler, THE COOTER PLAN is designed to follow the merchandise through from the manufacturer to the consumer. The program developed to efficiently perform this function includes the following features:

Retailer Stores Posters.

Mat Service to give added effectiveness to newspaper advertising.

Cooperative assistance in the preparation of handbills, radio copy, newspaper ads, and general programs.

The above services are available at nominal costs.

4. The Grocer's Digest:

—a Cooter publication is primarily a retailer's magazine.

Mailed each month to more than 10,000 retail customers of wholesalers operating under The Cooter Plan.

It is a medium to aid manufacturers in acquainting retailers with their wares. Each month the experiences of successful food operators are reported in its pages. Great care is exercised in preparing and editing each article to make it concise—useful—complete. All departments of the food industry are covered. Special emphasis is given to store modernization and low cost operations.

Cooter is constantly on the alert for plans and ideas to profitably increase the distribution and consumption of grocery products.

5. Controlled Brands:

Said advertising brochures set out the following Cooter Brands:

E–Z Kreem	(Shortening)	Nu-Bowl	(Bowl Cleaner)
Aunt Magda	(Shortening)	Nu-Drain	(Drain Opener)
Meal Time	(Corn Starch)	Nu-Cloz	(Bleach)
Bel-Dine	(All Items)	Nu-Cup	(Coffee)
Moon Rose	(All Items)	Nu-Lye	(Lye)
Nu-Crest	(All Items)	Micky	(Dog Food)
Jonquil	(Canned Fruits and Vegetables)	Washrite	(Soap)
Happy Host	(All Food Items Except Coffee, Tea & Spices)		

With regard to the foregoing Cooter Brands said advertising brochures state as follows:

The value of selling merchandise under buyer's label has long been recognized. All of the benefits resulting from promoting buyer's labels are retained under THE COOTER PLAN, together with the following additional advantages:

Exclusive sales franchise rights to customers covering their respective territory affording them the opportunity to promote brands now enjoying national distribution.

Wide selection of brands from which to choose.

Cooter carries label stock, relieving wholesaler of burdensome investment. Cooter creates consumer demand for its brands through advertising and other promotion programs. Cooter labels are attractively designed and act as silent salesmen on counter or shelf. Definite standard of quality is maintained for each brand.

Franchises still available in a limited number of markets.

Insurance protection for wholesaler and retailer against any claim for damage account bodily injuries, illness or death resulting from consumption of merchandise sold under Cooter Brands.

PAR. 7. Respondent Paul M. Cooter, in doing business, as hereinbefore described in preceding paragraphs, addressed letters of solicitation to sellers applying for said seller's account on a brokerage basis and as a means of persuading said sellers' acceptance of respondent's said application, respondent further attached or enclosed in said letters, for said sellers' consideration, a group list of wholesaler grocers stated by respondent to be customers of respondent. Said attached or enclosed list currently entitled "Customers on Daily Mailing List" while not inclusive of all the respondent's customers, discloses some 200 wholesale grocer concerns, branches and affiliates, located and doing business in 35 States. Respondent Paul M. Cooter's current letters of application to sellers, among other things, ask to offer the sellers merchandise on a brokerage basis to respondent Paul M. Cooter's select group of wholesaler grocer customers located in various States throughout the United States as appearing on respondent's said attached or enclosed list. The seller is advised that respondent's said customers are contacted daily by mail, telephone or wire communication and also through means of periodic visits by respondent's visiting representatives and by general customer meetings. The seller is also assured that respondent is confident that use of the respondent's organization will greatly aid the distribution of the seller's products. The seller is further informed of respondent's controlled, private or buyers' labels or brands and is requested to inform the respondent as to whether the seller is willing to sell its merchandise under or bearing respondent's said labels or brands, and, if so, what label allowance the seller will accord the respondent where respondent's said labels or brands are substituted for those of the seller by the seller on the seller's said merchandise.

Respondent Paul M. Cooter, in doing business as hereinbefore described, upon the request of respondent's wholesale grocer customers, and otherwise, contacts sellers named by said customers and also canvasses the seller market on said customers' behalf, in an effort to secure the merchandise of the said named sellers or the merchandise of other sellers, at a quality or price meeting or bettering those offered respondent's said customers, or the competitors of respondent's said customers, by brokers acting for the said named sellers or for other sellers.

Respondent Paul M. Cooter in addition to subbrokers, and the purchasing, merchandising and other services rendered by said respondent to his wholesale grocer customers as set out and described in paragraphs preceding, also employs missionary or field men to contact

affiliated retail grocer groups for and on behalf of said respondent's wholesale grocer customers. Such missionary or field men are recommended for employment to respondent Paul M. Cooter by the wholesale grocer customers in whose territory they are to be employed and when so employed and paid by respondent Paul M. Cooter, said missionary or field men are engaged in the promotion and sale to the said wholesale grocer customers affiliated retail grocer concerns, of merchandise under or bearing the private or buyers' labels or brands owned or controlled by respondent Paul M. Cooter and sponsored by respondent's said wholesale grocer customers.

Respondent Paul M. Cooter, in addition to the hereinbefore described advertising expenditures for his wholesale grocer customers, further has paid the traveling and hotel expenses of said customers from their respective places of business, for individual and group business meetings of said customers with respondent Paul M. Cooter and the respondent's organization in Chicago, Illinois, and San Francisco, California.

Respondent Paul M. Cooter, doing business as hereinbefore described, further upon occasion has purchased merchandise from sellers for said individual respondent's own account. Respondent Paul M. Cooter doing business as hereinbefore described, until his resignation and the disposal of his interests July 3, 1940, was also a shareholder, director and the president of Ridenour Baker Mercantile Company, Oklahoma City, Oklahoma, which said wholesale grocer concern was a shareholder in Merchants Service Corporation, respondent Recorg Supply Corporation, and also a customer of said respondent Paul M. Cooter.

PAR. 8. Respondent Paul M. Cooter, doing business as hereinbefore set out, on said individual respondent's own account and on merchandise purchase orders originated by respondent for or received from respondent's wholesale grocer customers located throughout the various States of the United States, has transmitted or caused to be transmitted to sellers located in States other than and including the State or States of respondent and respondent's said customers' locations, purchase orders pursuant to which said sellers have sold and shipped and transported, or caused to be shipped and transported, merchandise from the State or States wherein located, into and through the various States of the United States, to purchasers thereof in the State or States of respective location.

Respondent Paul M. Cooter, in such aforesaid transactions and in such other and similar transactions wherein said merchandise purchase orders are transmitted directly by respondent's said wholesale grocer

customers to the seller has received and accepted commissions, brokerage or other compensation, allowances or discounts in lieu thereof from the sellers in said transactions.

Respondent Recorg Supply Corporation, doing business as hereinbefore set out, on merchandise purchase orders originated by respondent Recorg Supply Corporation for or received from respondent Recorg Supply Corporation wholesale grocer shareholders, respondent Paul M. Cooter or respondent Paul M. Cooter's wholesale grocer customers, has transmitted or caused to be transmitted to sellers located in States other than and including the State or States of respondent Recorg Supply Corporation, respondent Recorg Supply Corporation's wholesale grocer shareholders, respondent Paul M. Cooter and respondent Paul M. Cooter's wholesale grocer customers locations, purchase orders pursuant to which said sellers have sold and shipped and transported, or caused to be shipped and transported, merchandise from the State or States wherein located, into and through the various States of the United States, to the purchasers thereof in the State or States of respective location.

Respondent Recorg Supply Corporation in such aforesaid transactions and in such other and similar transactions wherein said merchandise purchase orders are transmitted directly by respondent Recor Supply Corporation wholesale grocer shareholders to the sellers, has received and accepted commissions, brokerage or other compensation, allowances or discounts in lieu thereof from the sellers in said transactions.

PAR. 9. Respondent Paul M. Cooter doing business as hereinbefore set out, during the course of employment by respondent Recorg Supply Corporation and otherwise, in the receipt and acceptance from sellers directly, and through and by means of respondent Recorg Supply Corporation indirectly, of commissions, brokerage, or other compensation, allowances or discounts in lieu thereof, on purchases from sellers by respondent Paul M. Cooter, the former wholesale grocer shareholders of the since dissolved Merchants Service Corporation, respondent Recorg Supply Corporation and said respondent corporation's wholesale grocer shareholders, the wholesale grocer shareholders of Volunteer Stores, Inc., of America, and the wholesale grocer customers of respondent Paul M. Cooter, of merchandise in the manner and under the circumstances hereinbefore set forth and described, acted in such transactions other than as an agent, representative or intermediary therein, acting in fact for or in behalf, or subject to the direct or indirect control of the seller of said merchandise.

Said respondent Paul M. Cooter, in such transactions, acted in fact for and in behalf of respondent Paul M. Cooter, the former wholesale

grocer shareholders of the since dissolved Merchants Service Corporation, respondent Rocorg Supply Corporation and said respondent corporation's wholesale grocer shareholders, the wholesale grocer shareholders of Volunteer Stores, Inc., of America, and the wholesale grocer customers of respondent Paul M. Cooter, and no services were rendered to the seller by the said respondent Paul M. Cooter in connection with the sale of the said merchandise.

Respondent Recorg Supply Corporation and its officers and directors doing business as hereinbefore set out, during the course of employment of respondent Paul M. Cooter as hereinbefore described and otherwise, in the receipt and acceptance from sellers of commissions, brokerage, or other compensation, allowances or discounts in lieu thereof, on purchases from sellers by respondent Recorg Supply Corporation, respondent Recorg Supply Corporation wholesale grocer shareholders, respondent Paul M. Cooter and the wholesale grocer customers of respondent Paul M. Cooter, of merchandise in the manner and under the circumstances hereinbefore set forth and described, acted in such transactions other than as an agent, representative or intermediary therein, acting in fact for or in behalf, or subject to the direct or indirect control of the seller of said merchandise.

Said respondent Recorg Supply Corporation and its officers and directors, in such transactions, acted in fact for and in behalf of respondent Recorg Supply Corporation and its officers and directors, respondent Recorg Supply Corporation wholesale grocer shareholders, respondent Paul M. Cooter and the wholesale grocer customers of respondent Paul M. Cooter, and no services were rendered to the seller by the said respondent Recorg Supply Corporation and its officers and directors in connection with the sale of the said merchandise.

PAR. 10. The receipt and acceptance by respondent Paul M. Cooter and respondent Recorg Supply Corporation and its officers and directors, doing business as hereinbefore set out, of the above described commissions, brokerage or other compensation, allowances or discounts in lieu thereof from sellers in the transactions and in the manner and under the circumstances hereinbefore set forth, is in violation of subsection (c) of section 2 of the Clayton Act as amended by the Robinson-Patman Act (U. S. C. Title 15, sec. 13), approved June 19, 1936.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act),

as amended by an Act of Congress approved June 19, 1936 (the Robinson-Patman Act) (U. S. C. Title 15, Sec. 13), the Federal Trade Commission on August 28, 1946, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging said respondents with having violated the provisions of subsection (c) of Section 2 of the Clayton Act as amended. Answers to said complaint were filed on behalf of respondent Paul M. Cooter on September 18, 1946, and on behalf of respondent Recorg Supply Corporation, a corporation, and its named officers and directors, on September 25, 1946. Because of the subsequent developments hereinafter set forth no trial examiner of the Commission was appointed.

By motions dated December 20, 1946, all of the respondents requested permission to withdraw their aforesaid answers and, in lieu thereof, to substitute the answers annexed to and made a part of said motions, and by order issued May 6, 1947, the Commission granted the motions, and the substitute answers were duly received and filed. Each of said substitute answers, solely for the purposes of this proceeding, admits with certain exceptions all of the material allegations of fact set forth in the complaint and provides that the Commission may, without the holding of hearings, the taking of testimony, the adduction of other evidence, and without intervening procedure, hear this matter on the complaint, the substitute answers, a stipulation as to testimony entered into by and between respondent Paul M. Cooter and counsel in support of the complaint (which stipulation was duly executed and filed), and briefs and oral argument of counsel as to whether or not the allegations of the complaint as therein admitted constitute a showing of violation of law by these respondents, and may then proceed to make and enter its findings of fact, including inferences and conclusions based thereon, and enter its order disposing of this proceeding.

Thereafter, this proceeding regularly came on for final hearing before the Commission upon the complaint, the substitute answers, the aforesaid stipulation, briefs, oral argument and reargument of counsel, and the Commission having duly considered the matter and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Paul M. Cooter is an individual doing business under the firm names and styles of The Cooter Company and Mart Sales Company, with principal office and place of business lo-

cated at 228 North LaSalle Street, Chicago, Illinois, and branch office located at 16 California Street, San Francisco, California.

Respondent Paul M. Cooter formerly did business both in his own name and under the firm name and style of the Cooter Brokerage Company, and preceding that was the president, treasurer, controlling shareholder and general manager of a corporation designated as Lakeshore Brokerage Company, Inc., and its successor, Lakeshore Marketing & Merchandise Company, Inc., all with principal office and place of business one time located at Room 904, Merchandise Mart, Chicago, Illinois, and branch office located at 16 California Street, San Francisco, California. The Lakeshore Brokerage Company, Inc., incorporated July 11, 1936, and renamed Lakeshore Marketing & Merchandising Company, Inc., November 13, 1936, was a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois. The assets of said corporation were sold and transferred January 8, 1938, to respondent Paul M. Cooter who was then doing business under the firm name and style of the Cooter Brokerage Company, and the aforesaid corporation was dissolved February 17, 1938.

Prior to July 18, 1936, respondent Paul M. Cooter also was the assistant secretary, assistant treasurer and general manager of respondent Recorg Supply Corporation, the assistant secretary and assistant treasurer of another corporation designated as Volunteer Stores, Inc. of America, and the assistant secretary, assistant treasurer and general manager of a third corporation known as Merchants Service Corporation.

PAR. 2. Merchants Service Corporation, one time located at Room 904, Merchandise Mart, Chicago, Illinois, with branch office located at 16 California Street, San Francisco, California, was a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware. Said corporation, now dissolved, among other activities, did business as a group buying organization for its wholesale grocer shareholders and in so doing received and accepted commissions, brokerage, and other compensation, allowances or discounts in lieu thereof from sellers upon purchases from sellers for its said member shareholders.

Volunteer Stores, Inc., of America is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 201 North Wells Street, Chicago, Illinois. Said corporation, one time located at Room 904, Merchandise Mart, Chicago, Illinois, was organized by Merchants Service Corporation to license and provide for Merchants Service Corporation sponsoring wholesale grocer share-

holders to use the controlled, private or buyers' label or brand "Volunteer" and the Volunteer Stores system of retail distribution for merchandise so labeled or branded.

Respondent Recorg Supply Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 201 North Wells Street, Chicago, Illinois. Said corporation, one time located at Room 904, Merchandise Mart, Chicago, Illinois, among other activities, does business as a group buying organization for its wholesale grocer shareholders. Respondent Recorg Supply Corporation was organized and is controlled by wholesale grocers shareholders who were formerly the controlling shareholders of Merchants Service Corporation.

Respondent J. W. Herscher, the president and a director of respondent Recorg Supply Corporation, was formerly the president and a director of Merchants Service Corporation. Respondent J. W. Herscher is also the president and a director of Volunteer Stores, Inc. of America. He is associated with the Hubbard Grocery Company, Charleston, West Virginia. The Hubbard Grocery Company was a shareholder in Merchants Service Corporation and is a shareholder in both respondent Recorg Supply Corporation and Volunteer Stores, Inc. of America. The Hubbard Grocery Company further appears as a member on respondent Paul M. Cooter's hereinafter described group customer list.

Respondent Wm. H. Tyler is the vice president and a director of respondent Recorg Supply Corporation. Respondent Wm. H. Tyler is associated with Tyler & Simpson Company, Gainesville, Texas. Tyler & Simpson Company was a shareholder in Merchants Service Corporation and is a shareholder in respondent Recorg Supply Corporation. Tyler & Simpson Company further appears as a member on respondent Paul M. Cooter's group customer list.

Respondent Neil A. McKay, the secretary, treasurer and a director of respondent Recorg Supply Corporation, was formerly the treasurer and a director of Merchants Service Corporation. Respondent Neil A. McKay is also the treasurer and a director of Volunteer Stores, Inc. of America. He is associated with Bursley & Co., Inc., Ft. Wayne, Indiana. Bursley & Co., Inc., was a shareholder in Merchants Service Corporation and is a shareholder in both respondent Recorg Supply Corporation and Volunteer Stores, Inc. of America. Bursley & Co., Inc., further appears as a member on respondent Paul M. Cooter's group customer list.

Respondent L. H. Joannes, a director of Recorg Supply Corporation, was the secretary and a director of Merchants Service Corpora-

tion. Respondent L. H. Joannes is also the secretary and a director of Volunteer Stores, Inc., of America. He is associated with Joannes Brothers Company, Green Bay, Wisconsin. Joannes Brothers Company was a shareholder in Merchants Service Corporation and is a shareholder in both respondent Recorg Supply Corporation and Volunteer Stores, Inc., of America. Joannes Brothers Company further appears as a member on respondent Paul M. Cooter's group customer list.

Respondent Max A. Kuehn is a director of respondent Recorg Supply Corporation. Respondent Max A. Kuehn is associated with Andrew Kuehn Company, Sioux Falls, South Dakota. Andrew Kuehn Company was a shareholder in Merchants Service Corporation and is a shareholder in respondent Recorg Supply Corporation. Andrew Kuehn Company further appears as a member on respondent Paul M. Cooter's group customer list.

Respondent H. L. Miller is a director of respondent Recorg Supply Corporation. Respondent H. L. Miller is associated with the New River Grocery Company, Hinton, West Virginia. New River Grocery Company was a shareholder in Merchants Service Corporation and is a shareholder in respondent Recorg Supply Corporation. New River Grocery Company further appears as a member on respondent Paul M. Cooter's group customer list.

Respondent R. B. Wiltsee is a director of respondent Recorg Supply Corporation and also is a director of Volunteer Stores, Inc. of America. Respondent R. B. Wiltsee is associated with the Gilbert Grocery Company, Portsmouth, Ohio. Gilbert Grocery Company was a shareholder in Merchants Service Corporation and is a shareholder in both respondent Recorg Supply Corporation and Volunteer Stores, Inc. of America. Gilbert Grocery Company further appears as a member on respondent Paul M. Cooter's group customer list.

Respondent Jas. A. Scowcroft is a director of respondent Recorg Supply Corporation. Respondent Jas. A. Scowcroft is associated with John Scowcroft & Sons Co., Ogden, Utah. John Scowcroft & Sons Co. was a shareholder in Merchants Service Corporation and is a shareholder in respondent Recorg Supply Corporation. John Scowcroft & Sons Co. further appears as a member on respondent Paul M. Cooter's group customer list.

PAR. 3. In carrying on its business as a group buying organization for its wholesale grocer shareholders, Merchants Service Corporation purchased merchandise from selected sellers, either under or bearing the seller's label or brand, or under or bearing so-called private or buyers' labels or brands, which were controlled and sponsored by Merchants Service Corporation and its wholesale grocer shareholders.

Sellers accepted as sources of merchandise supply for Merchants Service Corporation were selected from seller lists furnished by the various corporation shareholders to Merchants Service Corporation's Concession Committee and operating manager, respondent Paul M. Cooter, as being sellers from whom brokerage or other monetary concessions in lieu thereof could or should be obtained by the corporation. Each wholesale grocer shareholder of Merchants Service Corporation was required to post a substantial guarantee fund with the corporation toward purchases made on such shareholder's behalf by the corporation. Patronage dividends based upon the total commissions, brokerage, and other compensation, allowances, or discounts in lieu thereof, collected from sellers by said corporation, after deduction of operating expenses, were declared and paid to each corporate shareholder. Such dividends were paid semiannually and were directly related to the amount of the commissions, brokerage, or other compensation, allowances or discounts in lieu thereof, collected by the corporation on purchases made for said individual shareholder.

Merchants Service Corporation discontinued trading operations as of July 17, 1936, on which date the corporation accepted the resignation of respondent Paul M. Cooter as assistant secretary, assistant treasurer and general manager, and entered into arrangements with the then recently organized Lakeshore Brokerage Company, Inc., whereunder Lakeshore Brokerage Company, Inc., purchased Merchants Service Corporation's office furniture, equipment, fixtures and supplies, assumed the office expenses, including salaries, payroll and the rental obligations, of Merchants Service Corporation's leases to 904 Merchandise Mart, Chicago, Illinois, and 16 California Street, San Francisco, California, and agreed to furnish Merchants Service Corporation's wholesale grocer shareholders the purchasing and other services formerly supplied by Merchants Service Corporation. At the same time Merchants Service Corporation transferred its corporate records and outstanding brokerage accounts receivable for collection to respondent Recorg Supply Corporation and assigned to said respondent Recorg Supply Corporation all of the private or buyers' labels or brands controlled and sponsored by Merchants Service Corporation and its member shareholders.

Pursuant to these arrangements, Lakeshore Brokerage Company, Inc., solicited the business of Merchants Service Corporation's wholesale grocer shareholders and, through letters addressed to sellers to the former Merchant Service Corporation, signed by respondent Paul M. Cooter as president, Lakeshore Brokerage Company, Inc., solicited and applied for said sellers' account on a brokerage basis. Attached to or enclosed with said letters were group lists on which appeared

the names of the wholesale grocer shareholders of the dormant Merchants Service Corporation stated to have become customers of Lakeshore Brokerage Company, Inc. Such letters, together with attached or enclosed group customer lists, revised as required, have since been used and are now being used (as set forth in Paragraph Seven) by respondent Paul M. Cooter in doing business as hereinabove and hereinafter described.

Merchants Service Corporation, prior to its dissolution, was the controlling shareholder in Volunteer Stores, Inc., of America. By resolution adopted on January 23, 1938, Merchants Service Corporation moved to dispose of and on February 15, 1938, it sold and transferred its shares in said corporation to its wholesale grocer shareholders and such others as were engaged in sponsoring the "Volunteer" label or brand and the Volunteer Stores system of distribution. Merchants Service Corporation was thereafter dissolved and final disposition of all of its assets and liabilities was made on August 27, 1942.

PAR. 4. Volunteer Stores, Inc., of America was organized by Merchants Service Corporation to lease from Volunteer Stores, Inc., of Tennessee the controlled private or buyers' label "Volunteer" and the Volunteer Stores system of retail distribution for the use of Merchants Service Corporation wholesale grocer shareholders. Volunteer Stores, Inc., of Tennessee is a Tennessee corporation controlled by King, Dobbs & Company, Chattanooga, Tennessee. King, Dobbs & Company was a shareholder in Merchants Service Corporation, is a shareholder in respondent Recorg Supply Corporation and Volunteer Stores, Inc., of America, and also appears as a member on respondent Paul M. Cooter's group customer list. Following the lease arrangement between Volunteer Stores, Inc., of America and Volunteer Stores, Inc., of Tennessee, all merchandise to be distributed under the "Volunteer" label or brand was to conform to a certain grade and quality and bear a label as approved and designated by the Board of Directors of Volunteer Stores, Inc., of America. All distributors operating under the Volunteer franchise were required to stock a specified number of items and it was further provided that any Merchants Service Corporation member failing to actively sponsor and promote the Volunteer Stores movement in the territory allotted to it would automatically forfeit the franchise to any other Merchants Service Corporation member desiring to actively sponsor and promote the Volunteer movement in such allotted territory. The "Volunteer label or brand was also made available to other groups of retail dealers sponsored by Merchants Service Corporation wholesale grocer shareholders where such sponsored retail dealers displayed on their store windows the legend "Affiliated with Volunteer Food Stores."

Immediately prior to the disposition by Merchants Service Corporation of its controlling shares of Volunteer Stores, Inc., of America, as aforesaid, respondent Paul M. Cooter and Volunteer Stores, Inc., of America on January 22, 1938, entered into the following agreement:

MEMORANDUM OF AGREEMENT made and entered into this 22nd day of January, A. D. 1938, by and between PAUL M. COOTER, doing business under the firm name and style of Cooter Brokerage Company (hereinafter for convenience termed "Cooter"), party of the first part; and VOLUNTEER STORES, INC., OF AMERICA, a corporation duly organized and existing under the laws of the State of Delaware (hereinafter for convenience termed "Volunteer"), party of the second part:

WITNESSETH: That:

WHEREAS, Volunteer represents and warrants that it is the holder and owner of the exclusive and perpetual franchise and the right to use the Volunteer Stores System of distribution, including Volunteer labels, trade-marks, insignia, store sign designs and any and all other incidents appurtenant thereto, in the following States of the United States of America: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming and District of Columbia; and

WHEREAS, Cooter desires to develop and promote the Volunteer Stores System of Distribution, as aforesaid, and to foster and expand the same to national proportions; and

WHEREAS, Volunteer has heretofore granted certain exclusive franchises to wholesalers in various territories (hereinafter sometimes referred to as the "Sponsoring Wholesalers");

NOW, THEREFORE, for and in consideration of the premises and the covenants hereinafter contained, the parties hereto do mutually agree as follows:

1. Volunteer does hereby grant and lease to Cooter (except as the same may have heretofore been granted to certain Sponsoring Wholesalers, as aforesaid) the exclusive privilege, franchise and right to use, develop and foster the Volunteer Stores System of distribution, as aforesaid, together with all labels, trademarks, insignia, store sign designs and any and all other incidents appurtenant thereto, in each and any of the States hereinabove set forth for a term of five (5) years from the date hereof; provided, however, that Cooter may, upon compliance with all of the terms and provisions hereof, if he so elects, renew this lease and all of its terms and provisions, for a like term, upon the giving of sixty (60) days' prior notice in writing to Volunteer. Such notice shall be deemed sufficient if deposited in the United States mail, postage prepaid, addressed to the last known address of Volunteer or to Volunteer in the care of its duly appointed or acting agent for the service of process in the State of Delaware.

2. Cooter shall pay to Volunteer the sum of Twenty-Five Hundred Dollars ($2,500.00) as rental for the exclusive privilege, franchise and right hereinabove granted, payable in five (5) installments of Five Hundred Dollars ($500.00) each in advance upon the first day of each and every year of said term, at the principal office of Volunteer. In the event that pursuant to the provisions of Paragraph I hereof Cooter exercises his option to renew this lease and all of

its terms and provisions, Cooter shall pay to Volunteer the sum of Five Thousand Dollars ($5,000.00) as rental aforesaid, payable in five (5) installments of One Thousand Dollars ($1,000.00) each in advance upon the first day of each and every year of said renewed term at the principal office of Volunteer.

3. In the event of the death or total disability of Cooter, this agreement, which is nontransferable and nonassignable by Cooter, shall automatically terminate. For the purposes of this agreement, total disability is defined to mean the absence from or inability to work for a continuous period of six (6) months or more.

4. Cooter agrees to assume the duties and obligations of Volunteer during the term of this agreement as imposed upon Volunteer by a certain lease agreement between Volunteer and Volunteer Stores, Inc. of Tennessee, executed contemporaneously herewith.

5. Volunteer will cooperate with and assist Cooter whenever possible to obtain lease agreements with each and every sponsoring wholesaler, said lease agreements to authorize the extension of Cooter's development activities to the respective territories hereinbefore allocated to such Sponsoring Wholesalers, as aforesaid.

6. It is expressly understood and agreed that each Wholesaler, whether a Sponsoring Wholesaler or otherwise, through whom the Volunteer Stores System of Distribution has developed, as aforesaid, shall be designated, and accept such designation, as an agent of Volunteer for the distribution, sale and marketing of all food products bearing such labels, trade-marks, insignia and store sign designs of Volunteer, as aforesaid. It is further expressly understood that the duties of said Wholesalers, as agents aforesaid, shall be to insure against the distribution of any food products bearing said labels, trade-marks and insignia of a standard of quality less than the minimum fixed by the Board of Directors of Volunteer.

IN WITNESS WHEREOF, Cooter has hereunto set his hand and seal, and Volunteer has caused this instrument to be executed by its duly authorized officers and its corporate seal to be hereunto affixed, all on the day and year first above set forth.

Paul M. Cooter, doing business under the firm name and style of COOTER BROKERAGE COMPANY.

VOLUNTEER STORES, INC. OF AMERICA,
By----------
President.

Following the execution of the aforesaid memorandum of agreement between Volunteer Stores, Inc., of America, and respondent Paul M. Cooter, such share holder dividends as were paid by Volunteer Stores, Inc., of America, were in large part declared on lease monies obtained from respondent Paul M. Cooter.

Pursuant to the lease arrangement with Volunteer Stores, Inc. of America, respondent Paul M. Cooter entered into lease agreements with various wholesalers, copy of a typical lease agreement being as follows:

MEMORANDUM OF AGREEMENT made and entered into this ---------- day of ---------- 1938, by and between PAUL M. COOTER doing business under the firm name and style of Cooter Brokerage Company (hereinafter for con-

venience termed "Cooter"), party of the first part, and ---------- (hereinafter for convenience termed the "Wholesaler"), party of the second part,

WITNESSETH: That,

WHEREAS, Cooter, by agreement dated January 22, 1938, made and entered into with Volunteer Stores, Inc. of America (hereinafter for convenience termed "Volunteer"), did become the holder, for a term of five (5) years (with an option to renew said agreement for a like term) of the exclusive privilege, franchise and right (except as the same may have theretofore been granted to certain sponsoring Wholesalers) to develop and foster the Volunteer Stores System of Distribution, together with all labels, trade-marks, insignia, store sign designs, and any and all incidents appurtenant thereto, in the following States of the United States of America: Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Idaho, Illinois, Indiana, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming, and District of Columbia; and

WHEREAS, Cooter desires to develop and promote the Volunteer Stores System of Distribution, as aforesaid, and to foster and expand the same to national proportions; and

WHEREAS, Wholesaler desires to participate in such program of development and promotion, and to obtain the various advantages thereof;

NOW, THEREFORE, for and in consideration of the premises and covenants hereinafter contained, and in the further consideration of the sum of One Dollar ($1.00) to Cooter paid in hand by Wholesaler, receipt of which is hereby acknowledged, the parties hereto do mutually agree as follows:

1. Wholesaler is hereby designated as the exclusive distributor for Cooter in the following described territory, to-wit: for the goods, wares and merchandise bearing the Volunteer Stores, Inc. of America labels, trade-marks, insignia or other designs, until January 21, 1943, or, in the event of the exercise by Cooter of his option to renew said agreements between Cooter and Volunteer, as hereinabove set forth, until January 21, 1948.

2. Wholesaler does hereby agree to attempt to increase the demand for and the use of the goods, wares and merchandise bearing the Volunteer Stores, Inc. of America labels, trade-marks, insignia, or other designs in the territory hereinabove described.

3. Cooter agrees that no goods, wares or merchandise bearing said Volunteer Stores, Inc. of America labels, trade-marks, insignia or designs, will be sold by or through Cooter, or with its consent for distribution or otherwise, in the territory of Wholesaler hereinabove described, to any person, partnership, corporation or association other than the Wholesaler.

4. All goods, wares and merchandise sold by wholesaler bearing said Volunteer Stores, Inc. of America labels, trade-marks, insignia or designs shall be purchased by Wholesaler from or through Cooter, or with its consent and approval.

IN WITNESS WHEREOF, the parties hereto have executed this agreement under seal, all on the day and year first above set forth.

PAUL M. COOTER, doing business under the firm name and style of COOTER BROKERAGE COMPANY.

Upon payments of $3,400.00 and $1,125.00 made on January 28, 1939, and $1,000.00 made on March 8, 1938, to King, Dobbs & Company, Chattanooga, Tennessee, Grenada Grocery Company, Grenada, Mississippi, and Evans Terry Company, Laurel, Mississippi, respondent Paul M. Cooter also entered into similar memorandums of agreement with the said sponsoring wholesalers formerly holding lease agreements with Volunteer Stores, Inc. of Tennessee prior to said corporation's lease arrangements with Volunteer Stores, Inc. of America. The aforesaid leasing and sponsoring wholesalers, including both former shareholders and nonshareholders of Merchants Service Corporation, as hereinbefore described, comprise the controlling shareholders of Volunteer Stores, Inc. of America, are shareholders in respondent Recorg Supply Corporation, and also appear as members on respondent Paul M. Cooter's group customer list.

Pursuant to the foregoing lease arrangements, respondent Paul M. Cooter entered into advertising authorizations with each of the leasing wholesalers whereunder a substantial portion of the commissions, brokerage or other compensation, allowances or discounts in lieu thereof, received and accepted from sellers by respondent Paul M. Cooter on such wholesaler's purchases of Volunteer brand merchandise was returned to the wholesaler in the form of payments by respondent Paul M. Cooter for such wholesaler's advertising and promotional activities in connection with said merchandise. Such payments were made until April 1, 1944, on which date they were discontinued, but most of the wholesalers are still buyers of merchandise packed under labels owned or controlled either by respondent Paul M. Cooter, by the seller or by the buyer, and on such transactions respondent Paul M. Cooter continues to receive brokerage payments from the sellers.

PAR. 5. Respondent Recorg Supply Corporation, organized and controlled by wholesale grocer shareholders, formerly the controlling shareholders of Merchant Service Corporation, among other activities, does business as a group-buying organization similar in style to that described in paragraphs preceding for the said Merchants Service Corporation. After the discontinuance of trading operations by Merchants Service Corporation and the resignation as of July 18, 1936, of respondent Paul M. Cooter as assistant secretary, assistant treasurer and general manager of respondent Recorg Supply Corporation, respondent Recorg Supply Corporation under successive arrangements and for varying considerations employed Lakeshore Brokerage Company, Inc., Lakeshore Marketing & Merchandising Company, Inc., and (prior to about September 22, 1943) respondent Paul M. Cooter, individually and doing business under the firm name and style of the Cooter Brokerage Company, to supply brokerage, marketing, mer-

chandising, advertising, and other services to respondent Recorg Supply Corporation and said respondent corporation's wholesale grocer shareholders.

Respondent Recorg Supply Corporation, following the acquisition of the private or buyers' labels or brands previously controlled and sponsored by Merchants Service Corporation and Merchants Service Corporation shareholders, entered into lease arrangements with respondent Recorg Supply Corporation wholesale grocer shareholders, whereunder each said shareholder was allotted specified territory for the exclusive distribution therein of the private or buyers' labels or brands controlled and sponsored by respondent Recorg Supply Corporation and its said member shareholders. Pursuant to these arrangements, respondent Recorg Supply Corporation (prior to about September 22, 1943) and respondent Recorg Supply Corporation wholesale grocer shareholders purchased from sellers, through or by means of respondent Recorg Supply Corporation and respondent Paul M. Cooter, individually and doing business as herein described, merchandise both under or bearing the sellers' labels or brands and merchandise under or bearing the controlled, private or buyers' labels or brands.

On January 25, 1939, respondent Recorg Supply Corporation and respondent Paul M. Cooter made and entered into the following agreement:

MEMORANDUM OF AGREEMENT made and entered into this 25 day of January, A. D. 1939, by and between RECORG SUPPLY CORPORATION, a Delaware corporation (hereinafter for convenience termed "Recorg"), party of the first part, and PAUL M. COOTER, of the city of Chicago, county of Cook and State of Illinois, doing business under the firm name and style of Cooter Brokerage Company (hereinafter for convenience termed "Cooter"), party of the second part;

WITNESSETH: That,

WHEREAS, Recorg represents and warrants that it is the owner and holder of certain trade-marks, insignia, brands, labels and designs, more particularly described as "MOON ROSE Brand," "MICKY Brand Dog Food," "RIXEY Dog Food," "NU DRAIN," "NU BOWL," "NU COLZ," "WASHRITE," "NU CREST Brand," "BEL DINE Brand," "STRATFORD Shaving Cream and Tooth Paste."

WHEREAS, Recorg and Cooter mutually desire to promote and develop the distribution of the above-named brands;

NOW, THEREFORE, for and in consideration of the premises and the covenants hereinafter contained, the parties hereto do mutually agree as follows:

1. Recorg does hereby grant and lease to Cooter the exclusive right and privilege to use develop and promote the distribution of all products, goods, wares or merchandise the subject of said trade-marks, insignia, brands, labels and designs or identified thereby, and further grants and leases to Cooter the exclusive right and privilege to use, develop the use of and advertise said trade-marks, insignia, brands, labels and designs, for a term of five (5) years from the date hereof; provided, however, that Cooter may, upon compliance with all of the terms and

provisions of this Agreement, if he so elects, renew this Agreement, and all of its terms and provisions, for a like term of five (5) years, upon the giving of sixty (60) days' prior notice in writing to Recorg. Such notice shall be deemed to be sufficiently given if deposited in the United States registered mail, postage prepaid, addressed to Recorg at its last known address or to Recorg in care of its duly appointed or acting agent for the service of process in the State of ----------.

2. Cooter shall pay to Recorg the sum of $5,000.00 as a rental for the exclusive right and privilege hereinabove granted, payable in five (5) installments of $1,000.00 each in advance upon the first day of each and every year of said term, at the principal office of Recorg. In the event that pursuant to the provisions of Paragraph 1 hereof Cooter exercises his option to renew this agreement and all of its terms and provisions, Cooter shall pay to Recorg the sum of $7,500.00 as rental aforesaid, payable in five (5) installments of $1,500.00 each in advance upon the first day of each and every year of said renewed term at the principal office of Recorg.

3. In the event of the death or total disability of Cooter, this Agreement shall automatically terminate. For the purposes of this Agreement, total disability is defined to mean the absence from, or inability to, work for a continuous period of six (6) months or more.

4. Recorg will cooperate with and assist Cooter wherever possible to obtain subordinate lease agreements with each and all of its stockholders. The right and privilege which may be hereafter conferred by Cooter in restricted territories to sell and distribute the goods, wares and merchandise bearing said trade-marks, insignia, brands, labels and designs shall be limited to and restricted by Cooter to, stockholders of Recorg.

5. Cooter agrees that all products, goods, wares and merchandise sold bearing any of said trade-marks, insignia, brands, labels and designs shall conform to the following minimum standards of quality:

MOON ROSE Brand:

Extra standard or better grades of canned vegetables.

Choice or better grades of canned fruits, with the exception of No. 2 RSP Cherries. No. 2 RSP Cherries water grade.

All bulk dry items must be fancy grade.

Coffee must be comparable in quality to the three leading advertised brands of coffee.

All other items not hereinabove in this Paragraph 5 expressly set forth but subject to the terms of this Agreement shall conform to the standard of quality presently obtaining.

IN WITNESS WHEREOF, Recorg has caused this instrument to be executed by its officers thereunto enabled and its corporate seal to be hereunto affixed, and Cooter has hereunto set his hand and seal, all on the day and year first above set forth.

[Seal] RECORG SUPPLY CORPORATION,

[s] By J. W. HERSCHER,
President.

Attest:

[s] MAURICE L. HORNER, JR.,
Secretary.

PAUL M. COOTER,

Paul M. Cooter, doing business under the firm name and style of COOTER BROKERAGE COMPANY.

Following the execution of the above memorandum of agreement, respondent Paul M. Cooter entered into exclusive franchise agreements with respondent Recorg Supply Corporation, wholesale grocer shareholders, a typical copy of said agreement being as follows:

MEMORANDUM OF AGREEMENT made and entered into this _____ day of _____ A. D., 1939, by and between PAUL M. COOTER, of the city of Chicago, county of Cook and State of Illinois, doing business under the firm name and style of Cooter Brokerage Company (hereinafter for convenience termed ("Cooter"), party of the first part, and _____ (hereinafter for convenience termed the "Wholesaler"), party of the second part;

WITNESSETH: That,

WHEREAS, Recorg Supply Corporation, a _____ corporation (hereinafter for convenience termed ("Recorg"), has represented and warranted to Cooter that it is the owner and holder of certain trade-marks, insignia, brands, labels and designs, more particularly described as "MOON ROSE Brand," "MICKY Brand Dog Food," "RIXEY Dog Food," "NU DRAIN," "NU BOWL," "NU CLOZ," "WASHRITE," "NU CREST Brand," "BEL DINE Brand," "STRATFORD Shaving Cream and Tooth Paste."

WHEREAS, Cooter, by agreement dated January _____, 1939, made and entered into with Recorg, did become the holder, for a term of five (5) years (with an option to renew said agreement for a like term) of the exclusive right and privilege to use, develop and promote the distribution of all products, goods, wares or merchandise the subject of said trade-marks, insignia, brands, labels and designs or identified thereby, and further did become the holder of the exclusive right and privilege to use, develop the use of and advertise said trade-marks, insignia, brands, labels and designs, during the term of said agreement:

NOW, THEREFORE, for and in consideration of the sum of One Dollar ($1.00) to Cooter by Wholesaler paid in hand, receipt whereof is hereby acknowledged, and of the further consideration of the premises and the covenants hereinafter contained, the parties hereto do mutually agree as follows:

1. Wholesaler is hereby designated as the sole and exclusive distributor for Cooter of the goods, wares and merchandise bearing the several trade-marks, insignia, brands, labels and designs hereinabove set forth, for a period of ten (10) years from the date hereof, in the following described territory.

2. Cooter agrees that no goods, wares or merchandise bearing such trade-marks, insignia, brands, labels and designs will be sold by or through Cooter, or with his consent, for distribution or otherwise, in the above described territory, to any person or corporation other than Wholesaler.

3. Wholesaler agrees that all goods, wares and merchandise sold by Wholesaler bearing said trade-marks, insignia, brands, labels and designs shall be purchased by Wholesaler from or through Cooter, or with Cooter's approval and consent, and further agrees to purchase from or through Cooter, or with his approval and consent, all such trade-marks, insignia, brands, labels and designs.

4. Wholesaler agrees actively to promote the sale and distribution of the goods, wares and merchandise bearing said trade-marks, insignia, brands, labels and designs.

5. In the event that Wholesaler, its successors or assigns, disposes of its stock in Recorg Supply Corporation, adopts a program of liquidation, ceases doing business or, upon its insolvency, there is appointed a receiver for, or there is filed a petition in bankruptcy, whether voluntary or involuntary, against Whole-

saler, or in any of said events, Cooter may terminate this Agreement and all of his rights or duties hereunder upon the giving of five (5) days prior notice in writing to Wholesaler, its successors or assigns. Such notice of termination shall be deemed to be sufficiently given if deposited in the United States registered mail, postage prepaid, addressed to the last known address of Wholesaler, its successors or assigns.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed under seal all on the day and year first above set forth.

Paul M. Cooter, doing business under the firm name and style of COOTER BROKERAGE COMPANY.

By ---

Attest:

Secretary.

Under lease arrangements similar to the agreement of January 25, 1939, with respondent Recorg Supply Corporation, respondent Paul M. Cooter also obtained from respondent Recorg Supply Corporation and others the following controlled, private or buyers' labels or brands:

"Jonquil" leased May 4, 1939, by respondent Recorg Supply Corporation from its shareholder Morey Mercantile Company, Denver, Colorado, for the sum of $5,000.00 and for the same consideration leased May 8, 1939, by respondent Recorg Supply Corporation to respondent Paul M. Cooter.

"Fleetwood" leased November 7, 1939, by respondent Recorg Supply Corporation, from its shareholder King, Dobbs & Company, Chattanooga, Tennessee, for the nominal sum of $1.00 and for the same consideration leased November 25, 1939, by respondent Recorg Supply Corporation to respondent Paul M. Cooter.

"Nu-Clene" leased October 25, 1939, by respondent Recorg Supply Corporation, from its shareholder Bursley & Co., Inc., Ft. Wayne, Indiana, for the nominal sum of $1.00 and for the same consideration leased December 9, 1939, by respondent Recorg Supply Corporation to respondent Paul M. Cooter.

"Nu-Lye" leased March 10, 1941, for the nominal sum of $1.00 by respondent Recorg Supply Corporation to respondent Paul M. Cooter.

"Meal Time" leased March 10, 1941, for the nominal sum of $1.00 by respondent Recorg Supply Corporation to respondent Paul M. Cooter.

"Aunt Magda" leased December 15, 1941, for the nominal sum of $1.00 by respondent Recorg Supply Corporation to respondent Paul M. Cooter.

"Happy Host" leased October 13, 1942, for the nominal sum of $1.00 by Preferred Foods, Inc., to respondent Paul M. Cooter.

"Angel Food," "E-Z-Kreem," "Ful-E-Ripe," "Washwell," Lady Louise," and 16 others leased March 1, 1942, for the nominal sum of $1.00 by Selected Products, Inc., an Illinois corporation, to respondent Paul M. Cooter. Mr. T. G. Harrison, president of Selected Products, Inc., is the president of Winston & Newell Company, Minneapolis, Minnesota, a member appearing on respondent Paul M. Cooter's group customer list. Respondent Paul M. Cooter's lease with Selected Products, Inc., required respondent's payment for the advertising and promotion of the merchandise thereunder. Respondent Paul M. Cooter on May 1, 1942, for the nominal sum of $1.00, under similar provisions, as hereinbefore set out, franchised Winston & Newell Company for exclusive distribution of said merchandise in specified States.

Pursuant to the foregoing lease arrangements, respondent Paul M. Cooter entered into advertising authorizations with each of the leasing wholesalers whereunder a substantial portion of the commissions, brokerage, or other compensation, allowances or discounts in lieu thereof, received and accepted from sellers by respondent Paul M. Cooter on such wholesaler's purchases of the merchandise named in said lease arrangements, was returned to each wholesaler in the form of payments by respondent Paul M. Cooter for such wholesaler's advertising and promotional activities in connection with said merchandise. Such payments were made until October 1, 1945, on which date they were discontinued, but most of the wholesalers are still buyers of merchandise packed under labels owned or controlled either by respondent Paul M. Cooter, by the seller or by the buyer, and on such transactions respondent Paul M. Cooter continues to receive brokerage payments from the sellers.

PAR. 6. Respondent Paul M. Cooter, individually and doing business under the firm names and styles of The Cooter Company and Mart Sales Company, on the dates and for the considerations shown, acquired and now owns or controls the following private or buyers' labels or brands:

By assignment dated March 13, 1944, respondent Recorg Supply Corporation, for the sum of $7,500, transferred to respondent Paul M. Cooter, doing business as The Cooter Company, the trade-marks "MOON ROSE," "NU-CREST," "BEL-DINE," "JONQUIL," "WASHRITE," "NU-LYE," "NU-BOWL," "NU-CLOZ," "NU-DRAIN," and "MICKY."

By assignment dated March 13, 1944, respondent Recorg Supply Corporation, for the nominal sum of $1.00, transferred to respondent Paul M. Cooter, doing business as The Cooter Company, the label "MOON ROSE."

By assignment dated March 13, 1944, respondent Recorg Supply Corporation, for the nominal sum of $1.00, transferred to respondent Paul M. Cooter, doing business as The Cooter Company, the trade-marks "MEALTIME" and "AUNT MAGDA."

By assignment dated April 24, 1944, respondent Recorg Supply Corporation, for the nominal sum of $1.00, transferred to respondent Paul M. Cooter, doing business as The Cooter Company, the trade-mark "NU-CUP."

By assignment dated April 6, 1944, Selected Products, Inc., an Illinois corporation, for the sum of $1.00, transferred to respondent Paul M. Cooter, doing business as Mart Sales Company, the trade-mark "ANGEL FOOD."

By assignment dated April 6, 1944, Selected Products, Inc., for the nominal sum of $1.00, transferred to respondent Paul M. Cooter, doing business as Mart Sales Company, the trade-mark "E-Z-KREEM."

By assignment dated April 6, 1944, Selected Products Company, Inc., for the sum of $1.00, transferred to respondent Paul M. Cooter, doing business as Mart Sales Company, the trade-mark "Ful-E-Ripe."

By assignment dated April 6, 1944, Selected Products Company, Inc., for the nominal sum of $1.00, transferred to respondent Paul M. Cooter, doing business as Mart Sales Company, the trade-mark "LADY LOUISE" subject to the agreement dated December 21, 1942, between Procter & Gamble Distributing Company and the said Selected Products Company, Inc.

By assignment dated April 6, 1944, Selected Products Company, Inc., for the nominal sum of $1.00, transferred to respondent Paul M. Cooter, doing business as Mart Sales Company, the trade-mark "WASH WELL" subject to the agreement dated December 21, 1942, between Procter & Gamble Distributing Company and the said Selected Products Company, Inc. Relinquishment of the ownership of the trade-marks "LADY LOUISE" and "WASH WELL" was not made by the Procter & Gamble Distributing Company.

By assignment dated February 11 and February 17, 1944, John N. Adler, Chicago, Illinois, and Grocers Service Corporation, Chicago, Illinois, for the nominal sum of $1.00, transferred to respondent Paul M. Cooter the label and trade-mark "HAPPY HOST."

Following the assignments hereinabove set out, respondent Paul M. Cooter entered into further agreements with respondent Recorg Supply Corporation wholesale grocer shareholders, a typical copy of said agreements being as follows:

AGREEMENT

THIS AGREEMENT, made and entered into this _____ day of _____, 1944, by and between PAUL M. COOTER, of Chicago, Illinois, doing business under

the firm name and style of "THE COOTER COMPANY" (hereinafter called "Cooter"), and _____ (hereinafter called the "Wholesaler"),

WITNESSETH: That

WHEREAS, Cooter, by an agreement made and entered into with Recorg Supply Corporation, a Delaware corporation, on the 13th day of March, 1944, purchased from said Company all of its right, title and interest in and to certain trade-marks and brands, more fully set forth in Exhibit "A" attached hereto and made a part hereof (hereinafter referred to as "brands") ; and

WHEREAS, the Wholesaler desires to secure from Cooter an exclusive license and right to use said brands in the hereinafter designated States of the United States;

NOW, THEREFORE, in consideration of the sum of One Dollar ($1.00) to Cooter by the Wholesaler in hand paid, receipt of which is hereby acknowledged, and in further consideration of the mutual covenants and agreements of the parties hereto, it is agreed:

1. Cooter does hereby give and grant to the Wholesaler an exclusive license and right to use the brands in the sale of merchandise in the territory described as:

for such period, and only so long as the Wholesaler during each twelve-month period, beginning with the first day of the month next succeeding the date of this contract, purchases a minimum volume of merchandise under said brands, in the amounts as enumerated opposite each brand on Exhibit "A." In the event that the Wholesaler in any such twelve-month period shall fail to purchase the minimum volume of merchandise as set forth in Exhibit "A," the Wholesaler shall, without any action to be taken by either the Wholesaler or Cooter, forfeit his right to a continuation of the exclusive license and right to use that particular brand on which the minimum volume of purchases has not been attained.

2. The Wholesaler agrees that all goods, wares and merchandise sold by the Wholesaler bearing said brands, insofar as said products are listed on Exhibit "A," shall be purchased by the Wholesaler through Cooter, and not otherwise, except with Cooter's approval and consent.

3. Cooter agrees that so long as the Wholesaler shall be entitled to the exclusive license and right to the use of the brands and shall not be in default hereunder, he will not cause any goods, wares or merchandise bearing such brands to be sold by or through Cooter, or with his consent, to any distributor in the above described territory, other than to the Wholesaler.

4. While Cooter represents that to his best knowledge and belief, full and complete ownership of the trade-mark and copyright registrations underlying the brands was vested in Recorg Supply Corporation at the time of the transfer of such brands to Cooter, Cooter does not, by this agreement, guarantee or warrant his title to such brands, and agrees to defend the use of such brands by the Wholesaler only to the extent of any acts or doings by Cooter that would affect his ownership of the trade-mark or copyright registrations.

5. Upon the execution hereof, this contract shall supersede and cancel license contract dated _____ day of _____ 19____, between Wholesaler and Paul M. Cooter, doing business as Cooter Brokerage Company, and also cancels and supersedes license agreement dated _____ day of _____ 19____, entered into between Wholesaler and Recorg Supply Corporation, and such contracts and agreements are hereby terminated.

6. This agreement shall be binding upon the Wholesaler, its successors and assigns, and likewise binding upon Cooter, his heirs and representatives.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed on the day and year first above set forth.

Paul M. Cooter, doing business under the firm name and style of The Cooter Company.

[Corporate seal]

By ---

President.

Attest:

Secretary.

* * * *THIS CONTRACT NULL AND VOID UNLESS ONE COPY IS SIGNED BY WHOLESALER AND RETURNED TO COOTER WITHIN 20 DAYS FROM DATE HEREOF.*

Exhibit A attached to and made a part of said lease agreement varied with each leasing wholesaler, depending upon the number of brands sponsored by said wholesaler and the minimum acceptable volume purchase requirements set by respondent Paul M. Cooter for each brand ranging from $250.00 to $25,000.00 annually.

Under date of May 6, 1944, respondent Paul M. Cooter also entered into lease agreements with Winston & Newell Company, Minneapolis, Minnesota, under which, for the nominal sum of $1.00, said company was allotted certain territories for the exclusive distribution of merchandise under or bearing the "Happy Host," "Angel Food," "Ful-E-Ripe," "E-Z-Kreem," "Washwell" and "Lady Louise" labels or brands with total minimum annual volume purchase requirements for all said labels or brands set by respondent Paul M. Cooter at the sum of $46,500.00.

Pursuant to the foregoing lease arrangements, respondent Paul M. Cooter entered into advertising authorizations with or for each of the leasing wholesalers whereunder a substantial portion of the commissions, brokerage, or other compensation, allowances or discounts in lieu thereof, received and accepted from sellers by respondent Paul M. Cooter on such wholesaler's purchases of the merchandise named in said lease arrangements, was returned to or expended for each wholesaler in the form of payments by respondent Paul M. Cooter for advertising and promotional activities by or for such wholesaler in connection with said merchandise. Such payments were made until October 1, 1945, on which date they were discontinued, but most of the wholesalers are still buyers of merchandise packed under labels owned or controlled either by respondent Paul M. Cooter, by the seller or by the buyer, and on such transactions Paul M. Cooter continues to receive brokerage payments from the sellers.

PAR. 7. Respondent Paul M. Cooter, doing business as hereinbefore described, under the firm name and style of The Cooter Company, presently operates what he terms "The Cooter Plan," and in so doing business, distributes illustrated advertising brochures, which, among other things, state as follows:

The Cooter Brokerage plan is a nation-wide service for wholesale food distributors. It includes:

1. Brokerage Service.
2. Market Information.
3. Advertising Counsel.
4. Merchandising Assistance.
5. Controlled Brands.

1. Brokerage Service:

Offices in Chicago and San Francisco. Coast to coast coverage offers advantages to manufacturers and wholesalers obtainable in no other way. Cooter customers have combined staff of over 900 salesmen serving more than 85,000 retail outlets.

To the Manufacturer it Means:

Low selling cost.
Wider market for his goods.
Established outlet for disposal of substantial quantities of merchandise without danger of market demoralization.

To the Wholesaler it Means:

Wider selection of offerings and products.
Time saved in executing purchases.
Assurance of trading with reliable packers and manufacturers.
Details of purchases made through Cooter not revealed to competitors.
Cooter's office is as close as the phone on your desk. Orders may be phoned or wired in at Cooter's expense.

2. Market Information:

Up-to-the-minute reports on three fundamentals are necessary to insure a profitable pricing and supply program:

1. Crop conditions.
2. Price structure.
3. Available supply.

Cooter gives its customers all three of these completely and quickly through *Weekly Market Letter* containing latest summary of market conditions secured primarily by wire and phone. *Daily Postings* announcing new items, price changes, and data on available quantities. Cooter's nation-wide coverage gives it unequalled opportunity for a correct weighing of all the factors affecting market conditions. Their long experience in markets from coast to coast enables them to interpret local situations and allow for any peculiarities in a particular market. Such information is most valuable to both buyer and seller.

3. Advertising Counsel:

Long recognizing the principle that successful retail operation is of vital interest to both the manufacturer and wholesaler, THE COOTER PLAN is designed to follow the merchandise through from the manufacturer to

the consumer. The program developed to efficiently perform this function includes the following features:

Retailer Store Posters.

Mat Service to give added effectiveness to newspaper advertising.

Cooperative assistance in the preparation of handbills, radio copy, newspaper ads and general programs.

The above services are available at nominal costs.

4. The Grocer's Digest:

—a Cooter publication, is primarily a retailer's magazine. Mailed each month to more than 10,000 retail customers of wholesalers operating under The Cooter Plan. It is a medium to aid manufacturers in acquainting retailers with their wares. Each month the experiences of successful food operators are reported in its pages. Great care is exercised in preparing and editing each article to make it concise—useful—complete. All departments of the food industry are covered. Special emphasis is given to store modernization and low cost operations.

Cooter is constantly on the alert for plans and ideas to profitably increase the distribution and consumption of grocery products.

5. Controlled Brands:

Said advertising brochures set out the following Cooter Brands:

E–Z Kreem (Shortening)
Aunt Magda (Shortening)
Meal Time (Corn Starch)
Bel-Dine (All Items)
Moon Rose (All Items)
Nu-Crest (All Items)
Jonquil (Canned Fruits and Vegetables)
Happy Host (All Food Items Except Coffee, Tea & Spices)
Nu-Bowl (Bowl Cleaner)
Nu-Drain (Drain Opener)
Nu-Cloz (Bleach)
Nu-Cup (Coffee)
Nu-Lye (Lye)
Micky (Dog Food)
Washrite (Soap)

With regard to the foregoing Cooter Brands said advertising brochures also state:

The value of selling merchandise under buyer's label has long been recognized. All of the benefits resulting from promoting buyer's labels are retained under THE COOTER PLAN, together with the following additional advantages:

Exclusive sales franchise rights to customers covering their respective territory affording them the opportunity to promote brands now enjoying national distribution.

Wide selection of brands from which to choose.

Cooter carries label stock, relieving wholesaler of burdensome investment. Cooter creates consumer demand for its brands through advertising and other promotion programs. Cooter labels are attractively designed and act as silent salesmen on counter or shelf.

Definite standard of quality is maintained for each brand.

Franchises still available in a limited number of markets.

Insurance protection for wholesaler and retailer against any claim for damage account bodily injuries, illness or death resulting from the consumption of merchandise sold under Cooter Brands.

In carrying on his business as aforesaid, respondent Paul M. Cooter also addresses letters of solicitation to sellers applying for said sellers' accounts on a brokerage basis, and as a means of persuading the sellers' acceptance of respondent's application, he attaches or encloses in said letters, for the sellers' consideration, a group list of wholesaler grocers stated by respondent to be his customers. The attached or enclosed list, currently entitled "Customers on Daily Mailing List," while not inclusive of all the respondent's customers, discloses some 200 wholesale grocer concerns, branches and affiliates, located and doing business in 35 States. Respondent Paul M. Cooter's current letters of application to sellers, among other things, ask to offer the sellers' merchandise on a brokerage basis to respondent Paul M. Cooter's select group of wholesaler grocer customers located in various States throughout the United States as appearing on the attached or enclosed list. The seller is advised that respondent's said customers are contacted daily by mail, telephone or wire communication and also through means of periodic visits by respondent's visiting representatives and by general customer meetings. The seller is also assured that respondent is confident that use of the respondent's organization will greatly aid the distribution of the seller's products. The seller is further informed of respondent's controlled, private or buyers' labels or brands and is requested to inform the respondent as to whether the seller is willing to sell its merchandise under or bearing respondent's said labels or brands, and, if so, what label allowance the seller will accord the respondent where respondent's said labels or brands are substituted for those of the seller on the seller's said merchandise.

It is the practice of respondent Paul M. Cooter, in doing business as hereinbefore described, upon the request of his wholesale grocer customers, and otherwise, to contact sellers named by said customers and also to canvass the seller market on the customers' behalf, in an effort to secure the merchandise of the sellers or the merchandise of other sellers of a quality or at a price meeting or bettering those offered respondent's said customers, or the competitors of such customers, by brokers acting for the named sellers or for other sellers.

In addition to employing sub-brokers and furnishing to his wholesale grocer customers the purchasing, merchandising and other services and (formerly) providing such customers with the advertising expenditures described in paragraphs preceding, respondent Paul M. Cooter also employs missionary or field men to contact affiliated retail grocer groups for and on behalf of said respondent's wholesale grocer customers. Such missionary or field men are recommended for employment to respondent Paul M. Cooter by the wholesale grocer

customers in whose territory they are to be employed and when so employed and paid by respondent Paul M. Cooter said missionary or field men are engaged in the promotion and sale to the retail grocer concerns affiliated with respondent's wholesale grocer customers of merchandise under or bearing the private or buyers' labels or brands owned or controlled by respondent Paul M. Cooter and sponsored by respondent's said wholesale grocer customers. The relationship existing between respondent Paul M. Cooter and his wholesale grocer customers is further illustrated by the fact that prior to September 2, 1943, said respondent Paul M. Cooter paid the traveling and hotel expenses of said customers from their respective places of business for individual and group business meetings of such customers with respondent Paul M. Cooter and his organization in Chicago, Illinois, and San Francisco, California. Most of these wholesalers are still buyers of merchandise packed under labels owned or controlled either by respondent Paul M. Cooter, by the seller or by the buyer, and on such transactions respondent Paul M. Cooter continues to receive brokerage payments from the sellers.

Respondent Paul M. Cooter, doing business as hereinbefore described, upon occasion has also purchased merchandise from sellers for said individual respondent's own account. Prior to July 3, 1940, respondent Paul M. Cooter, doing business as hereinbefore described, was a shareholder, director and the president of Ridenour Baker Mercantile Company, a wholesale grocery concern of Oklahoma City, Oklahoma, which said concern was a shareholder in Merchants Service Corporation and in respondent Recorg Supply Corporation, and which concern was a customer of said respondent Paul M. Cooter.

PAR. 8. Respondent Paul M. Cooter, doing business as herein described, on said individual respondent's own account and on merchandise purchase orders originated by respondent for or received from respondent's wholesale grocer customers located throughout the various States of the United States, has transmitted or caused to be transmitted to sellers located in States other than and including the State or States in which said respondent and his said customers were located, purchase orders pursuant to which said sellers have sold and shipped and transported, or caused to be shipped and transported, merchandise from the State or States wherein located, into and through the various States of the United States to purchasers thereof in the State or States of their respective locations.

In such transactions and in other and similar transactions wherein merchandise purchase orders were transmitted directly by the wholesale grocer customers of respondent Paul M. Cooter to the sellers, respondent Paul M. Cooter has received and accepted commissions,

brokerage or other compensation, allowances or discounts in lieu thereof, from the sellers in said transactions.

On merchandise purchase orders originated by respondent Recorg Supply Corporation for or received from respondent Recorg Supply Corporation wholesale grocer shareholders, respondent Paul M. Cooter or respondent Paul M. Cooter's wholesale grocer customers, respondent Recorg Supply Corporation, doing business as hereinbefore set out, has transmitted or caused to be transmitted to sellers located in States other than and including the State or States in which respondent Recorg Supply Corporation, respondent Recorg Supply Corporation's wholesale grocer shareholders, respondent Paul M. Cooter and respondent Paul M. Cooter's wholesale grocer customers were located, purchase orders pursuant to which said sellers have sold and shipped and transported, or caused to be shipped and transported, merchandise from the State or States wherein located, into and through the various States of the United States, to the purchasers thereof in the State or States of their respective locations.

In such transactions and in other and similar transactions occurring prior to about March 13, 1944, wherein merchandise purchase orders were transmitted directly by respondent Recorg Supply Corporation wholesale grocer shareholders to the sellers, respondent Recorg Supply Corporation received and accepted commissions, brokerage or other compensation, allowances or discounts in lieu thereof, from the sellers in said transactions.

PAR. 9. In the receipt and acceptance from sellers directly, and (prior to about September 22, 1943) through and by means of respondent Recorg Supply Corporation indirectly, of commissions, brokerage, or other compensation, allowances or discounts in lieu thereof, on purchases from sellers by respondent Paul M. Cooter, the former wholesale grocer shareholders of the since dissolved Merchants Service Corporation, respondent Recorg Supply Corporation and said respondent corporation's wholesale grocer shareholders, the wholesale grocer shareholders of Volunteer Stores, Inc. of America, and the wholesale grocer customers of respondent Paul M. Cooter, of merchandise in the manner and under the circumstances hereinbefore set forth and described, respondent Paul M. Cooter acted in such transactions other than as an agent, representative or intermediary therein, acting in fact for or in behalf or subject to the direct or indirect control of the sellers of said merchandise.

In such transactions said respondent Paul M. Cooter acted in fact for and in behalf of himself, the former wholesale grocer shareholders of the since dissolved Merchants Service Corporation, respondent Recorg Supply Corporation and said respondent corporation's whole-

sale grocer shareholders, the wholesale grocer shareholders of Volunteer Stores, Inc. of America, and the wholesale grocer customers of respondent Paul M. Cooter, and, contrary to said respondent's contentions, no services were rendered to the sellers by him in connection with the sale of said merchandise except for such incidental services in the form of benefits as may have accrued to the sellers in not having to seek other outlets for merchandise sold through said respondent.

In the receipt and acceptance from sellers of commissions, brokerage, or other compensation, allowances or discounts in lieu thereof, on purchases from sellers by respondent Recorg Supply Corporation, respondent Recorg Supply Corporation wholesale grocer shareholders, respondent Paul M. Cooter and the wholesale grocer customers of respondent Paul M. Cooter, of merchandise in the manner and under the circumstances hereinbefore set forth and described, respondent Recorg Supply Corporation acted in such transactions other than as an agent, representative or intermediary therein, acting in fact for or in behalf, or subject to the direct or indirect control, of the sellers of said merchandise.

In such transactions said respondent Recorg Supply Corporation and its officers and directors acted in fact for and in behalf of themselves, respondent Recorg Supply Corporation wholesale grocer shareholders, respondent Paul M. Cooter and the wholesale grocer customers of respondent Paul M. Cooter, and no services were rendered to the sellers by the said respondent Recorg Supply Corporation and its officers and directors in connection with the sale of said merchandise.

CONCLUSION

The receipt and acceptance by respondent Paul M. Cooter and by respondent Recorg Supply Corporation and its officers and directors of the above described commissions, brokerage or other compensation, and allowances or discounts in lieu thereof, in the manner and under the circumstances described, constitute violations of sub-section (c) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the respondents' substitute answers, a stipulation as to testimony entered into by and between counsel in support of the complaint and respondent Paul M. Cooter, briefs, oral argument and reargument of opposing counsel, said substitute answers admitting, with certain exceptions, all of

the material allegations of fact set forth in the complaint and providing in part that the Commission may, without the holding of hearings, the taking of testimony, the adduction of other evidence, and without intervening procedure, hear this matter upon the complaint, the substitute answers, the stipulation and briefs and oral argument of opposing counsel, and proceed to make and enter its findings as to the facts, including inferences and conclusions based thereon, and enter its order disposing of this proceeding; and the Commission having made its findings as to the facts and its conclusion that the respondents have violated the provisions of subsection (c) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U. S. C. Title 15, Sec. 13):

It is ordered, That respondent Paul M. Cooter, and his agents, representatives and employees, directly or through any corporate or other device, in or in connection with the purchase of grocery products or other commodities in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon any purchase for the account of said respondent Paul M. Cooter or in connection with any purchase wherein said respondent acts in fact for or in behalf or subject to the direct or indirect control of any party to the transaction other than the seller; and from transmitting, paying or granting, directly or indirectly, in the form of money or credits or in the form of services or benefits provided or furnished, to any buyer or to respondent Recorg Supply Corporation, any commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, received on purchases for such buyer's account.

It is further ordered, That respondent Recorg Supply Corporation, its officers and directors, J. W. Herscher, Wm. H. Tyler, Neil A. McKay, L. H. Joannes, Max A. Kuehn, H. L. Miller, R. B. Wiltsee and Jas. A. Scowcroft, and their agents, representatives and employees, directly or through any corporate or other device, in or in connection with the purchase of grocery products or other commodities in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller or from respondent Paul M. Cooter, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon any purchase for the account of respondent Paul M. Cooter, respondent Recorg Supply Corporation, or any stockholder of

respondent Recorg Supply Corporation, or upon any purchase negotiated by or through said respondent Recorg Supply Corporation.

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

Commissioner Mason not concurring.

Syllabus

IN THE MATTER OF

CARPEL FROSTED FOODS, INC., ET AL.

COMPLAINT, FINDINGS, ORDER AND COMMISSION AND DISSENTING OPINIONS IN REGARD TO THE ALLEGED VIOLATION OF SUBSEC. (C) AND SUBSEC. (D) OF SEC. 2 OF AN ACT OF CONGRESS APPROVED OCT. 15, 1914, AS AMENDED BY AN ACT APPROVED JUNE 19, 1936

Docket 5482. Complaint, Feb. 7, 1947—Decision, Dec. 13, 1951

The Commission is informed of no law or public policy which gives to businessmen of any class or size immunity from the requirements of the law, or which condones discriminatory practices in conflict with statutory provisions, as involved in the question of possible economic injury to a large number of independent retail grocers, members of a cooperative buying agency, through the ordered discontinuance of certain unlawful discriminatory payments. The law applies to the chains, to groups of independent grocers who operate together, and to any single grocer, large or small, who may engage in unlawful practices, and the Commission is without authority to exclude from its operation the practices of any individuals or groups who may seek or obtain advantages over their competitors by unlawful means.

As regards operations under a contract which was challenged under the provisions of subsecs. 2 (c) and 2 (d) of the Clayton Act and which involved payment of a lump sum to a cooperative corporate purchasing agency for two types of activities, namely, (1) activities directed to inducing its members to purchase and stock the products of the contractor, and (2) others having to do with advertising and promotional services to facilitate the resale of the contractor's products to the consuming public, said activities were of a distinctively different character and involved important differences in their competitive and legal effects, in that the advertising and promotional services were to stimulate the resale of said contractor's products to consumers *after* the products reached the retailer's store, had nothing to do with brokerage or with "the prerogatives of the broker class," and did not involve violation of subsection 2 (c).

As concerns the expression of an opinion or the giving by an individual member of the staff or the Commission of advice which proves to be in conflict with the Commission's own determination, the Commission would be unfaithful to its public trust if it should consider that its hands are tied in any sense thereby.

The responsibility of decision is upon the Commission alone, and its decisions can be reached only by majority action and in proper circumstances, and, even in such cases, may be altered to avoid injustice or to protect the public interest, since "it must not be forgotten that the Commission is not a private party, but a body charged with the protection of the public interest; and it is unthinkable that the public interest should be allowed to suffer as a result of inadvertence or mistake on the part of the Commission or its counsel where this can be avoided."

Where a corporation which was engaged in the sale and distribution of frozen foods and frozen dog food to retail stores in the District of Columbia and

adjacent areas of Virginia and Maryland, and had entered into a contract with a nonprofit corporate purchasing agent for its 275 retail grocer members, whereby it undertook to pay said agent four percent on each year's sales of its said agent's members, or, if greater, a specified lump sum; to sell the member stores at prices no higher than charged other similar retail outlets; and, in case of shortage, to prorate supplies; and said purchasing agent—which maintained a central warehouse, bought in large quantities and resold to its members at cost plus a mark-up of five or six percent to cover estimated costs of warehousing, overhead and distribution, assessed monthly dues on each member to cover contingent or unexpected expenses, and, at the end of the year, distributed any surplus to the members in proportion to their purchases from it—agreed, among other things, to aid in promoting the sale of said products to its members; to include, in its own advertising, at least one of said frozen food items, each week, at the other's expense; and not to sponsor or advertise any competitive brands of frosted food items;

Following a new contract with said agent whereby, in consideration of the payment of an annual lump sum by it to said purchasing agent, latter undertook to promote and increase purchases by its owner members from said seller, through furnishing the latter with the list of its members, advising as to the brands of frosted food each member carried, advising when a member decided to put in a line of frosted foods, keeping the list current, and bulletinizing its members once each week with information about and urging the purchase of said seller's merchandise—

(a) Made payments to said agent or buyers' intermediary, acting for and in their behalf and under their direct and indirect control, in the nature of a commission or brokerage, with the purpose and effect of increasing, or preventing decrease of, purchases by the buyers from the paying seller; and

Where said purchasing cooperative, pursuant to said contract, under which the individual members were free to and did buy other brands than said seller's—

(b) Received and accepted, as such intermediary, payments in consideration of services which were in the nature of a broker's functions and the benefits of which, insofar as distributed as refunds or rebates, inured to the benefit of the members generally, including both those who purchased the products of said seller and the 40 per cent who did not:

Held, That the paying and granting of the aforesaid commissions, or fees or allowances, by said seller to said buyers' agent and intermediary, and their receipt and acceptance by said agent and intermediary, under the circumstances set forth, were in violation of subsection 2 (c) of the Clayton Act as amended; and

Where said seller, which sold five to seven percent of its products to four chain store concerns, twelve per cent to more than one-half of the 275 member stores of said cooperative and the remainder to one other cooperative and to 300 to 350 independently owned and operated grocery stores, who were engaged in competition with one another and with other customers of said seller in the resale of said seller's frosted foods;

In further carrying out said contract whereby said cooperative also undertook, in consideration of said lump sum payment, to assist in displaying to good advantage said frozen food items; in posting streamers furnished by said

seller to the members of said cooperative; and to set aside a specified space in its regular local newspaper advertisements for the advertisement, at said seller's expense, of its frozen food item; and under which said seller was free to enter into similar contracts with other customers on the same or proportionally equal terms, and did discuss tentatively with said chain stores and the other cooperative customer the possibility of granting them a promotional allowance or payment—

(c) Regardless of whether similar payments were actually offered to said chain stores and said other cooperative, contracted to and did pay for the benefit of customer members of said cooperative, substantial sums of money for advertising and promotional services which were furnished by said purchasing agent and intermediary and which facilitated the resale of said seller's products by said customers to the consuming public, without making available, either through proportional offer, allowance, etc., or general offer to all customers of graduated payments for proportionally graduated services, such payments on proportionally equal terms to said independently owned and operated stores which competed with said customer members in the resale of said seller's products and constituted, both numerically and by volume, the bulk of its customers:

Held, That the contracting for the payment and the payment of sums of money by said seller for the benefit of some favored customers as compensation for advertising and promotional services furnished by their agent, in connection with the resale of said seller's food products, without making such payments available on proportionally equal terms to said favored customer's competitors in the resale of such products, was violative of subsection (d) of Sec. 2 of the Clayton Act as amended by the Robinson-Patman Act.

Payments for advertising and promotional services, which are not unlawful *per se* under the provisions of subsec. 2 (d), were found unlawful in the instant case because not made available on proportionally equal terms to or for the benefit of others engaged in the resale of the seller's products in competition with the members of a cooperative, so that latter received substantial advantages over their competitors and there resulted a discrimination specifically prohibited by the Act. The Commission, therefore, as respects the rights of a cooperative purchasing agency to educate its member owners through making available the trained assistance of professional merchandisers and thus put them in the same class with chain stores in selling to consumers, did not, in the instant matter, condemn such aids to small business as the exclusive prerogative of the broker class.

With regard to the contention that the contract concerned evidently satisfied the Commission because it was in operation with no objection for three years between the beginning of the practices and the issuance of complaint, said lapse of time represents a situation which too often occurs as a result of limited facilities, the general pressure of other work, and the necessity for careful consideration and appraisal before determining that corrective action is required.

As concerns respondent seller's contention that the two contracts were executed by it in good faith to meet a competitive offer, it appearing, among other things, that when they were executed frosted foods were in short supply and it had more difficulty in supplying the demand than in making sales; that under the Government's fixed gross margin on frozen food of 19 percent of

sales price, seller had a maximum margin of six percent; that the earlier long term contract eliminated competition instead of meeting it; that there was no evidence that the vague offer of five percent of an unknown sales volume, for an unknown time, by an unknown competitor, for unknown services, was a continuing one down to the execution of the later contract; and that payments in said second contract were not related to sales volume:

The Commission concluded that Carpel entered into said contracts more as an exclusive bid for long range business than as a defensive act to prevent specific loss of sale; and accordingly found that respondent had not rebutted the prima facie case made against it by a showing that said contracts were entered into by it in good faith to meet a competitive offer by a competitor.

As respects the testimony which, under the trial examiner's conduct of the case, sustained by the Commission, was physically in the transcript without becoming legally a part of the formal record; had to do with conferences by respondents with the Commission's attorney who supervised the preliminary investigation; was the basis of a contention to the effect that the respondents acted in conformity with the opinion and advice of said attorney and that the Commission accordingly was guilty of some impropriety or immorality in proceeding against said respondents; and in which connection it appeared, among other things, that said attorney carefully informed respondents that he could give no interpretation or expression of opinion which would be binding upon the Commission; that they understood such limitation upon his authority and were not lulled into any feeling that they could act with assurance upon the opinion received; and recognized that the legality of any practice in which they engaged in connection with the contract and its operation could properly be questioned by the Commission regardless of the view of any member of its staff:

The Commission was of the opinion that, regardless of the substance of the opinion and the degree of conformance therewith, it was neither legally nor morally binding upon it, and that in the matter in question it was unthinkable that violations of the law should be cloaked with any legal or moral immunity as the result of a preliminary, informal and carefully circumscribed opinion by an attorney on its staff.

Before *Mr. Frank Hier*, trial examiner.

Mr. Floyd O. Collins and *Mr. Philip R. Layton* for the Commission.

Buckley & Danzansky, of Washington, D. C., for Carpel Frosted Foods, Inc., Harry L. Carpel, Albert J. Carpel, Nathan Gumenick and John L. Brawner.

Whiteford, Hart, Carmody & Wilson, of Washington, D. C., for District Grocery Stores, Inc.

COMPLAINT

The Federal Trade Commission having reason to believe that Carpel Frosted Foods, Inc., a corporation, and Harry L. Carpel, Albert J. Carpel, Nathan Gumenick and John L. Brawner, individuals, and District Grocery Stores, Inc., a corporation, are now and have

been since August 29, 1944, as set forth in Count I hereof, violating the provisions of subsection (c) 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), and that Carpel Frosted Foods, Inc., a corporation, and Harry L. Carpel, Albert J. Carpel, Nathan Gumenick, and John L. Brawner are now and have been since August 29, 1944, as set forth in Count II hereof, violating the provisions of subsection (d) of section 2 of the Clayton Act as amended by the Robinson-Patman Act, approved June 19, 1936 (U. S. C. Title 15, Sec. 13), hereby issues its complaint in two counts, stating its charges in that respect as follows:

COUNT I

PARAGRAPH 1. Respondent Carpel Frosted Foods, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its home office and principal place of business located at 2155 Queens Chapel Road, N. E., Washington, D. C.

PAR. 2. Respondent Harry L. Carpel, whose address is 2155 Queens Chapel Road, N. E., Washington, D. C., is an individual and President and Director of respondent Carpel Frosted Foods, Inc.

Respondent Albert J. Carpel, whose address is 2155 Queens Chapel Road, N. E., Washington, D. C., is an individual and Secretary and Director of respondent Carpel Frosted Foods, Inc.

Respondent Nathan Gumenick whose address is 2155 Queens Chapel Road, N. E., Washington, D. C., is an individual and is Treasurer and Director of respondent Carpel Frosted Foods, Inc.

Respondent John L. Brawner, whose address is 2155 Queens Chapel Road, N. E., Washington, D. C., is an individual and is a Director of respondent Carpel Frosted Foods, Inc.

The hereinabove named individual respondents own all the stock of the respondent Carpel Frosted Foods, Inc., and promulgate, direct and control the transactions, practices and business policies of the respondent Carpel Frosted Foods, Inc.

PAR. 3. Respondent Carpel Frosted Foods, Inc., under the supervision and control of the individual respondents named in Paragraph Two hereof, is now and has been since before the year 1944, engaged in offering for sale, selling and distributing frosted foods, dog foods and frozen vegetables to wholesale and retail stores located in the several States of the United States and in the District of Columbia. Respondent, when sales are made, transports or causes said products to be transported from its place of business located in the District of Columbia to the purchasers thereof located in the several States of the United States and in the District of Columbia. Respondent has at

all times herein mentioned carried on a constant course of trade in commerce in said products as hereinabove set forth.

PAR. 4. District Grocery Stores, Inc., is a nonprofit sharing corporation, organized and existing under and by virtue of the laws of the State of Delaware, and has its principal office and a warehouse located at 304 Fourth Street, N. W., Washington, D. C. The activities and operations of said District Grocery Stores, Inc., are under the control and direction of its members and the profits derived from the operation of the said District Grocery Stores, Inc., are for the benefit of its members.

Some of the functions of said District Grocery Stores, Inc., are to buy groceries and other products at wholesale and to resell to its members at cost; to enter into contracts with manufacturers, jobbers, and wholesalers for the purchase of groceries and other products for and on behalf of itself and its members; and to otherwise promote and protect the interest of its members.

The membership of the District Grocery Stores, Inc., is composed of approximately 263 grocers who own grocery stores located in the District of Columbia and the territory adjacent thereto. Said members are engaged in the sale and distribution at retail of groceries and other products among which are frosted foods, dog foods, and frozen vegetables. In the operation of their respective businesses the District Grocery Stores, Inc., and its members are in direct and substantial competition with other corporations, firms and partnerships located in the District of Columbia and in the territory adjacent thereto.

PAR. 5. On the 28th day of August, 1944, the respondent Carpel Frosted Foods, Inc., entered into a contract with the District Grocery Stores, Inc., in the following words and figures to-wit:

CONTRACT

This AGREEMENT entered into this the 28th day of August 1944 between the District Grocery Stores, Inc., a corporation organized and existing under the laws of Delaware, herein styled D. G. S. and the Carpel Frosted Foods, Inc., a corporation organized and existing under the laws of the State of Delaware, herein styled the Company,

WITNESSETH:

1. The Company agrees to pay to the D. G. S. four percent on all sales of frosted fruits and vegetables and dog foods made to the members of the D. G. S. The first payment shall be made one month from the signing of this agreement and subsequent payments shall be made on the same date in each month thereafter during the term of this contract.

2. The Company agrees to furnish monthly to the D. G. S. copies of invoices or other proper evidence of sales of all frosted foods made to members of said D. G. S.

3. The Company agrees to deliver frosted foods direct to each store, and at prices which shall in no case be in excess of those charged other similar retail outlets for like commodities.

4. The Company agrees that in case of extreme shortage of frosted foods all D. G. S. members shall receive their pro rata share, on the basis of their former purchases.

5. The D. G. S. agrees to furnish the Company with an appropriate letter of introduction for each of its salesmen, requesting cooperation from the members of said D. G. S.

6. The D. G. S. agrees to send out by special delivery an introductory letter advising the members of the arrangement hereby made and requesting cooperation from the D. G. S. stores.

7. The D. G. S. agrees to furnish the Company with a complete list of all D. G. S. stores that carry frosted foods and to keep the Company advised of any new stores that may be added.

8. The D. G. S. agrees to include in its advertisements at least one frosted food item of the Company each week, the item to be included to be agreed upon by the parties hereto. The cost of advertising all such items shall be borne by the Company at national lineage rates.

9. The D. G. S. agrees to bulletinize its members periodically advocating increase purchases from the Company.

10. It is expressly understood and agreed between the parties hereto that the sum of money to be paid to the D. G. S. by the Company hereunder shall be not less than Five Thousand Dollars ($5,000.00) per annum, and in the event the four percent on purchases provided for in Article 1 hereof does not aggregate that sum annually, the deficit shall be made up by the Company at the end of each year this contract is in effect.

11. The D. G. S. agrees that it will not sponsor or advertise any brands of frosted foods, fruits, vegetables, or dog foods, that are competitive with those of the Company.

12. It is understood and agreed that the D. G. S. will carry in the warehouse all frosted fruits and vegetables items being sold by the Carpel Frosted Foods, Inc., as soon as facilities for handling same are available, and that an adjustment in the percentage paid to the D. G. S. will be made by the Company commensurate with the increased cost of warehousing to the D. G. S. and the corresponding savings to the Company.

13. This contract shall be and remain in force and effect for three years from and after the date of its execution, and for an additional period of three years thereafter, unless the D. G. S. or the Company shall give to the other a written notice of its desire to terminate the agreement at least ninety (90) days prior to the date of expiration of this contract.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals the date hereinbefore set forth.

DISTRICT GROCERY STORES, INC.

SEAL

CARPEL FROSTED FOODS, INC.

SEAL

Subsequently, on the 30th day of November, 1944, respondent Carpel Frosted Foods, Inc., entered into another contract with the District Grocery Stores, Inc., in words and figures as follows, to-wit:

AGREEMENT

THIS AGREEMENT Made this 30th day of November, 1944, by and between the DISTRICT GROCERY STORES, INC., a corporation organized and existing under the laws of the State of Delaware, and engaged in business in the District of Columbia, hereinafter called D. G. S., Party of the First Part, and the Carpel Frosted Foods, Inc., a corporation likewise organized and existing under the laws of the State of Delaware, and engaged in business in said District, hereinafter called the Company, Party of the Second Part;

WITNESSETH:

The Parties hereto have mutually agreed, and do hereby mutually agree as follows:—

(1) The D. G. S. agrees to sponsor and promote among its members the sale of the Company's dog foods and its frozen foods, which are packed and sold under the trade-mark "Carpel Frosted Foods."

(2) The services to be rendered by D. G. S. hereunder shall consist of the following:

(a) The D. G. S. agrees to include in its bulletins at least once a week information pertaining to and advocating the promotion of said foods.

(b) The D. G. S. will furnish the Company a complete list of its members, and will note next to each name the various brands of Frosted Foods each carries and while D. G. S. will endeavor to supply accurate information in this respect, it is understood and agreed that D. G. S. shall not be responsible for the accuracy of such information.

(c) As new members are admitted to the D. G. S. the latter agrees to furnish the Company with the names and locations of any such new members.

(d) Should any of the members of the D. G. S. who are not selling frozen foods decide to handle and sell the same, the D. G. S. will convey such information to the Company as soon as D. G. S. receives notice of the same.

(e) D. G. S., through its supervisors, will assist its members in displaying to good advantage the Company's Frozen Foods, and will likewise assist in posting any streamers furnished by the Company to members of the D. G. S., in such places as will be likely to increase the sale of and consumer demand for the Company's products.

(f) The D. G. S. will make available to the Company each week a space equal to 42 lines in its regular advertisements in local newspapers, the item to be included to be agreed upon by the parties hereto. The cost of advertising all such items shall be borne by the Company at local rates.

(3) In consideration of the foregoing promotion services to be rendered by D. G. S. to the Company, the latter agrees to pay to D. G. S. the sum of Five Thousand ($5,000.00) Dollars annually, payable quarterly.

(4) Nothing contained in this contract shall be construed to prevent the Carpel Company from entering into similar contracts with other persons, firms or corporations on the same or proportionally equal terms to its customers.

(5) That nothing contained in this contract shall be construed to prevent the individual members of the D. G. S. from purchasing frosted foods or frozen

food products from any other manufacturer or wholesaler selling other named brands of frosted or frozen food products.

(6) The provisions of this contract shall be binding upon and shall enure to the benefit of the parties hereto and their respective successors and assigns.

(7) This contract shall be and remain in full force and effect for a period of three (3) years from the date hereof.

IN WITNESS WHEREOF, the parties hereto have cause these presents to be signed in their respective corporate names, by their respective officers thereunto duly authorized, and their respective corporate seals to be affixed, attested by their respective secretaries, all done the day and year first hereinbefore written.

DISTRICT GROCERY STORES, INC.
By /s/ Paul D. Kerman
President

ATTEST: /s/ _____
Secretary

CARPEL FROSTED FOODS, INC.
By /s/ Harry L. Carpel
President

ATTEST: /s/ Albert J. Carpel
Secretary

Pursuant to, and carrying out, said contracts with respondent, the District Grocery Stores, Inc., on the 5th day of September, 1944, sent a letter to each of its members in words and figures as follows, to-wit:

Dear Member:

Your warehouse has just concluded an agreement with Carpel Frosted Foods, Inc., for the distribution to our stores of Carpel Frosted Foods. Before entering into this agreement every consideration was given to all factors from the members' point of view.

The Carpel Company is at present serving the greater majority of our stores and from all indications is doing a very good job. It also appears that during the period of extreme shortages the Carpel Company was in a better position to serve our stores with more of the critical items than most of the other frosted food distributors.

We have been assured by Mr. Carpel that his company intends to aggressively advertise their products and thus create greater consumer demand. The D. G. S. will assist in this program by periodically featuring some of their products in our own advertising.

Effective from September 1, every six months you will receive a credit of two percent *from the warehouse* on all of your purchases of frosted foods from the Carpel Company.

By this time I am sure that most of us realize that frosted foods are here to stay and that they will grow in demand and expand in variety from now on.

Your organization has the right to expect your full cooperation in this matter and can only assure you that if you back your warehouse one hundred percent, many other deals can be worked out to your advantage.

At the time of the consummation of said contract the District Grocery Stores, Inc., was not, and at no times thereafter has been, equipped to handle frosted foods, and while said contracts were executed by and

in the name of the District Grocery Stores, Inc., the proceeds and advantages were for the ultimate benefit of the members of the District Grocery Stores, Inc., and the District Grocery Stores, Inc., in the entering into and consummating of said contracts and receiving the specified payments thereunder, was acting as an intermediary, agent and representative of its members, and at the time of entering into said contracts and receiving said payments it was under the control and supervision of its members.

PAR. 6. When the respondents Carpel Frosted Foods, Inc., Harry L. Carpel, Albert J. Carpel, Nathan Gumenick and John L. Brawner acted in compensating the District Grocery Stores, Inc., and the District Grocery Stores, Inc., acted in receiving said compensation, the latter was acting as an intermediary, agent and representative of and acting for and on behalf of its members, as hereinabove set forth, in connection with the sale and distribution in commerce of the products hereinabove specified.

PAR. 7. The paying and granting by respondents Carpel Frosted Foods, Inc., Harry L. Carpel, Albert J. Carpel, Nathan Gumenick and John L. Brawner, and the receipt and acceptance by respondent District Grocery Stores, Inc., of the above described commissions, brokerage and other compensation, allowances or discounts in lieu thereof in the transactions and in the manner and under the circumstances hereinbefore set forth, are in violation of subsection (c) of section 2 of the Clayton Act as amended by the Robinson-Patman Act (U. S. C. Title 15, Sec. 13), approved June 19, 1936.

COUNT II

PARAGRAPH 1. As and for Paragraph 1 of this Count II of its complaint against the respondents Carpel Frosted Foods, Inc., Harry L. Carpel, Albert J. Carpel, Nathan Gumenick and John L. Brawner, the Federal Trade Commission adopts, incorporates by reference and makes as a part hereof, as fully as though set out verbatim herein, all that part of Count I of this complaint down to and including Paragraph 5 of said Count I, and further charges:

PAR. 2. That many of respondents' other customers located in the District of Columbia and the territory adjacent thereto are engaged in the sale and distribution of frozen foods, dog foods and frozen vegetables, and with such other customers the District Grocery Stores, Inc., and its members are in direct and substantial competition.

PAR. 3. The payment, promises and consideration given to the District Grocery Stores, Inc., and its members, as herein set forth,

were not by the respondents made available to such of its other customers on proportionally equal terms.

PAR. 4. The acts and practices of the respondents Carpel Frosted Foods, Inc., a corporation, and Harry L. Carpel, Albert J. Carpel, Nathan Gumenick and John L. Brawner, in contracting with and making the promises and payments to District Grocery Stores, Inc., as set forth hereinabove, when like contracts, promises and payments were not made available to its other customers on proportionally equal terms, constitute violations of section 2 (d) of the Robinson-Patman Act.

REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (Clayton Act), as amended by an Act of Congress approved June 19, 1936 (Robinson-Patman Act), and by virtue of the authority vested in the Federal Trade Commission by the aforesaid Act, the Federal Trade Commission, on February 7, 1947, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging all of them in Count I thereof with violation of the provisions of subsection (c) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act and charging the respondents Carpel Frosted Foods, Inc., Harry L. Carpel, Albert J. Carpel, Nathan Gumenick, and John L. Brawner in Count II thereof with violation of the provisions of subsection (d) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act. After the issuance of said complaint and the filing of respondents' answers thereto, testimony and other evidence in support of and in opposition to the allegations of said complaint were taken before a trail examiner of the Commission theretofore duly designated by it, and said testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter this proceeding regularly came on for final hearing before the Commission upon the complaint, answers thereto, testimony and other evidence, recommended decision of the trial examiner and exceptions filed thereto, and briefs and oral argument of counsel; and the Commission, having duly considered the matter and having entered its order disposing of the exceptions to the trial examiner's recommended decision, and being now fully advised in the premises, makes this its findings as to the facts and its conclusion drawn therefrom:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Carpel Frosted Foods, Inc., is a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2155 Queens Chapel Road, N. E., Washington, D. C.

PAR. 2. Respondent Harry L. Carpel, residing at 1705 Webster Street, N. W., Washington, D. C., is president and a director of Carpel Frosted Foods, Inc.

PAR. 3. Respondent Albert J. Carpel, residing at 3731 Fessenden Street, N. W., Washington, D. C., was, at the time of the filing of the complaint and during all but the last hearing in this case, secretary, general manager, and a director of Carpel Frosted Foods, Inc., but is now no longer connected with said corporation.

PAR. 4. Respondent Nathan Gumenick, residing at 1704 Altamont Avenue, Richmond, Virginia, is a nominal director of Carpel Frosted Foods, Inc., but took no active part in its management and had no knowledge of the facts involved in this proceeding.

PAR. 5. Respondent John F. Brawner, incorrectly named in the complaint as John L. Brawner, residing at 4500 28th Street, N. W., Washington, D. C., is a nominal director of Carpel Frosted Foods, Inc., but took no active part in its management and had no knowledge of the facts involved in this proceeding.

PAR. 6. Respondent Carpel Frosted Foods, Inc., was, during the period involved in this proceeding, managed and controlled by the abovenamed individual respondents Harry L. Carpel and Albert J. Carpel, and its acts and practices were at their direction and under their control.

PAR. 7. Respondent Carpel Frosted Foods, Inc., is now, and for six years last past has been, engaged in the sale and distribution of frozen foods and frozen dog foods to retail stores located in the District of Columbia and in those parts of the States of Virginia and Maryland adjacent thereto. Said respondent, when sales are made, transports, or causes to be transported, said products from its place of business in the District of Columbia to purchasers thereof located in the several States of the United States and in the District of Columbia. Said respondent maintains, and at all times herein mentioned has maintained, a course of trade in said food products in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 8. Respondent District Grocery Stores, Inc., is a nonprofit corporation without capital stock, organized and existing under and by virtue of the laws of the State of Deleware, with its principal office

and warehouse located at 304 Fourth Street, N. W., Washington, D. C. Its operations are under the immediate control of its officers and board of directors, who are elected annually by the two hundred and seventy-five retail store owners who comprise its membership. Operating capital comes from a uniform entrance assessment. Each member has the same financial interest and the same vote in the corporation. Each director and officer must also be a store owner. The members are all located in the District of Columbia and adjacent parts of the States of Virginia and Maryland and are all engaged in the retailing of groceries.

PAR. 9. District Grocery Stores, Inc., is a purchasing cooperative for its membership, maintaining a central warehouse, buying in large quantities, and reselling to its members at cost plus a mark-up of five or six percent, estimated in advance, to cover costs of warehousing, overhead, and distribution. It also assesses monthly dues of $12.00 on each member to cover contingent or unexpected expenses. Other income is derived from cooperative advertising arrangements with its suppliers. All monies are carried in one general fund and there are no profits as such, but any surplus at the end of the year, remaining from all income less operating expenses, is distributed to all members in proportion to their year's purchases from District Grocery Stores, Inc. The latter does not enter into any purchase contracts for and on behalf of its members as such, but only contracts for itself. Members are not compelled to buy any particular commodity, or in any particular quantity, but no sales are made to outsiders except distress or perishable merchandise. Members, however, follow the cooperative's sponsorship as to brands and products.

PAR. 10. In the operation of their respective businesses, District Grocery Stores, Inc., and its members are in direct and substantial competition with other corporations, firms, partnerships, and individuals similarly engaged in the District of Columbia and those parts of the States of Virginia and Maryland adjacent thereto. Between fifty and sixty percent of the membership sell frozen food items.

PAR. 11. On August 28, 1944, District Grocery Stores, Inc., and Carpel Frosted Foods, Inc., entered into a contract whereby the latter agreed to pay the former four percent on all sales of frosted food items and frozen dog foods made by Carpel Frosted Foods, Inc., to the member stores of the District Grocery Stores, Inc., or $5,000.00, whichever sum was the greater, per year for a period of three years; said contract to be automatically renewable for a period of an additional three years unless ninety days' notice was given, by either party, of intention to terminate at the end of the initial three-year period.

Under this contract Carpel Frosted Foods, Inc., agreed to furnish proper evidence of sales to members of District Grocery Stores, Inc.; agreed to deliver frosted foods direct to each store at prices no higher than those charged other similar retail outlets; and agreed in case of a shortage to prorate supplies on the basis of past purchases. On its part, District Grocery Stores, Inc., agreed to furnish Carpel Frosted Foods, Inc., with a letter of introduction for each of Carpel's salesmen, requesting cooperation from the membership, and also agreed to send its membership a special delivery letter advising of the arrangement; agreed to furnish the seller a complete list of all its stores which carried frosted foods, and to keep that list current; agreed to "bulletinize" its members periodically, advocating increased purchases of Carpel's frosted food items; agreed to include in its own advertisements at least one Carpel frosted food item each week, the cost of such advertising to be borne by Carpel Frosted Foods, Inc., separately; and further agreed that it would not sponsor or advertise any competitive brands of frosted food items. It was further agreed that the District Grocery Stores, Inc., would carry in its warehouse a stock of Carpel frozen food items as soon as facilities became available, and that the four percent would be adjusted to compensate for the increased cost of warehousing and the corresponding savings to Carpel Frosted Foods, Inc.

PAR. 12. On September 5, 1944, District Grocery Stores, Inc., sent a letter to each of its members, advising them of the above-described agreement which had been entered into with Carpel Frosted Foods, Inc. In said letter the members were advised that District Grocery Stores, Inc., would periodically feature some of Carpel's products in its advertising, and that no other distributor of frosted foods had any selling arrangement with it. The members were also informed in said letter that effective September 1, 1944, each member would each six months receive a credit of two percent *from the warehouse* on the member's purchases of frosted foods from Carpel Frosted Foods, Inc.

PAR. 13. There is testimony that, because of the questioned legality of the afore-mentioned contract, the same was never put into force or operation, and that it was rescinded about thirty days after its signing. District Grocery Stores, Inc., did not notify its members of the rescission of said contract by letter, circular, or bulletin, but did verbally notify the members at a general meeting of the members held in September 1944.

PAR. 14. On November 30, 1944, Carpel Frosted Foods, Inc., and District Grocery Stores, Inc., entered into another contract whereby the latter agreed to sponsor and promote among its members the

sale of the former's products; to include in its membership bulletins at least once a week information pertaining to and advocating the promotion of said frozen food items; to furnish the former a complete list of its members, indicating the brands of frosted foods handled by each; to furnish the former with the names and locations of any new members admitted to the cooperative; to advise the former of any members embarking on the handling and selling of frozen foods; to assist in displaying to good advantage Carpel frozen food items and in posting streamers furnished by the former to its members; to set aside a space equal to forty-two lines in its regular local newspaper advertisements, for a frozen food item sold by the former, the cost of which advertising was to be borne entirely by the former at local rates; all in consideration for the payment by the former to the latter of $5,000.00 annually, payable quarterly. This contract further provided that Carpel Frosted Foods, Inc., could enter into similar contracts with others of its customers on the same or proportionally equal terms; that nothing therein was to prevent individual members of District Grocery Stores, Inc., from purchasing frosted foods from other sellers; and that the contract was to remain in force and effect for three years.

PAR. 15. This contract was carried out by both parties until cancellation shortly after the filing of complaint in this proceeding.

PAR. 16. Under the aforesaid contract dated November 30, 1944, no sales were made by Carpel Frosted Foods, Inc., to District Grocery Stores, Inc., but all contracts, sales, and deliveries were to and with the member stores. No statement was ever sent by the seller to the cooperative of the amount of the members' purchases. Such members, during the life of this contract, did sell other brands of frosted foods than those distributed by Carpel Frosted Foods, Inc., and only sixty percent of the members bought them. Payments made by Carpel Frosted Foods, Inc., to District Grocery Stores, Inc., were not distributed as such to the membership, but went into the general fund, and any refund or rebate therefrom inured to the benefit of the members not purchasing Carpel frosted food items, as well as to those who had so purchased.

PAR. 17. Part of the annual payment so made to District Grocery Stores, Inc., by Carpel Frosted Foods, Inc., was in consideration of "services" by the former in promoting and increasing purchases by its owners from the seller. Specifically, these "services" consisted of furnishing the seller with the list of all its members, advising as to the brands of frosted foods each carried, advising when a member decided to put in a line of frosted foods, keeping the list current, and

bulletinizing its members at least once each week with information about, and urging the purchase of, Carpel's merchandise. There was thus a payment made by the seller to an agent or intermediary of the buyers, acting for and on behalf of the buyers and under the buyers' direct or indirect control, in the nature of a commission or brokerage, the purpose and effect of which was to increase, or prevent decrease of, purchases by the buyers from the paying seller.

PAR. 18. Carpel Frosted Foods, Inc., sells five to seven percent of its products to four chain store concerns; twelve percent to more than one-half of the two hundred and seventy-five members of District Grocery Stores, Inc.; and the remainder to one other cooperative and to from three hundred to three hundred and fifty independently owned and operated grocery stores. All of such customers are located in the District of Columbia and areas of Maryland and Virginia adjacent thereto, and are engaged in reselling Carpel frosted foods to consumers therein. District Grocery Stores, Inc., advertises on behalf of its members in the daily newspapers circulated in that area. From these facts and the agreement of August 28, 1944, by Carpel Frosted Foods, Inc., to sell its products to the cooperative's membership at prices not in excess of those charged other retail customers, it is inferred, and therefore found, that the members of District Grocery Stores, Inc., in the aggregate and through it, are in competition with the other customers of Carpel Frosted Foods, Inc., in the Washington metropolitan area in the resale of Carpel frosted foods and that those members of the cooperative who purchase such products are in competition in the resale thereof with other customers of Carpel Frosted Foods, Inc.

PAR. 19. Sometime after the execution of the contract of November 30, 1944, Carpel Frosted Foods, Inc., discussed with its four chain store and one other cooperative customers the possibility of granting them a promotional allowance or payment. These discussions were tentative and never reached the stage of negotiation, being refused or postponed on first mention. There was no formulation by Carpel Frosted Foods, Inc., of the amount of payment, the kind or amount of services to be furnished therefor, or any other terms. No agreements resulted. At no time did Carpel Frosted Foods, Inc., make or contract to make, offer to make, or discuss the making of any promotional allowances or payments or any promotional arrangement or agreement with any of its other customers, nor was any general offer formulated and distributed to all of its customers, setting forth graduated payments for proportionally graduated services, enabling all of its customers to share in these promotional payments according to the kind and extent of service they could furnish.

PAR. 20. Thus, Carpel Frosted Foods, Inc., contracted to pay and did pay for the benefit of some of its customers—the members of District Grocery Stores, Inc.—substantial sums of money for advertising and promotional services furnished by the agent of those customers, facilitating the resale of its products by those customers to the consuming public, and, regardless of whether similar payments were actually offered to four chain stores and one cooperative, such payments were not made available on proportionally equal terms, or on any terms, to the bulk of its customers—both numerically and by volume, that is, the three hundred to three hundred and fifty independently owned and operated grocery stores who compete in the metropolitan Washington area with the cooperative's members in the resale of Carpel's products.

PAR. 21. As a defense to the charge in Count 11 of the complaint respondent Carpel Frosted Foods, Inc., claims that the aforesaid contracts of August 28, 1944, and November 30, 1944, were executed by it in good faith to meet a competitive offer by a competitor. With respect to this defense, the evidence shows that at the time the contracts were executed frosted foods were in short supply, and Carpel Frosted Foods, Inc., had more difficulty in supplying the demand than in making sales. No special inducement was needed to obtain or hold business. Also, at the time the said contracts were entered into, the gross margin on frozen foods was fixed by an agency of the United States Government at nineteen percent of sales price. The minimum cost to Carpel Frosted Foods, Inc., of doing business was twelve to thirteen percent of the sales price, leaving a maximum margin of six percent. The asserted offer of five percent to District Grocery Stores, Inc., by a competitor of Carpel Frosted Foods, Inc., could not have been believed by officials of Carpel Frosted Foods, Inc., familiar as they were with the above facts, especially when coupled with a refusal to name the offerer and in the absence of any information as to what services it was being offered for. No information was demanded or obtained as to the sales volume on which the five percent was computed, and some of the payments provided for in the contract of August 28, 1944, were contingent and uncertain if not speculative in aggregate cost. Furthermore, that long-term contract eliminated competition instead of meeting it, by its provisions whereby District Grocery Stores, Inc., agreed not to sponsor or advertise any competitive brands of frosted foods. There is no evidence that this vague offer of five percent of an unknown sales volume, for an unknown time, by an unknown competitor, for unknown services, was a continuing one down to the execution of the contract of November 30, 1944. The evidence, on the contrary, indicates it had been

rejected or dropped shortly after August 28, 1944, and hence was no longer an impelling threat. Payments contracted for in the second contract were not related to sales volume. From these facts it is concluded that Carpel Frosted Foods, Inc., entered into these contracts more as an aggressive bid for long-range business than as a defensive act to prevent specific loss of sales. The Commission finds, therefore, that the respondent Carpel Frosted Foods, Inc., has not rebutted the prima facie case made against it by a showing that the said contracts were entered into in good faith to meet a competitive offer by a competitor.

CONCLUSION

The paying and granting of the aforesaid commissions, or fees, or allowances, by Carpel Frosted Foods, Inc., to District Grocery Stores, Inc., as agent and intermediary acting in fact for and on behalf of and under the control of the buyers, and the receipt and acceptance of such commissions, fees, or allowances by the latter, in the manner and under the circumstances hereinabove found, are in violation of subsection (c) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

The contracting for the payment and the payment of sums of money by Carpel Frosted Foods, Inc., for the benefit of some favored customers in consideration of and as compensation for advertising and promotional services contracted to be furnished and furnished by the agent for said favored customers in connection with the resale of food products of Carpel Frosted Foods, Inc., without making such payments for advertising and promotional services available on proportionally equal terms to other customers who compete with the favored customers in the resale of such products is violative of subsection (d) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, answers of the respondents, testimony and other evidence in support of and in opposition to the allegations of the complaint taken before a trial examiner of the Commission theretofore duly designated by it, recommended decision of the trial examiner and exceptions filed thereto, and briefs and oral argument of counsel; and the Commission having disposed of said exceptions as to the recommended decision of the trial examiner by separate order and having made its findings as to

the facts and its conclusion that respondents Carpel Frosted Foods, Inc., a corporation, Harry L. Carpel, Albert J. Carpel, and District Grocery Stores, Inc., have violated the provisions of subsection (c) of Section 2 of the Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914 (the Clayton Act), as amended by an Act of Congress approved June 19, 1936 (the Robinson-Patman Act), and that the respondents Carpel Frosted Foods, Inc., a corporation, Harry L. Carpel, and Albert J. Carpel have violated subsection (d) of Section 2 of said Clayton Act as amended by the Robinson-Patman Act.

I. *It is ordered*, That the respondent Carpel Frosted Foods, Inc., a corporation, and its officers, and the respondents Harry L. Carpel and Albert J. Carpel, individually and as officers of said corporation, and their representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale of food products, or other merchandise, in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

1. Paying or granting, directly or indirectly, to District Grocery Stores, Inc., or to its members, or to any other buyer, or to any agent, representative, or other intermediary acting for or in behalf of or subject to the direct or indirect control of any such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, on sales for such buyer's own account.

2. Paying or contracting to pay anything of value to, or for the benefit of, any purchaser for advertising or promotional services or facilities furnished by, or contracted to be furnished by, such purchaser in connection with the processing, handling, sale or offering for sale of any of said respondents' products unless such payment or consideration is available to all other competing purchasers on proportionally equal terms.

II. *It is further ordered*, That respondent District Grocery Stores, Inc., and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the purchase of food products, or other merchandise, in commerce as "commerce" is defined in the aforesaid Clayton Act, do forthwith cease and desist from:

Receiving or accepting from Carpel Frosted Foods, Inc., or any other seller, directly or indirectly, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon any purchase made by District Grocery Stores,

Inc., for resale by it to its members, or upon any purchase made by any such member from Carpel Frosted Foods, Inc., or any other seller.

III. *It is further ordered*, That the complaint herein be, and the same hereby is, dismissed as to Nathan Gumenick and John F. Brawner (named in the complaint as John L. Brawner).

IV. *It is further ordered*, That each of the respondents herein, except those as to whom the complaint is dismissed, 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 Mason dissenting.

OPINION OF THE COMMISSION BY AYRES, COMMISSIONER

There is very little of novelty in this proceeding. The legal questions which are presented have previously been considered and determined by the Commission and the courts in various settings in cases too numerous to warrant citing here. Were it not for the fact that there is disagreement, an amplifying opinion would be unnecessary and inappropriate. In view of the disagreement, however, some discussion of the basis of the Commission's decision and the areas of disagreement may be helpful.

The charges are stated in the complaint, and the findings as to the facts and conclusion set out the facts disclosed by the evidence and indicate how those facts constitute violations of the law. In this opinion we shall endeavor to refer to the pertinent facts only in their brief essentials.

The respondents in this matter are in two categories. Carpel Frosted Foods, Inc., which for convenience we will refer to as Carpel, is a producer and seller of frozen food products; and District Grocery Stores, Inc., which we will identify as DGS, is a corporation formed by and representing a group of 275 independently owned and operated grocery stores, many of which buy frozen food products from Carpel. The complaint charges Carpel with violations of subsections (c) and (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, and DGS is charged only with violations of subsection (c).

The Commission has found that Carpel, the seller, has granted to DGS, the intermediary acting on behalf of the buyers, certain fees or allowances for promoting and increasing purchases of Carpel products by the grocery store members of the DGS group; and that DGS has received such fees or allowances. These were in the nature of and in lieu of brokerage, and the Commission has found that the pay-

ing and the receiving of the fees and allowances under those circumstances are in violation of Section 2 (c) of the Clayton Act. It is only in this respect that we have found any violation of law by DGS. No violations by any of the individual grocers who are members of DGS have been found, and no such grocers are named as respondents in this proceeding.

The Commission has also found that Carpel has engaged in an additional violation of law. This involves the payment to DGS, the representative of the buyers, of certain sums of money as compensation for advertising and promotional services in connection with the resale of Carpel frozen food products by the individual retail grocers who are members of DGS. This violation occurred, not because the payments were made, but because Carpel failed to make such payments available on proportionally equal terms to or for the benefit of other buyers in competition with DGS members. Because of this failure the payments to DGS violated subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

In opposition to this decision it is asserted that the order in this case will cause economic injury to 275 "corner grocers" and prevent their meeting the competition of the chains. There is no showing in this case that any economic injury will be caused to the members of DGS except such injury as may result from the discontinuance of discriminatory payments which were unlawfully granted and received on their behalf. These are specific violations of the statute, and we know of no law or public policy which gives to businessmen of any class or size immunity from the requirements of the law or which condones discriminatory practices in conflict with statutory provisions. The law applies alike to the chains, to groups of independent grocers who operate together, and to any single grocer, large or small, who may engage in unlawful practices. This Commission is without authority to exclude from the operation of the law the practices of any individuals or groups who may seek or obtain advantages over their competitors by unlawful means.

There seems to be an implication that the order in this case will interfere with the right of DGS to educate its members to put in frozen food products and thus to be more competitive with the chains. No such interference will result from the order except to the extent that the activities in question may depend upon the receipt of unlawful payments. The "education" involved here was strictly limited to Carpel products, which DGS urged its members to handle in preference to competitive lines, and for which DGS received a very substantial compensation from Carpel.

The activities of DGS in inducing its members to handle Carpel products in preference to competitive products constituted an important consideration for the compensation which it received from Carpel. These activities were equivalent to the functions of brokers, and the compensation for them was in lieu of brokerage. Since DGS was acting on behalf of the buyers, it was unlawful under Section 2 (c) of the Clayton Act for it to receive compensation from Carpel in lieu of brokerage. DGS was no more entitled to receive compensation for activities of this nature than a chain store company would be entitled to receive compensation from the seller for requiring the individual stores in the chain to stock a particular line of merchandise.

It is urged that under the arrangement with Carpel the neighborhood grocer was given the trained assistance of professional merchandisers and was put in the same class with chain stores in selling to consumers, and that the Commission has condemned these aids to small business as the exclusive prerogative of the broker class. The only payments in lieu of brokerage involved in this proceeding are those which represented compensation to DGS for inducing its members to purchase and stock Carpel products. The balance of the payments to DGS by Carpel were for advertising and promotional services facilitating the resale of Carpel products to the consuming public by DGS members. Payments for both types of activities were covered by the same contract and made in one lump sum, but the activities were of a distinctly different character and involved important differences in their competitive and legal effects. The payments by Carpel to DGS for advertising and promotional services were for the purpose of stimulating the resale of Carpel products to consumers *after* the products reached the retailer's store. Such payments had nothing to do with brokerage or with "the prerogatives of the broker class," and they did not involve violation of subsection 2 (c) of the Clayton Act, as amended.

Payments for advertising and promotional services are not unlawful, per se, under the provisions of subsection 2 (d) of the Clayton Act, as amended. They were unlawful here only because they were not made available on proportionally equal terms to or for the benefit of others engaged in the resale of Carpel products in competition with DGS members. The record shows that Carpel's customers include more than 300 independently owned and operated retail grocers who are competitive with the DGS stores. No allowances or payments similar to those made to DGS were made or offered by Carpel to any of these small grocers who do not enjoy the advantages of combined operations. Through these discriminatory payments to DGS for advertising and promotional services its members received substantial

advantages over their competitors engaged in reselling Carpel products. This is a discrimination specifically prohibited by the Robinson-Patman Act.

It is asserted that the contract under which respondents operated evidently satisfied the Federal Trade Commission because it operated for three years with no objection by the Commission. There is no evidence of any sort that the contract or practices under it satisfied the Federal Trade Commission at any time. There is nothing to indicate that the preliminary investigation of this matter was discontinued or suspended by the Commission from the time it was begun until the complaint issued, or that the Commission ever considered that the practices involved were legal. The lapse of three years between the beginning of the practices and the issuance of complaint represents a situation which too often occurs as a result of limited facilities, the general pressure of other work, and the necessity for careful consideration and appraisal before determining that corrective action is required.

During the trial of this matter the respondents offered testimony concerning opinions they were given during conferences with the Commission's attorney who supervised the preliminary investigation. The trial examiner permitted proffer of proof of this testimony in the form of questions and answers, but refused to admit the testimony in evidence on the ground that the opinion of an attorney on the Commission's staff does not constitute a legal defense to the charges of the complaint. This resulted in the questions and answers being physically in the transcript without becoming legally a part of the formal record. The respondents appealed from the trial examiner's ruling which excluded this testimony, and in its order of March 23, 1948, the Commission, by unanimous action, sustained the ruling. Accordingly, any consideration or discussion of such testimony in connection with the decision of this case involves matters outside the record, and is in conflict with the limitations placed upon the Commission and its members by the Administrative Procedure Act.

It is urged in opposition to this decision, nevertheless, that the respondents acted in conformity with the opinion and advice of the attorney on the Commission's staff in charge of the preliminary investigation of this case, and accordingly that the Commission is guilty of some impropriety or immorality in proceeding against these respondents. Such emphasis is given to this contention that the Commission, with great reluctance, is compelled to examine and comment upon matters relating to it, even though they are outside the record.

The proffered testimony disclosed that the respondents consulted with the attorney in question and thereafter made material revisions in their contract. Upon further consultation, they were informed by the attorney that he saw nothing illegal in the revised contract. Respondents have made it very clear, however, that the Commission's attorney carefully informed them that he could give no interpretation or expression of opinion which would be binding upon the Commission. They have also made it clear that they understood this limitation upon his authority and were not lulled into any feeling that they could act with assurance upon the opinion so received. They recognized that the legality of any practice in which they engaged in connection with the contract and its operation could properly be questioned by the Commission, regardless of the views of any member of its staff.

We need not determine precisely what advice or opinion respondents were given by the Commission's attorney, nor the extent to which they operated in accord with it. Regardless of the substance of the opinion and the degree of conformance therewith, it is neither legally nor morally binding upon the Commission.

This is necessarily so. For a law enforcement agency to proceed on any other basis would constitute abdication of its responsibility and authority to the members of its staff. The Commission would be unfaithful to its public trust if it should consider that its hands are tied in any sense when a member of its staff, or even a member of the Commission, expresses an opinion or gives advice which proves to be in conflict with the Commission's own determination. The responsibility of decision is upon the Commission alone. Its decisions can be reached only by majority action, and in proper circumstances, even those decisions may be altered to avoid injustices or to protect the public interest. Our obligations in this respect are well stated by the United States Court of Appeals for the Fourth Circuit in its opinion of December 29, 1950 in *P. Lorillard Co.* v. *Federal Trade Commission* (186 F. (2d) 52):

> It must not be forgotten that the Commission is not a private party, but a body charged with the protection of the public interest; and it is unthinkable that the public interest should be allowed to suffer as a result of inadvertence or mistake on the part of the Commission or its counsel where this can be avoided.

In the present matter it is unthinkable that violations of the law should be cloaked with any legal or moral immunity as the result of a preliminary, informal and carefully circumscribed opinion by an attorney on the Commission's staff.

Where there is disagreement with a decision of the Commission, it is important that the facts and reasons upon which it is based should

be fully stated in a manner which will contribute to a better understanding of the issues and the basis of the decision. The Commission deeply regrets, therefore, that the statement of disagreement in this case should include unwarranted comments which impugn the motives and personal morality of the Commission and its members.

It is significant that the practices which were unanimously considered to be unlawful by the Commission as it was composed when the complaint was issued, have been found to be unlawful by the present Commission. For the reasons stated above and in the findings as to the facts, the Commission has entered its order to cease and desist in this case.

DISSENTING OPINION OF COMMISSIONER LOWELL B. MASON

While the title of this case indicates Carpel, the frozen food producer, as a nominal defendant, this is actually a suit against 275 small independent retail grocery merchants, generally referred to in common parlance as the corner or neighborhood grocer.

The economic facts that serve as a background for this litigation are as simple as the law is complicated.

Every student of business knows of the depressed state of the corner grocer when the chains first entered the contest for the housewife's dollar. Before the advent of universal automotive transportation, the natural geographic isolation of the neighborhood grocer may have given him a monopoly that softened his will for good service at a low price. He was a sitting duck for the mass purchaser and mass merchandiser who moved in across the street.

But those days are gone forever, we hope.

The corner grocer today is an up and comer, and he'll remain so unless Government enters too many orders like the one here.

When the chains came in, they did something to the neighborhood grocers besides putting the marginal operators out of business. They showed the wide-awake small merchant the great value of coordinated market information, sound accounting practices, reduction of unnecessary and uneconomic middleman functions, and the advantages of large coverage advertising.

But the corner grocer soon found out that few of these benefits were available to him except by uniting with others in a cooperative merchandising organization.

By so doing he could meet the competition of the chains and yet not lose his own identity as an individual. He kept his own name, paid his own taxes, pocketed his own profits and ran his own business.

It is this kind of nonprofit cooperative organization that we are here suing.

And it is the use of the above advantages that gives us the guts of this complaint.

I hesitate to do more than utter my dissent to the obvious economic injury done to these 275 corner grocers by the repressive order entered herein, and would not go further if it were possible to silence my sense of justice which is outraged at the legal abstractions and sophistries used to justify this ill considered litigation.

I had been on the Commission a year and a half when this complaint was issued. I am heartily ashamed of any connection with its restriction on free enterprise and must now disassociate myself from any further participation in it.

Before discussing the question of law involved in this matter, I would like to first comment briefly on the administrative injustice we have thrust upon these bewildered grocers.

On August 28, 1944, this group of corner grocers, through its cooperative association, D. G. S., entered into a sales contract with Carpel for the purchase of frosted foods. Article One of that contract provided for the payment of a 4% broker's commission by Carpel to D. G. S.

Anybody who has read Section 2 (c) of the Robinson-Patman Act knows that Congress has specifically said only brokers may receive the emoluments of a broker, and it was quite obvious this group of small shopkeepers organized into a cooperative did not fill the bill.

By some manner or means, Harry Babcock, the Attorney in Charge of the Commission's Washington Field Office, found out about this contract. A seasoned and competent administrator, he had evidently read President Wilson's message to Congress when the creation of the Federal Trade Commission was proposed. At least, he must have taken to heart the Wilsonian philosophy that:

> The businessmen of the country desire something more than that the menace of legal process in these matters be made explicit and intelligible. They desire the advice, the definite guidance and information which can be supplied by an administrative body, an interstate trade commission.

A complete verbatim report of Mr. Babcock's stand as disclosed by the record would serve no purpose in this opinion, but I may sum up its essence in the following paraphrasing:

Mr. Babcock called the corner grocers in and said, "Show me the contract."

And they brought him the contract and he said to them, "Whose is this 4% commission that Carpel has agreed to pay you?"

And they said to him, "It is a sales commission."

And he said to them, "Render therefore unto brokers the things which are brokers'."

When the corner grocers heard these words, they marveled and left him and went their way, for their contract with Carpel violated the Robinson-Patman Act. It diverted from the brokers' pocket a commission based on sales that Congress had declared must go there.

And thereupon the corner grocers immediately canceled the contract and, fortunately, did it before a penny had been paid under its terms.

But this put them right back where they were before, vis-à-vis the big chains. What the small grocery man wanted to know was how in the competitive struggle could he make like a big company. He wanted buying power and selling savvy such as his rivals, the chain stores, had.

Heretofore, such help as small entrepreneurs had received had been limited largely to speeches on the floor of Congress and antitrust suits against big corporations, all of which made good reading but didn't help with the rent.

Mr. Babcock decided to be of practical assistance. He showed the corner grocers how they could pool their merchandising efforts for the joint benefit of their group, for more efficient service to the public and the consequent improvement of their own individual shops.

So on November 30 of the same year, D. G. S. entered into a new contract for the promotion of Carpel's frosted foods. This time there was no provision for the sale or purchase of frosted foods, nor any reference or obligation on either D. G. S. or Carpel to buy or sell, nor any compensation, either direct or indirect, or in lieu of brokerage. It was a promotional and advertising contract from beginning to end. It met with Mr. Babcock's approval and evidently satisfied the Federal Trade Commission, for it operated openly and above board for three years with no objection by the Commission or any of its staff.

Under the stimulation of the contract's provisions, the corner grocers prospered. And why shouldn't they?

D. G. S. educated its neighborhood grocers to put in frozen food products. Heretofore, frozen foods had been more or less the exclusive field of the big fancy chains. Now the neighborhood businessmen were giving the chains a run for their money in this line.

D. G. S. educated the public who came into its member stores to buy frozen foods. D. G. S. was obliged to do this under Section (e) of the November 1944, contract. It provided:

> (e) D. G. S., through its supervisors, will assist its members in displaying to good advantage the Company's Frozen Foods, and will likewise assist in posting any streamers furnished by the Company to members of the D. G. S., in such places as will be likely to increase the sale of and consumer demand for the Company's products.

This gave the neighborhood grocery man the trained assistance of professional merchandisers. It put him in the same class with the chain stores who have their own central offices print banners and streamers and send out experienced window and stock arrangers to set up the exhibits in their chain stores.

An analysis of every one of the other services rendered by D. G. S. as set forth in paragraphs (a) to (f) of the November 30, 1944, contract reveals similar obligations all tied in with advertising, merchandising and promotional activities.

To condemn these aids to small business as the exclusive prerogative of the broker class is contrary to all common business experience. It is not only absurd but we would saddle the broker with functions he has neither the stomach for nor the facilities to carry out.

Does promotion make D. G. S. a broker? Then newspapers, magazines, billboards, radios and all other media are brokers. Every advertising agency serving its store clients who is paid by the publication in which copy is placed would be labeled a broker.

Under the rule in this case, every buying cooperative that uses its services for the promotion of the products sold by its member stores would be a broker, and under the law which prohibits brokerage from a seller when the broker is under the direct or indirect control of the buyers, these organization, too, would be condemned.

This strained interpretation, if applied to the business universe, makes practically every field of promotional activity tainted with illegality.

But, in my opinion, neither the sponsors of the Robinson-Patman Act nor Congress when it passed the Act, nor the President when he signed it, had any intention of cutting off from businessmen any honest method of business promotion that came to hand, even though brokers were left entirely out of the picture.

Section 2 (c) of the Clayton Act is known as the brokerage clause. It was passed under the sponsorship of the brokers. The legislative comment pertaining to it refers to the brokerage problem, and its purpose is to specifically restrict and limit who may and who may not collect a broker's emoluments. It creates a new offense under the law—not acts that are wrong in themselves, but acts that are wrong because Congress prohibits them.

A statute that prohibits and represses what are otherwise legal actions may be valid, but it must be strictly interpreted, and no latitude can be used to broaden its restrictions to other legal actions which are not prohibited by the specific language of the act.

There is nothing in Section 2 (c) that stops anybody from hiring whoever he wants to furnish lists of prospects and hang banners in

stores. Section 2 (c) is only concerned with who gets what on sales or purchases.

The payments made here in nowise rested on either sale or purchase. Nor in this case was there remuneration paid as a commission or payment in lieu of a commission. Nor was it any payment at all for the sale of goods.

Everything in this record shows D. G. S. was in a position to perform and did perform a promotional service—valuable to Carpel because it encouraged the dissemination of its products in retail channels; valuable to the neighborhood grocers because it placed them on a parity with the big chains by increasing the variety of their offerings to the public, and valuable to the public because it encouraged the continued existence of alternate sources of supplies for the consumer. Today frozen foods may be found in almost all stores, but at the time D. G. S. broke into the field with Carpel products, there were few corner grocers able to compete with their larger rivals.

Harry Babcock's advice to the small-business men should have been the source of congratulation rather than the basis for a suit.

But it wasn't.

The public records do not disclose whether the applicant for complaint against D. G. S. was a disappointed broker. Nor is there any testimony that any of the 300-odd other customers of Carpel complained because they had not had made available to them on proportionally equal terms the facilities and services offered to D. G. S. But it is evident from the record that on February 7, 1947, without notice or further ado, the Federal Trade Commission sued the grocery boys for doing what the head of the Commission's Washington office had told them they could do.

Perhaps it is a human hunger in all of us to crave that our Government comport itself with dignity and morality.

In terms of personal morality, it would be difficult to interpret this governmental action in any but an unfavorable light.

Nothing could fit the situation more aptly than Mr. Justice Douglas' statement in *Refugee Committee* v. *McGrath*, 95 L. Ed. 587:

> When the government becomes the moving party and levels its great powers against a citizen, it should be held to the same standards of fair dealing as we prescribe for other legal citizens. To let the government adopt such lesser ones as suits the convenience of its officers is to start down the totalitarian path.

We had no business suing the corner grocers. I am not talking about immunity from prosecution for following the personal advice of a Government official, either.

I am familiar with the ruling in *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U. S. 150. In that case the defendants sought to

justify their maintenance of the gasoline market on the grounds that the Secretary of Interior countenanced and encouraged their activities. The Supreme Court held that in the absence of legislative authority, one agency of the Government could not give immunity from a law another agency (the Department of Justice) enforced.

In the instant case, the Commission itself is charged with the responsibility of interpreting the law and bringing about its observance. It gave tacit approval for three years to the course of conduct its official had proposed. That course of conduct was legal then and, in my opinion, it is legal now.

I am opposed to the order in the instant case, not only because it is immoral and oppressive, which is true from a private standpoint, but because, in my opinion, it is unfounded from a legal standpoint. Bureaucratic reactionism may decry the liberalism that seeks to conform statutes to morality. But when there are two interpretations that may be made of a congressional enactment, I would pay the legislature the compliment of construing their directive on the side of fair play as well as on the side of free competitive enterprise.

In my opinion, the instant order does neither.

I am against it.

Syllabus

IN THE MATTER OF

KOKEN COMPANIES, INC.

COMPLAINT, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5743. Complaint, Mar. 1, 1950—Decision, Dec. 20, 1951

On appeal in the instant matter from the initial decision of the hearing examiner upon two grounds, one of which was that respondent, pursuant to an agreement to cease and desist, discontinued the dissemination of all false advertisements, the Commission was of the opinion that the facts of record showed that respondent had violated its agreement to cease and desist through the dissemination of a certain advertisement which, while some of the phrases were vague and obscure in their meaning, taken in its entirety had the effect of representing that respondent's preparation was an effective treatment for causes of dandruff, the subject of the agreement to cease and desist in the stipulation in question.

As respects respondent's second ground of appeal, namely, that the order, by including advertisement of any product possessing substantially similar properties, could prohibit respondent from truthfully advertising other products and, therefore, is not warranted by the Federal Trade Commission Act: the Commission's power to prevent unfair and deceptive acts and practices is not limited to prohibiting only representation of the identical act found to be illegal, the purpose of an order to cease and desist being to prevent unfair and deceptive acts and practices, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts found to have been committed by the respondent in the past.

As respects the inclusion in an order prohibiting misrepresentation of product, of language including any preparation of substantially similar composition or possessing substantially similar properties, should respondent decide in the future to market such a preparation, which could truthfully be represented in any respect prohibited by the order to cease and desist, it may then petition the Commission to modify the order to permit such truthful representation.

As regards respondent's appeal from the initial decision of the hearing examiner, as above indicated, the Commission accordingly was of the opinion that its appeal was without merit, and that said initial decision was appropriate in all respects to dispose of the proceeding, and accordingly denied the appeal.

Where a corporation engaged in the interstate sale and distribution, among beauty and barber shop supplies, of a product designated as "Vanish" for use in the treatment of dandruff and other scalp disorders; in advertising through radio broadcasts, newspapers, magazines and circulars—

Falsely represented that its said product was a cure or remedy and a competent and effective treatment for dandruff and other scalp disorders, and that use thereof promoted the health of the scalp and hair;

With tendency and capacity to mislead a substantial portion of the purchasing public and thereby cause its purchase of substantial quantities of its said product:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice of the public and constituted unfair and deceptive acts and practices in commerce.

As regards respondent's appeal from the decision of the hearing examiner, on the ground that pursuant to agreement to cease and desist it had discontinued the dissemination of all false advertisements, the Commission was of the opinion that through the use of a vague and obscurely phrased advertisement since the time of the stipulation, it had violated its agreement to cease and desist.

In view of said fact, and the fact that such violation of the stipulation was continued even after it was brought to the attention of the respondent, and the further fact that the record contained no assurance by respondent or any of its officials that they did not intend to continue to so advertise, the Commission was of the opinion that the public interest required that respondent be ordered to cease and desist from the dissemination of false advertisements in the form of order contained in the hearing examiner's initial decision.

Before *Mr. William L. Pack*, hearing examiner.

Mr. Jesse D. Kash for the Commission.

Shepley, Kroeger, Fisse & Ingamells, of St. Louis, Mo., for respondent.

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

PARAGRAPH 1. Respondent, Koken Companies, Inc., is a corporation organized and existing under the laws of the State of Missouri, with its office and principal place of business located at Broadway at Tyler, St. Louis, Missouri.

PAR. 2. The Respondent is now and for more than one year last past has been engaged in the business of selling and distributing a drug product, as "drug" is defined in the Federal Trade Commission Act, designated "Vanish," intended for the treatment of dandruff and other scalp disorders. The active ingredients of "Vanish" are:

Sodium Salicylate
Oxyquinalin sulphate
Arsenate trioxide, 5/100 of 1%
Denatured alcohol, 8%

PAR. 3. Respondent causes and has caused said product when sold to be transported from its place of business in the State of Missouri to purchasers thereof located in various other States of the United States and in the District of Columbia, and at all times mentioned herein maintained and has maintained a course of trade in said product in commerce among and between the various States of the United States and in the District of Columbia. Respondent's volume of business in such commerce is substantial.

PAR. 4. In the conduct of its business, respondent subsequent to March 31, 1938, has disseminated and caused the dissemination of certain advertisements concerning said product by the United States mails and by various means in commerce as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, radio continuities emanating from Radio Station WIL, St. Louis, Missouri, February 2, 18, 19, 22, 23, 26, 27, 1943; March 3, 6, 9, 10, 11, 15, 1943; Radio Station KWK, St. Louis, Missouri, March 4, 5, 15, 1943; April 7, 1943; and advertisements in "Modern Beauty Shop," March and November issues, 1944, and March 1945 issue; "St. Louis Post Dispatch," June 22, 1945 issue; and "American Hair Dresser," October 1945 issue, all of which were sent through the United States mails, and folders distributed in commerce entitled, "I Am After Your Customers' Scalps," for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product; and respondent has disseminated and caused the dissemination of advertisements concerning its said product, including, but not limited to, the advertisements, radio continuities and circulars referred to above, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among the statements and representations contained in said advertisements disseminated as aforesaid are the following:

Simply massage VANISH into your scalp between or after shampoos, let it dry naturally, and in an incredibly short time, see if every trace of dandruff hasn't disappeared completely.

That's all there is to it—and after 1 or 2 treatments, you should be absolutely free from dandruff.

Last summer I had quite a problem with my little girl who was 2½ years old at the time.

She had a scalp condition that is hard to explain. It was sore in spots and would form large thick scales.

Whenever I combed her hair, her scalp would start to bleed. I tried everything I knew for it, but nothing helped her. Then I was told about "VANISH." I tried it for 2 or 3 weeks. From the very first treatment her scalp showed marked improvement. In all I used ½ of a $1 sized bottle and her scalp was completely clear again.

VANISH FOR DANDRUFF.

When you want to get rid of irritating unsightly dandruff VANISH is the answer.

* * * dandruff I've got just the thing that will put him out of business in short order, too—VANISH.

VANISH, the dandruff banisher.

* * * don't take a chance with old fashioned remedies. * * * eliminate dandruff the modern way with VANISH.

This Public Enemy No. One, old man dandruff, but cheer up—you can put an end to his dirty work in a jiffy with VANISH.

* * * VANISH is not a cure-all. It is made to do just one job and do it thoroughly—get rid of dandruff.

Use VANISH to keep the hair well groomed and in good condition. VANISH is that remarkable new dandruff treatment so highly recommended by many leading hairdressers.

VANISH is the modern way of treating common dandruff that gets right to the root of the trouble in a jiffy.

Besides the pleasant feeling of the scalp, customers have also remarked how healthy the hair appears between shampoos.

Vanish encourages healthy scalps because they are dandruff free * * * and healthy, glossy well-groomed hair is a natural result of a healthy scalp.

* * * Joe's hair was smooth, healthy and well groomed. Joe used VANISH.

* * * How healthy the hair looks between shampoos.

VANISH for healthy hair.

Lovely hair grows in healthy scalps. VANISH is quick, simple, effective, exhilarates the scalp, refreshes the hair, removes dandruff.

PAR. 6. Through the use of the advertisements containing the statements and representations hereinabove set forth and others similar thereto, not specifically set out herein, respondent has represented directly and by implication that the use of Vanish is a cure or remedy and constitutes a competent and effective treatment for dandruff and other scalp troubles and promotes health of scalp and hair.

PAR. 7. The said advertisements are misleading in material respects and are "false advertisements," as that term is defined in the Federal Trade Commission Act. In truth and in fact "Vanish" is not a cure or an effective treatment for dandruff. Said product does not have any beneficial therapeutic effects in the prevention, treatment, or cure of any unhealthy scalp or hair condition nor will its use promote or be conducive to health of the scalp or hair.

PAR. 8. The aforesaid acts and practices of the respondent, as herein alleged, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDERS AND DECISION OF THE COMMISSION

Order denying respondent's appeal from initial decision of the hearing examiner and decision of the Commission and order to file report of compliance, Docket 5743, December 20, 1951, follows:

This matter came on to be heard by the Commission upon the respondent's appeal from the hearing examiner's initial decision herein and brief in opposition thereto filed by counsel in support of the complant (oral argument not having been requested).

The facts in this matter are as follows: Respondent manufactures and sells in commerce a drug preparation designated as "Vanish." In connection with the sale of this preparation, respondent has disseminated in commerce advertisements which represented that this preparation would prevent and cure dandruff and unhealthy scalp conditions. In fact, this preparation has no beneficial effect in the treatment of dandruff other than facilitating the removal of loose dandruff scales, has no therapeutic effect in the treatment of any scalp disorder, and does not promote the health of the scalp or hair. Upon this record, the hearing examiner issued an initial decision in which he found that respondent had disseminated false advertisements in violation of the Federal Trade Commission Act and ordered respondent to cease and desist from such dissemination in connection with its "* * * product designated 'Vanish,' or any product of substantially similar composition or possessing substantially similar properties, whether sold under the same name or any other name, * * *." From this initial decision, respondent made its appeal now being considered.

The grounds relied upon in support of this appeal are (1) that respondent, pursuant to an agreement to cease and desist, discontinued the dissemination of all false advertisements, and (2) that the order, by relating to advertisements of any product possessing substantially similar properties, could prohibit respondent from truthfully advertising other products and, therefore, is not warranted by the Federal Trade Commission Act.

The record shows that in 1948 respondent entered into with the Commission an agreement to cease and desist from disseminating advertisements containing the representations alleged to be false in the complain herein. Since the time of the said stipulation, respondent, in connection with the sale of said preparation, has disseminated in commerce the following advertisement:

Guaranteed?
vanish for dandruff
Vanish for dandruff is unconditionally guaranteed, but users write us they want to be guaranteed Vanish is always available. Profitable Vanish dandruff treatments in the shop increase sales of the retail bottle.

After advising respondent that the new advertising was not in compliance with respondent's agreement to cease and desist, and

upon respondent's continued use of this advertisement, the Commission issued its complaint in this proceeding alleging that respondent was disseminating false advertisements in violation of the Federal Trade Commission Act. The advertisements referred to in the complaint included those disseminated by respondent prior to its agreement to cease and desist.

The Commission is of the opinion that the facts of record show that respondent has violated its agreement to cease and desist by the dissemination of the above-quoted advertisement. Although some of the phrases in this advertisement are vague and obscure in their meaning, taken in its entirety this advertisement has the effect of representing that respondent's preparation is an effective treatment for the causes of dandruff. This violation of the stipulation was continued even after it was brought to the attention of the respondent by the Commission. Furthermore, this record does not contain any assurance by respondent or any of its officials that they do not intend to continue to so advertise. Under these circumstances the Commission is of the opinion that the public interest requires that respondent be ordered to cease and desist from the dissemination of false advertisements in the form of order contained in the hearing examiner's initial decision.

The Commission is of the further opinion that the order in this matter properly applies to advertisements relating not only to this preparation but also to any other of respondent's products of substantially similar composition or possessing substantially similar properties. The Commission's power to prevent unfair and deceptive acts and practices is not limited to prohibiting only repetition of the identical act found to be illegal. The purpose of an order to cease and desist is to prevent unfair and deceptive acts and practices, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts found to have been committed by the respondent in the past. If respondent should decide in the future to market a preparation of substantially similar composition or possessing substantially similar properties which could truthfully be represented in any respect prohibited by this order to cease and desist, respondent may at that time petition the Commission to modify this order to permit such truthful representations.

The Commission, therefore, being of the opinion that the respondent's appeal is without merit and that the hearing examiner's initial decision is appropriate in all respects to dispose of this proceeding:

It is ordered, That the respondent's appeal from the hearing examiner's initial decision be, and it hereby is, denied.

It is further ordered, That the initial decision of the hearing examiner shall on the 20th day of December 1951 become the decision of the Commission.

It is further ordered, That the respondent Koken Companies, 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 attached order to cease and desist.

Said initial decision, thus adopted by the Commission as its decision, follows:

INITIAL DECISION BY WILLIAM L. PACK, TRIAL EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on March 1, 1950, issued and subsequently served its complaint in this proceeding upon the respondent, Koken Companies, Inc., a corporation, charging it with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of that Act. After the issuance of the complaint and the filing of respondent's answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before the above-named trial examiner theretofore duly designated by the Commission, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final consideration by the trial examiner on the complaint, the answer thereto, and testimony and other evidence; and the trial examiner, having duly considered the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Koken Companies, Inc., is a corporation organized and existing under the laws of the State of Missouri, with its office and principal place of business located at Broadway and Tyler Streets, St. Louis, Missouri. It is now and for a number of years last past has been engaged in the sale and distribution of furniture and other equipment and supplies to barber shops and beauty shops. One of the numerous items sold by respondent is a drug product designated by it as "Vanish," this product being intended for use in the treatment of dandruff and other scalp disorders. While during recent years the volume of sales of this product has constituted

less than one percent of respondent's total volume of sales, the volume of business in the product has been substantial.

PAR. 2. Respondent causes and has caused this product, when sold, to be transported from its place of business in the State of Missouri to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains and has maintained a course of trade in the product in commerce among and between the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of its business respondent has advertised its product "Vanish" by means of radio broadcasts and by means of advertisements inserted in newspapers and magazines, and by means of circulars distributed through the United States mails among prospective purchasers. All of these advertisements either were disseminated in commerce, as "commerce" is defined in the Federal Trade Commission Act, or were for the purpose of inducing the purchase of the product in such commerce. Among the statements appearing in such advertisements were the following:

Simply massage VANISH into your scalp between or after shampoos, let it dry naturally, and in an incredibly short time, see if every trace of dandruff hasn't disappeared completely.

That's all there is to it—and after 1 or 2 treatments, you should be absolutely free from dandruff.

Last summer I had quite a problem with my little girl, who was 2½ years old at the time.

She had a scalp condition that is hard to explain. It was sore in spots and would form large thick scales.

Whenever I combed her hair, her scalp would start to bleed. I tried everything I knew for it, but nothing helped her. Then I was told about "VANISH." I tried it for 2 or 3 weeks. From the very first treatment her scalp showed marked improvement. In all I used ½ of a $1 sized bottle and her scalp was completely clear again.

VANISH FOR DANDRUFF.

When you want to get rid of irritating unsightly dandruff VANISH is the answer.

* * * dandruff I've got just the thing that will put him out of business in short order, too—VANISH.

VANISH, the dandruff banisher.

* * * don't take a chance with old fashioned remedies. * * * eliminate dandruff the modern way with VANISH.

This Public Enemy No. One, old man dandruff, but cheer up—you can put an end to his dirty work in a jiffy with VANISH.

* * * VANISH is not a cure-all. It is made to do just one job and do it thoroughly—get rid of dandruff.

Use VANISH to keep the hair well groomed and in good condition. VANISH is that remarkable new dandruff treatment so highly recommended by many leading hairdressers.

VANISH is the modern way of treating common dandruff that gets right to the root of the trouble in a jiffy.

Besides the pleasant feeling of the scalp, customers have also remarked how healthy the hair appears between shampoos.

Vanish encourages healthy scalps because they are dandruff free * * * and healthy, glossy well-groomed hair is a natural result of a healthy scalp.

* * * Joe's hair was smooth, healthy and well groomed. Joe used VANISH.

* * * How healthy the hair looks between shampoos.

VANISH for healthy hair.

Lovely hair grows in healthy scalps. VANISH is quick, simple, effective, exhilarates the scalp, refreshes the hair, removes dandruff.

GUARANTEED?

Vanish for Dandruff.

Vanish for dandruff is unconditionally guaranteed, but users write us they want to be guaranteed Vanish is always available. Profitable Vanish dandruff treatments in the shop increase sales of the retail bottle.

PAR. 4. Through the use of these statements respondent has represented that its product is a cure or remedy and a competent and effective treatment for dandruff and other scalp disorders, and that the use of the product promotes the health of the scalp and hair.

PAR. 5. The active ingredients of the product are sodium salicylate, oxyquinalin sulphate, arsenate trioxide 5/100 of 1%, and denatured alcohol 8%. The record establishes and the examiner therefore finds that the product is not a cure or remedy for dandruff, nor has it any beneficial effects in the treatment of dandruff other than to facilitate the removal of such loose dandruff scales as may be accumulated upon the scalp at the time the product is applied. The product has no therapeutic effect upon the underlying cause of dandruff and therefore it will not prevent the recurrence of such scales. The use of the product has no therapeutic effects upon any unhealthy scalp or hair condition, nor will it promote the health of the scalp or hair.

PAR. 6. The examiner therefore finds that the representations made by respondent with respect to the product, as set forth above, are erroneous and misleading and constitute false advertisements.

PAR. 7. The record indicates that, with one exception, all of these advertisements have been discontinued by respondent, the exception being the last advertisement in Paragraph 3 above.

PAR. 8. The use by respondent of these advertisements has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to the properties and efficacy of respondent's product, and the tendency and capacity to cause such portion of the public to purchase substantial quantities of the product as a result of the erroneous and mistaken belief so engendered.

CONCLUSION

The acts and practices of the respondent as hereinabove set out are all to the prejudice of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent, Koken Companies, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of respondent's product designated "Vanish," or any product of substantially similar composition or possessing substantially similar properties, whether sold under the same name or any other name, do forthwith cease and desist from directly or indirectly:

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

(a) That said product is a cure or remedy for dandruff; or that it has any beneficial effect in the treatment of dandruff other than facilitating the removal of loose dandruff scales.

(b) That said product has any therapeutic effect in the treatment of any scalp disorder, or that it promotes the health of the scalp or hair.

2. Disseminating or causing to be disseminated by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said product, any advertisement which contains any representation prohibited in paragraph 1 of this order.

ORDER TO FILE REPORT OF COMPLIANCE

It is further ordered, That the respondent Koken Companies, 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 attached order to cease and desist [as required by aforesaid orders and decision of the Commission].

IN THE MATTER OF

EWALD A. THALACKER, DOING BUSINESS AS TOP MANUFACTURING COMPANY

COMPLAINT, FINDINGS, AND ORDERS IN REGARD TO THE ALLEGED VIOLATION OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

Docket 5831. Complaint, Dec. 4, 1950—Decision, Dec. 24, 1951

Where an individual engaged in the interstate sale and distribution of push cards, which, bearing explanatory legends (or spaces therefor), were designed for use in the sale and distribution of articles of merchandise to the ultimate purchasers by means of varying games of chance, under a plan whereby the purchasers of a push who, by chance, selected a concealed winning name or number, secured articles without additional cost at less than the normal retail price thereof, others receiving nothing or, in some cases, a small consolation prize of less value than the price of the push (amount of which in some cases was similarly chance determined);

Sold and distributed such devices to dealers in various articles of merchandise, assortments of which, along with said devices, were made up by the direct and indirect retail dealer purchasers thereof, and exposed and sold to the purchasing public in accordance with the aforesaid sales plan, involving sale of a chance to procure articles of merchandise at much less than their normal retail price; and

Thereby supplied to and placed in the hands of others the means of conducting lotteries in the sale and distribution of their merchandise, contrary to an established public policy of the United States Government;

With the result that many members of the public were induced to deal with retailers who sold and distributed merchandise by means of said devices; many retailers were thereby induced to trade with manufacturers, wholesalers and jobbers who sold and distributed merchandise together with such devices; gambling was taught and encouraged; and said individual thereby supplied to and placed in the hands of others means and instrumentalities for engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act:

Held, That such acts and practices, under the circumstances set out, were all to the prejudice of the public and constituted unfair acts and practices in commerce.

Before *Mr. William L. Pack*, hearing examiner.
Mr. J. W. Brookfield Jr., for the Commission.

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 Ewald A. Thalacker, individually and doing business as Top Manufacturing Company,

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

PARAGRAPH 1. Respondent Ewald A. Thalacker is an individual trading and doing business as Top Manufacturing Company with his office and principal place of business located at Route 4, Eau Claire, Wisconsin.

Respondent is now and for more than two years last past has been engaged in the sale and distribution of devices commonly known as push cards and in the sale and distribution of said devices to dealers in various articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia and to dealers in various articles of merchandise within the various States of the United States and in the District of Columbia.

Respondent causes and has caused said devices when sold to be transported from his place of business in the State of Wisconsin to purchasers thereof at their points of location in the various States of the United States and in the District of Columbia. There is now and has been for more than two years last past a course of trade in such devices by said respondent in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of his said business as described in Paragraph One hereof, respondent sells and distributes, and has sold and distributed, to said dealers in merchandise, push cards so prepared and arranged as to involve games of chance, gift enterprises or lottery schemes when used in making sales of merchandise to the consuming or purchasing public. Respondent sells and distributes, and has sold and distributed, many kinds of push cards, but all of said devices involve the same chance or lottery features when used in connection with the sale or distribution of merchandise and these devices vary only in detail. One of said push cards has twenty-four small partially perforated discs on the face of which is printed the word "Push." Concealed within each disc is a number which is disclosed when the disc is pushed or separated from the card. The push card bears the legend as follows:

TRY YOUR LUCK!
PAY WHAT YOU PUNCH
1¢ to 39¢
All Numbers Over 39
Pay Only 39¢
(NAME UNDER SEAL WINS)

(Under the above legend is printed twenty-four squares, each enclosing one of the perforated discs bearing a feminine name. Opposite the twenty-four discs is a list of the corresponding twenty-four names, together with a blank space for writing in the name of the purchaser of each disc.)

Many others of said push cards have printed on the faces thereof other labels or instructions that express the manner in which said devices are to be used or may be used in the sale and distribution of various specified articles of merchandise, such as candy, novelties and similar articles. The prices of the sales on said push cards vary in accordance with individual devices. Each purchaser pays either a specified price, usually from 1¢ to 5¢, or a price that is revealed only when a push has been made, and is entitled to a push or chance from the push card. When a push is made a disc is separated from the push card and a number is disclosed. In some type cards the number fixes the amount to be paid for the push or chance and in another type of cards, the number may designate whether or not an article of merchandise is awarded to the purchaser of that particular push. The numbers are effectively concealed from the purchasers and prospective purchasers until the selection has been made and the push completed. In some types of respondent's cards specified numbers entitle purchasers to designate articles of merchandise. Others of respondent's cards have a master seal which is opened when all of the pushes have been sold and discloses the winning push. Persons securing by their push lucky or winning numbers or names receive articles of merchandise without additional cost at prices which are less than the normal retail price of the said articles of merchandise. Persons who do not secure such winning numbers receive in some cases a small consolation prize of less value than the price paid for the push or, in other cases, receive nothing for their money. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Some of said push card devices have no instructions or legends thereon but have a blank space provided therefor. On these push cards the purchasers thereof place instructions or labels which have the same or similar import or meaning as instructions or labels placed by respondent on the said push cards hereinabove described, and are used for the distribution of various articles of merchandise in the same manner as the cards above described.

Respondent sells and distributes, and has sold and distributed, many kinds of push cards, but all of said devices involve the same chance or lottery features when used in connection with the sale or distribution

of candy or other merchandise and vary only in detail. The only use to be made of said push card devices and the only manner in which they are used by the ultimate purchasers thereof is in combination with other merchandise so as to enable said ultimate purchasers or retailers to sell and distribute said other merchandise by means of lot or chance as hereinabove alleged.

PAR. 3. Many persons, firms and corporations who sell and distribute, and have sold and distributed, candy, cigarettes, novelties, and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia, purchase and have purchased respondent's said push card devices, and pack and assemble, and have packed and assembled, assortments comprised of various articles of merchandise together with said push card devices. Retail dealers who have purchased said assortments either directly or indirectly have exposed the same to the purchasing public and have sold or distributed said articles of merchandise by means of said push cards and in accordance with the sales plan as described in Paragraph Two hereof. Because of the element of chance involved in connection with the sale and distribution of said merchandise by means of said push cards, many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing said merchandise by means thereof. As a result thereof, many retail dealers have been induced to deal with or trade with manufacturers, wholesale dealers and jobbers who sell and distribute said merchandise together with said devices.

PAR. 4. The sale of merchandise to the purchasing public through the use of, or by means of, such devices in the manner above alleged, involves a game of chance or the sale of a chance to procure articles of merchandise at prices much less than the normal retail price thereof and teaches and encourages gambling among members of the public, all to the injury of the public. The use of said sales plan or methods in the sale of merchandise and the sale of merchandise by and through the use thereof, and by the aid of said sales plan or method is a practice which is contrary to an established public policy of the Government of the United States and constitutes unfair acts and practices in said commerce.

The sale or distribution of said push cards by respondent as hereinabove alleged supplies to and places in the hands of others the means of conducting lotteries, games of chance or gift enterprises in the sale or distribution of their merchandise. The respondent thus supplies to, and places in the hands of, said persons, firms and corporations the means of, and instrumentalities for, engaging in unfair acts and prac-

tices within the intent and meaning of the Federal Trade Commission Act.

PAR. 5. The aforesaid acts and practices of respondent as hereinabove alleged are all to the prejudice and injury of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, and as set forth in the Commission's "Decision of the Commission and Order to File Report of Compliance," dated December 24, 1951, the initial decision in the instant matter of hearing examiner William L. Pack, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on December 4, 1950, issued and subsequently served its complaint in this proceeding upon the respondent, Ewald A. Thalacker, individually and doing business as Top Manufacturing Company, charging him with the use of unfair acts and practices in commerce in violation of the provisions of that Act. Thereafter respondent filed his answer in which he admitted all of the material allegations of fact set forth in the complaint and waived all intervening procedure and further hearing as to the facts. Such answer, however, was conditioned upon the deferring by the hearing examiner of his initial decision in the proceeding until the determination by the Commission of another, similar matter, that of W. H. Brady & Company, Docket No. 5298. Subsequently the present proceeding regularly came on for final consideration by the above-named hearing examiner, theretofore duly designated by the Commission, (the Commission having in the meantime rendered its decision in the W. H. Brady & Company case) upon the complaint and answer, and the hearing examiner, having duly considered the matter, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom and order.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, Ewald A. Thalacker, is an individual trading and doing business as Top Manufacturing Company, with his office and principal place of business located on Route 4, Eau

Claire, Wisconsin. Respondent is now, and for a number of years last past has been, engaged in the sale and distribution of devices commonly known as push cards. Some of such devices are sold by respondent to dealers who are themselves engaged in the sale of various articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia. Others of such devices are sold by respondent to dealers engaged in the sale of various articles of merchandise within the several States of the United States.

Respondent causes and has caused his devices, when sold, to be transported from his place of business in the State of Wisconsin to purchasers located in the various States of the United States and in the District of Columbia. There is now and has been a course of trade by respondent in such devices in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 2. In the course and conduct of his business, respondent sells and distributes to said dealers in merchandise, push cards so prepared and arranged as to involve games of chance, gift enterprises, or lottery schemes when used in making sales of merchandise to the consuming or purchasing public. Respondent sells and distributes many kinds of push cards, but all of them involve the same chance or lottery features and vary only in detail. One of such push cards has twenty-four small, partially perforated discs on the face of each of which is printed the word "Push." Concealed within each disc is a number which is disclosed when the disc is pushed or separated from the card. The push card bears the following legend:

TRY YOUR LUCK!
PAY WHAT YOU PUNCH
1¢ to 39¢
All Numbers over 39
Pay Only 39¢
(NAME UNDER SEAL WINS)

(Under the above legend appear twenty-four squares, each enclosing one of the perforated discs bearing a feminine name. Opposite the twenty-four discs is a list of the corresponding twenty-four names, together with a blank space for writing in the name of the purchaser of each disc.)

Many others of the push cards have printed on the faces thereof other labels or instructions that state the manner in which such devices are to be used or may be used in the sale and distribution of various specified articles of merchandise, such as candy, novelties, and similar articles. The prices of the sales on the push cards vary in accordance with the various cards. Each purchaser pays either a speci-

fied price, usually from 1¢ to 5¢, or a price that is revealed only when a push has been made. When a push is made a disc is separated from the push card and a number is disclosed. In some types of cards the number fixes the amount to be paid for the push or chance, and in another type of card the number may designate whether or not an article of merchandise is awarded to the purchaser of that particular push. The numbers are effectively concealed from purchasers and prospective purchasers until the selection has been made and the push completed. In some types of respondent's cards specified numbers entitle purchasers to designated articles of merchandise. Others of respondent's cards have a master seal which is opened when all of the pushes have been sold and discloses the winning push. Persons securing by their push lucky or winning numbers or names receive articles of merchandise without additional cost at prices which are less than the normal retail price of such articles of merchandise. Persons who do not secure such winning numbers receive in some cases a small consolation prize of less value than the price paid for the push or, in other cases, receive nothing for their money. The articles of merchandise are thus distributed to the consuming or purchasing public wholly by lot or chance.

Some of respondent's push-card devices have no instructions or legends thereon but have a blank space provided therefor. On these push cards the purchasers thereof place instructions or labels which have the same or similar import as instructions or labels placed by respondent on the push cards hereinabove described, and are used for the distribution of various articles of merchandise in the same manner as the cards above described.

Respondent sells and distributes many kinds of push cards, but all of such devices involve the same chance or lottery features when used in connection with the sale or distribution of candy or other merchandise and vary only in detail. The only use to be made of such push-card devices and the only manner in which they are used by the ultimate purchasers thereof is in combination with other merchandise so as to enable such ultimate purchasers or retailers to sell and distribute other merchandise by means of lot or chance as hereinabove described.

PAR. 3. Many persons, firms, and corporations, who sell and distribute candy, cigarettes, novelties, and other articles of merchandise in commerce between and among the various States of the United States and in the District of Columbia, purchase respondent's push card devices, and pack and assemble assortments comprised of various articles of merchandise, together with such push card devices. Retail dealers who have purchased such assortments either directly or

indirectly have exposed the same to the purchasing public and have sold or distributed such articles of merchandise by means of such push cards and in accordance with the sales plan as described above. Because of the element of chance involved in the sale and distribution of merchandise by means of such push cards, many members of the purchasing public have been induced to trade or deal with retail dealers selling or distributing merchandise by means thereof. As a result, many retail dealers have been induced to deal or trade with manufacturers, wholesale dealers and jobbers who sell and distribute merchandise, together with such devices.

PAR. 4. The sale of merchandise to the purchasing public through the use of, or by means of, such devices in the manner above set forth involves a game of chance or the sale of a chance to procure articles of merchandise at prices much less than the normal retail price thereof, and teaches and encourages gambling among members of the public, all to the injury of the public. The use of such sales plan or method in the sale of merchandise and the sale of merchandise by and through the use thereof, and by the aid of such sales plan or method, is a practice which is contrary to an established public policy of the Government of the United States and constitutes unfair acts and practices in commerce.

The sale or distribution of push cards by respondent as hereinabove found supplies to and places in the hands of others the means of conducting lotteries, games of chance or gift enterprises in the sale or distribution of their merchandise. Respondent thus supplies to, and places in the hands of such persons, firms, and corporations means and instrumentalities for engaging in unfair acts and practices within the intent and meaning of the Federal Trade Commission Act.

CONCLUSION

The acts and practices of respondent as hereinabove set out are all to the prejudice of the public and constitute unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent, Ewald A. Thalacker, individually and doing business as Top Manufacturing Company, or under any other name, and his agents, representatives, and employees, directly or through any corporate or other device, do forthwith cease and desist from:

Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, push cards, punchboards, or other

lottery devices which are to be used or may be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise, or lottery scheme.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondent herein shall, within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist [as required by said declaratory decision and order of December 24, 1951].