IN THE MATTER OF

WILLIAM G. BARNARD, SR. ET AL. TRADING AS NATURAL FOODS INSTITUTE

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 5956. Complaint, Feb. 21, 1952—Decision, Nov 18, 1953

Where two partners, trading as Natural Foods Institute, engaged in the interstate sale and distribution of health foods, books, drugs, and devices of various sorts; in advertising in catalogs bearing their said name, and in various other ways, seven products which they designated as: "Chic Tablets", "Garlic Capsules", "Papain Tablets", "Soy Milk Powder (Soyalac", "Macu Brand Papaya", "Peppermint Tea", and "Alfalfa Tea"—(a) Falsely represented that their said products, as the case might be, would reduce weight, were odorless, constituted an effective treatment for indigestion, were a tonic which would sweeten the intestinal tract, and would have a significant effect upon the building of muscle, bone, or hair by reason of the alfalfa nutrients; that their "Papaya Pulp" contained no sugar and was a valuable food for diabetics; and that it was possible for human beings to contract mastitis from animal milk and that the use of their "Soya Milk Powder" would prevent the contraction of such disease; and

Where said partners, engaged as aforesaid, in also selling and distributing certain foods, namely, their "Dr. Gaymont's Yogourt Culture", "Red Beet Juice", "Brown Rice", "Dehydrated Powdered Vegetables", and "Celery Juice"—

(b) Falsely and misleadingly represented that said "culture" was an effective treatment for stomach ulcers or colitis, that their said beet juice built up red blood or red corpuscles of the blood and toned up the blood, that their said dehydrated powdered vegetables were more easily digested and more nutritious than fresh vegetables; and that their celery juice was an effective treatment for arthritis and rheumatic conditions; and

Where said partners, engaged as aforesaid, in the offer and sale also of certain health books which they designated as "Raw Vegetable Juices", "Health Via the Carrot and Other Vegetables", "The Grape Cure", and "My Water Cure"; in advertising the same through their aforesaid catalogs and otherwise—

(c) Falsely and misleadingly represented that a deficiency of minerals and salts in the diet was the primary cause of nearly every sickness and disease, that the eating of raw vegetables and fruit juices in the manner set forth in said first book was a cure for numerous specified ailments and conditions, comprising most of the common ailments suffered by mankind and that eating carrots and other vegetables in the manner set out in said second book would keep one healthy and constituted a cure for numerous ailments, including diabetes, diseases peculiar to women, colds, arthritis, and cancer, and a tired feeling;

Notwithstanding the fact as respects said last-named condition that only rarely does it result from dietary deficiencies of the type which can be corrected through any possible use of carrots and other vegetables; and

(d) Falsely and misleadingly represented that the system outlined in "The Grape Cure" would cure cancer and that outlined in "My Water Cure" would cure all diseases in any way curable; and

Where said partners, engaged as aforesaid in the offer and sale also of certain juice extractors sold under the designations "Vita-Mix" and "Juicex"; in advertising the same in catalogs, newspapers, magazines, circulars, and in radio and television broadcasts, and in other advertising media—

(e) Falsely and misleadingly represented that the consumption of raw fruits and vegetables prepared in said Vita-Mix would result in better digestion, restful sleep, normal elimination, strong, healthy teeth, or continued good eyesight, and was an effective treatment for various ailments, including those above indicated, and would result in good health;

(f) Falsely represented that nutritional deficiencies were increasing and that, according to the Department of Agriculture, three out of every four meals in the United States were deficient in the minimum daily requirement of vitamins, minerals, and other nutrients, and that 90% of the rejections in the draft of World War II were because of malnutrition, and that cooked and peeled vegetables were so deficient in nutritional qualities that children's teeth and tonsils were adversely affected;

(g) Falsely represented that Vitamin E was the antisterility vitamin and that the ingestion of Vitamin A would build resistance against all infectious diseases;

(h) Falsely represented that the consumption of the entire cucumber was an effective treatment for nervous conditions in women and that the consumption of lettuce was an effective treatment for such conditions generally;

(i) Falsely represented that the necessity for the removal of tonsils in children arose because of malnutrition; and

(j) Falsely represented that the consumption of fruit and vegetable juices prepared in the Juicex would assure health, vigor, and charm, and that consumption of such juices would regenerate and rebuild the system; and

Where said partners, engaged as aforesaid—

(k) Falsely represented through the use of the word "Institute" in their trade name that they constituted an organization for the promotion of research, experimentation, investigation, and study in the science of dietetics and related subjects, and that a trained staff of employees and a properly equipped laboratory were maintained for such purposes;

When in fact there were no lectures or courses in dietetics in given subjects given by trained technical lecturers and said representation was otherwise false in the respect above indicated; and

(l) Falsely represented through the use of the word "sterilizer" in the trade name of their "N. F. I. Vegetable and Fruit Washer and Sterilizer" in the advertising thereof in their catalogs and other media, that their said apparatus had a germicidal effect;

When in fact it had no such effect of any nature, but was a device which consisted essentially of a wire basket and a length of hose to be attached to a water faucet for use in washing vegetables:

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

Before *Mr. James A. Purcell*, hearing examiner.

Mr. George M. Martin and *Mr. J. M. Doukas* for the Commission.

Mr. Henry Junge, of Chicago, Ill., for respondents.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on February 21, 1952, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. After the service of the said complaint, respondents filed their answer thereto admitting all of the material allegations of fact charged in the complaint to be true, waiving any and all hearings as to the facts and conclusions and consenting to the issuance of an order, reserving, however, the right to file objections to the form and contents of the order. Thereafter the proceeding regularly came on for final consideration by a hearing examiner of the Commission, duly designated by it and named in the "Notice" appended to the complaint at the time of its issuance, upon the said complaint and respondents' answer thereto, and said hearing examiner, on April 24, 1952, filed his initial decision.

Within the time permitted by the Commission's Rules of Practice, counsel for respondents filed with the Commission an appeal from said initial decision, and thereafter this proceeding regularly came on for consideration by the Commission upon the record herein, including briefs in support of and in opposition to said appeal, no oral argument having been requested.

The Commission on March 31, 1953, issued its order granting respondents' appeal. On the same day the Commission issued, and thereafter caused to be served, its order granting leave to respondents and to counsel supporting the complaint to file with the Commission objections to the order to cease and desist which the Commission proposed to issue as a part of its decision herein, after making appropriate findings as to the facts and conclusion consonant with the pleadings; under the terms of this order such objections were to be filed within twenty days after service thereof and the proposed order to cease and desist attached thereto.

No objections were filed by respondents. On April 23, 1953, counsel supporting the complaint filed objections to the proposed order to cease and desist, and also filed a motion for reconsideration by the Commission of its order granting respondents' appeal.

The Commission having entered its order denying the said motion and rejecting the objections to the proposed decision, the proceeding came on for final consideration by the Commission upon the record herein on review, and the Commission, having duly considered the matter and being now fully advised in the premises, 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, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondents William G. Barnard, Sr., and William G. Barnard, Jr., are copartners trading as Natural Foods Institute with their office and principal place of business at Olmstead Falls, Ohio. Respondents sell and distribute various items of merchandise including health foods, books, drugs, and devices of various sorts.

PAR. 2. Respondents are now and have been for more than one year last past engaged in the business of selling and distributing foods, drugs and devices as the terms "food," "drug" and "device" are defined in the Federal Trade Commission Act. The designation used by respondents for various of their said food and drug products and the formulae and directions for use thereof are as follows:

(1) Designation: Chic Tablets.

Formula: 9 tablets daily represent the following percentage of minimum daily adult requirements.

Vitamin B_1 ,Thiamine Hydrochloride)	333 U. S. P. Units	100%
Vitamin B_2 (Riboflavin)	2 Milligrams	100%
Niacinamide	10 Milligrams	100%
Calcium (Calcium Phosphate Dibasic)	920 Milligrams	120%
Phosphorous (Calcium Phosphate Dibasic)	750 Milligrams	100%
Iron (Ferric Peptonate)	15 Milligrams	100%
Iodine (Kelp)	0.10 Milligrams	100%

Also contains skimmed milk powder, malt extract, dextrose, cocoa powder and flavor, with traces of zinc, magnesium cobalt, copper and manganese.

Directions: Take 3 tablets about 15 to 20 minutes before each meal. Tablets may be swallowed whole with water or fruit juice, or chewed if desired. If one meal is omitted (preferably lunch) it is suggested that 4 tablets be taken at this time.

(2) Designation: Garlic Capsules.

Formula: Vegetable oil extraction of garlic.

Directions: TO BE SWALLOWED WHOLE—NOT CHEWED, Take two capsules before each meal three times a day unless otherwise prescribed.

(3) Designation: Papain Tablets 3 gr.

Formula: Dehydrated juice of Carica Papaya.

Directions: Take one or two tablets to help occasional stomach distress.

(4) Designation: Soy Milk Powder (Soyalac)

Formula: Contains: Soya beans, dextrin, dextrose, soya bean oil, maltose, sugar, salt, dicalcium phosphate, trisodium phosphate, viosterol.

Directions: How to make Soya Milk.

With Soyalac being readily soluble in cold water, a whip, egg beater, hand or electric mixer readily serves the purpose for mixing. Always add powder to water, an ounce (approximately a heaping tablespoon) to a glass, more or less

to individual taste. Then use like milk, 4 ounces Soyalac makes approximately a quart of soya milk, 1 pound a gallon.

(5) Designation: Macu Brand Papaya

Formula: Papaya Pulp

Directions: Take in pure state or mix with water, milk, fruit juices, honey, sugar, saccharine or flavors to suit taste. Keep in cool place, tightly closed when not in use.

(6) Designation: Peppermint Tea

Formula: Peppermint leaves

Directions: Pour boiling water over and let steep to desired strength and serve with or without cream and sugar.

(7) Designation: Alfalfa Tea

Formula: Tender, small alfalfa leaves.

Directions: Pour boiling water over and let steep to desired strength and serve with or without cream and sugar.

In addition to the aforesaid products respondents sell and distribute the following foods, to wit: Dr. Gaymont's Yogourt Culture, Red Beet Juice, Brown Rice, Dehydrated Powdered Vegetables, Celery Juice, and devices designated as NFI Vibrator and Oster Stim-U-Lax Junior.

Respondents cause the said products hereinabove listed in Paragraph One when sold to be shipped from their place of business in the State of Ohio to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in their said products in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of their aforesaid business respondents, subsequent to March 21, 1938, have disseminated and caused the dissemination of advertisements concerning their said products set out in Paragraph Two, 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 catalogs entitled "Natural Foods Institute, Olmstead Falls, Ohio" and respondents have disseminated and caused the dissemination of advertisements concerning their said products by various means, including but not limited to, the catalogs referred to above for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of the said products in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Among and typical of the statements contained in the said catalogs disseminated as aforesaid and the products to which they relate are the following:

(1) Chic.

CHIC

Reducing Formulae

Get rid of ugly fat now. You can be slim the easy way, without drugs or opiates. Many have received wonderful results from Chic. This food supplement furnishes the necessary food materials without adding on the pounds. We're so sure that this Reducing Formula will give you the results you've been looking for that we make you a Money-Back Guarantee.

(2) Pure Garlic Capsules.

PAPA BARNARD Says: "Odorless and tasteless, but still essential for my diet."

Dr. Kellog in "New Dietetics" says garlic is a natural disinfectant of the alimentary canal. Used by thousands who value their health.

(3) Papain Tablets

Perfect for indigestion. Takes away gas and discomfort.

(4) Soy Milk Powder.

Eliminates all danger of * * * mastitis, * * * sometimes contracted from the use of animal milk. * * *

(5) Papaya Pulp.

PAPAYA PULP for diabetics. No sugar in it.

(6) Peppermint Tea

California

PEPPERMINT TEA

Dried Mineralized peppermint leaves are an alkalinizer and a natural tonic. Sweetens the entire intestinal tract.

(7) Alfalfa Tea.

ALFALFA TEA

Alfalfa helps produce muscle, bone and hair. You need the vitamins and minerals Alfalfa Tea gives you. Animals thrive on alfalfa—why not you? Now adapted for human consumption.

(8) Dr. Gaymont's Yogourt Culture.

* * * Gives relief from Stomach Ulcers * * *

Dr. Gaymont's

YOGOURT CULTURE

Here Is What Dr. Gaymount's Yogourt Culture Will Do For You!

* * * * *

Are you healthy? Dr. Gaymount's Yogourt, nature's most perfect food, will help you stay healthy and help you enjoy life. Suffering from Colitis? Delicious Yogourt is unexcelled for soothing relief in the corrective diet. * * * Stomach Ulcers! Be relieved. Yogourt is wonderfully alkalizing, pain comforting. * * *

(9) Red Beet Juice.

Pure Unadulterated

RED BEET JUICE

* * * "This is one of the most valuable juices for helping to build up red blood or red corpuscles of the blood and tone up the blood generally." Red Beet Juice is high on list of beneficial vitamin and mineral juices.

(10) Brown Rice.

* * * Contains all the essential minerals and vitamins.

(11) Dehydrated Powdered Vegetables.

* * * The walls and shells of a vegetable cell contain cellulose—which cannot be digested by man. In dehydrated vegetables these cell walls have been broken and destroyed so that you can get the inner nutritious part with the full food value. * * *

(12) Pure Celery Juice.

* * * Dr. R. D. Pope, M.D., especially recommends celery juice in the dietary care of arthritis and rheumatic conditions in his book, "Raw Vegetable Juices, What's Missing in Your Body."

(13) NFI Vibrator.

Helps Get Rid of Aches and Pains
BLOOD CIRCULATES BETTER
with the NFI
VIBRATOR.

(14) Oster Stim-U-Lax Junior.

I use the Stim-U-Lax before retiring. It seems to make my rich red blood circulate more smoothly.

PAPA BARNARD

Just try an OSTER STIM-U-LAX Junior on your body, face, gums, scalp, arms, feet. You'll be amazed! Massage is man's oldest method for soothing his ails, and OSTER STIM-U-LAX Junior enables you to give it more effectively than ever before. An OSTER can deliver controllable, rotating-patting movements to your fingertips to make massage mildly soothing or deeply penetrating. Only an OSTER has Suspended Motor action movement—so soothing to the nerves, so nice to the muscles, stimulating to the circulation.

PAR. 5. Through the use of the advertisements containing the statements and representations hereinabove set forth, and others similar thereto not specifically set out herein, respondent's have represented directly and by implication:

(1) That their Chic Tablets are a reducing formula and will in and of themselves reduce weight.

(2) That their Garlic Capsules are odorless in use and are an intestinal disinfectant.

(3) That their Papain Tablets are an effective treatment for indigestion.

(4) That mastitis may be contracted through the use of animal milk and that the use of Soy Milk Powder will prevent the contracting of such disease.

(5) That their Papaya Pulp does not contain any sugar and therefore is a valuable food for diabetics as part of their diets.

(6) That their Peppermint Tea is a tonic and sweetens the entire intestinal tract.

(7) That their Alfalfa Tea helps produce muscle, bone and hair in human beings.

(8) That Dr. Gaymont's Yogourt Culture is an effective treatment for stomach ulcers and colitis.

(9) That their Red Beet Juice builds up red blood or red corpuscles of the blood and tones up the blood.

(10) That their dehydrated powdered vegetables are more digestible and nutritious than vegetables in any other forms.

(11) That their Celery Juice is an effective treatment for arthritis and rheumatic conditions.

(12) That the use of the NFI Vibrator rids the human body of aches and pains and stimulates or improves the circulation of the blood throughout the body.

(13) That the use of Oster Stim-U-Lax Junior stimulates or improves the circulation of the blood throughout the body.

PAR. 6. The said advertisements are misleading in material respects, and are "false advertisements" as the term is defined in the Federal Trade Commission Act. In truth and in fact:

(1) The Chic Tablets are not a reducing formula; will have no influence whatsoever on obesity and in and of themselves will not bring about weight reduction. It is necessary to use a restricted diet to bring about weight reduction and said tablets are merely a dietary supplement.

(2) The Garlic Capsules are not oderless in use since they contain significant quantities of oil of garlic which produces an odor on the breath. This product is not an intestinal disinfectant.

(3) The Papain Tablets are not an effective treatment for indigestion.

(4) It is not possible for human beings to contract mastitis from animal milk or otherwise.

(5) The Papaya Pulp is not a valuable food for diabetics because it contains significant amounts of sugar.

(6) The California Peppermint Tea is not a tonic nor will it sweeten the intestinal tract.

(7) The amounts of nutrients which can be extracted from the alfalfa during the preparation of an infusion or tea will have no significant effect upon the building of muscle, bone, or hair.

(8) Dr. Gaymont's Yogourt Culture is not an effective treatment for stomach ulcers or colitis.

(9) Red Beet Juice will not build up red blood or red corpuscles or tone up the blood to any significant extent.

(10) Dehydrated powdered vegetables are not more easily digested or more nutritious than fresh vegetables.

(11) Celery juice has no therapeutic value in the treatment of arthritis or rheumatic conditions.

(12) The benefits from the NFI Vibrator are limited to those which can be secured from massage. In some cases the use of massage, such as that obtained with this device, will tend to temporarily relieve aches and pains although there are many types of aches and pains which will not even be temporarily diminished through the use of such a device. The massage secured through the use of this device will temporarily stimulate the flow of the blood in that part of the body being massaged, but the use of the device would not serve to stimulate or improve the circulation of the blood generally throughout the body.

(13) The massage secured through the use of the Oster Stim-U-Lax Junior would temporarily stimulate the flow of blood in the part of the body being massaged but the use of the device would not serve to stimulate or improve the circulation of the blood generally throughout the body.

PAR. 7. In the course and conduct of their aforesaid business and for the purpose of inducing the purchase of certain of their health books designated "Raw Vegetable Juices," "Health Via the Carrot and Other Vegetables," "The Grape Cure" and "My Water Cure," in the commerce aforesaid respondents have also made numerous statements concerning said books through the medium of the aforesaid catalogs and by other means. Among and typical of the aforesaid statements and the books to which they relate are:

(1) The book entitled "Raw Vegetable Juices"

The lack or deficiency of certain elements such as vital organic mineral and salts from our customary diet is the primary cause of nearly every sickness and disease, says Dr. Pope. He answers this vital question in his book—"how can we most readily furnish our body with the elements needed?" * * *

Look at the fascinating subjects covered. Arthritis, gall bladder trouble, anemia, tuberculosis, asthma, heart trouble, indigestion, colitis, constipation, boils, cancer, convulsions, diabetes, high blood pressure, liver, miscarriage, rheumatism, eczema, goiter, liver trouble, kidney trouble, obesity, nervousness, prostate trouble, in fact most all of the common ailments suffered by mankind.

TO OVERCOME CERTAIN DISEASES LEARN WHAT JUICES YOUR BODY NEEDS.

One of the most sensational parts of this fascinating book is a section entitled "Raw vegetable and fruit juices and their therapeutic use in specific ailments." Dr. Pope has taken such diseases as cancer, chicken pox, the common cold, hernia, hives, indigestion, constipation and many others and tells you what fruit and vegetable juices you should eat in order to overcome these diseases.

(2) The book entitled "Health Via the Carrot and Other Vegetables."

HOW TO STAY HEALTHY BY EATING PROPERLY.

Indigestion—the Glands—Headaches—Rheumatism—Blood Stream—Diabetes—That Tired Feeling—Asthma—The Women's Problem—Colds and Influenza—Arthritis—Cancer.

Prevent Disease.

Learn Foods you need for LONGER, HAPPIER LIFE.

No longer need you worry about crippling diseases and ailments.

(3) The book entitled "The Grape Cure" by Johanna Brandt.

Can Cancer be Relieved?

In inspiring fashion, Miss Brandt gives you her explanation of the causes of cancer. She had cancer herself. She tried many cures, which didn't work. Nine years she fought a grim battle. Three more years went by. In 1925 she accidentally discovered the miracle of the grape.

Johanna Brandt has learned the reasons for the success of the grape cure. In 15 chapters, she tells how the grape is taken, why it is effective.

(4) The book entitled "My Water Cure" by Father Kneipp.

Father Kneipp said "The water, in particular, my water cure, heals all diseases in any way curable."

PAR. 8. Through the use of the aforesaid representations disseminated as aforesaid, and others similar thereto but not specifically set out herein, respondents have represented, directly or by implication:

(1) That a deficiency of minerals and salts in the diet is the primary cause of nearly every sickness and disease, and the eating of the raw vegetable and fruit juices in the manner set forth in the book "Raw Vegetable Juices," is a cure for arthritis, gall bladder troubles, anemia, tuberculosis, asthma, heart trouble, indigestion, colitis, boils, cancer, convulsions, diabetes, high blood pressure, miscarriage, rheumatism, eczema, goiter, liver trouble, kidney trouble, obesity, nervousness, prostrate trouble, chicken pox, the common cold, hernia or hives and most of the common ailments suffered by mankind.

(2) That by eating carrots and other vegetables in the manner set out in the book "Health Via the Carrot and Other Vegetables," one can prevent disease, live longer and remain healthy and that such diseases and ailments as indigestion, glandular troubles, headaches, rheumatism, disorders of the blood stream, diabetes, a tired feeling, asthma, diseases peculiar to women, colds, influenza, arthritis and cancer will be cured thereby.

(3) That the system or method of treatment outlined in the book entitled "The Grape Cure" will relieve or cure cancer.

(4) That the system or method of treatment outlined in the book entitled "My Water Cure" is a cure for all curable diseases.

PAR. 9. The aforesaid statements are false, misleading and deceptive. In truth and in fact:

(1) A deficiency of minerals and salts in the customary diet is not the primary cause of nearly every sickness and disease and no possible

combination of raw vegetable and fruit juices is a cure of arthritis, gall bladder trouble, anemia, tuberculosis, asthma, heart trouble, indigestion, colitis, boils, cancer, convulsions, diabetes, high blood pressure, miscarriage, rheumatism, eczema, goiter, liver trouble, kidney trouble, obesity, nervousness, prostate trouble, chicken pox, the common cold, hernia or hives or any significant number of the common ailments suffered by mankind.

(2) Eating the carrots and other vegetables in the manner set out in the book, "Health Via the Carrot and Other Vegetables" will not keep one healthy and is not a cure for indigestion, glandular troubles, headaches, rheumatism, disorders of the blood stream, diabetes, asthma, diseases peculiar to women, colds, influenza, arthritis or cancer. The condition popularly known as "a tired feeling" arises from a multitude of causes and only rarely does it result from dietary deficiencies of the type which can be corrected through any possible use of carrots and other vegetables in the diet.

(3) The system or method of treatment outlined in the book entitled "The Grape Cure" will not relieve cancer, or cure cancer.

(4) The system or method of treatment outlined in the book entitled "My Water Cure" is not a cure for any curable disease.

PAR. 10. In the course and conduct of their aforesaid business and for the purpose of inducing the purchase of certain of their juice extractors in the commerce aforesaid, the respondents have made numerous statements by means of advertisements inserted in catalogs, in newspapers, magazines, circulars and in radio and television broadcasts and in other advertising media. Among and typical of such statements and the juice extractor to which they relate are the following:

(A) VITA-MIX

WHAT DO YOU WANT? BETTER DIGESTION
RESTFUL SLEEP
NORMAL ELIMINATION
STRONG HEALTHY TEETH
CONTINUED GOOD EYESIGHT

USE A VITA-MIX TO PREPARE YOUR MEALS AND DRINK YOUR WAY TO HEALTH

VITAMINS AND MINERALS May Help Build Resistance Against Most Common Ailments. GET THEM THE VITA-MIX WAY—

The Dept. of Agriculture admits that 3 out of every 4 meals are short of vitamins and minerals. No wonder so many people feel run-down, worn out, tired all the time. * * *

Nutritional deficiencies are increasing * * * According to the U. S. Department of Agriculture, 3 out of 4 meals are deficient in the minimum daily requirements * * *.

VITAMINS AND MINERALS ARE ESSENTIAL TO GOOD HEALTH
WHY NOT BE SURE YOU GET ALL THAT ARE IN YOUR FOOD?

Most of the vitamins in your food are in the out parts, those which you normally peel off and throw away. With a Vita-Mix you will never need to lose these precious health-giving vitamins * * *. Cooking also destroys much of the vitamin and mineral content of food. You pour these vital compounds down the drain when you prepare food the ordinary way. Why should you throw out the things that are so important to strong teeth, good digestion, eyesight, vigor, body tone. Get a Vita-Mix and be sure you get all the vitamins and minerals nature put into your food.

Your health depends on vitamins and minerals which nature has placed next to and in the skins of fruits and vegetables. Peeling and boiling destroy these valuable elements that are vital to your good health and enjoyment of life. * * *

LOOK AT THESE RESULTS

"Although I am only 28 years old I have had bowel trouble for the last 3 or 4 yrs. Thanks to my Vita-Mix, I can do as you say—throw out the laxative bottle."

Mrs. A. S., Cincinnati, Ohio.

The following advertisement excerpts are taken from television transcripts entitled "Home Miracles of 1950" in which respondent W. G. Bernard, Sr., appeared and which were transmitted from various cities located throughout the United States. The television broadcasts consisted of demonstrations by respondent W. G. Barnard, Sr., of the use of the Vita-Mix and lectures by said W. G. Barnard, Sr., on the value of various juices which can be extracted through the use of this device. The lecture is also directed towards the alleged unhealthful cooking habits employed throughout the nation and the various ills which arise as a result thereof. All of these statements were intended to influence the purchase of the Vita-Mix. Among and typical of the statements made during the course of the demonstration and lecture on the aforesaid television broadcasts are:

I happen to be president of the Natural Foods Institute, as you know. And we are trying to teach the mothers of America exactly what the Red Cross and the Parent-Teachers Association are trying to put over—and that is, you must, mother, you must change the diet of your family, or America is going blind. Do you know that right now, one-half of us—children and all—are looking through a pane of glass? Do you know that right now half of us in America hasn't got a tooth in their mouth except what they bought from their dentist? * * *

* * * A million boys went before our draft boards in the last world war and four hundred and sixty thousand of them were rejected. Think of it, Brigadier General Louis B. Hershey said that it's a national disgrace, that ninety percent of those boys were rejected because of malnutrition—at the dining table. * * *

* * * And the first meal she gives the child is one of the most demineralized, de-vitalized meals which she could possibly give him—which is mashed potatoes. * * *

* * * There's only one way to eat that potato if you want your family to have eyes, teeth, and tonsils. And that's to put it in the oven and bake it, skin and all. But no, Mommy says Daddy doesn't have any teeth. He can't eat the skin. And she doesn't have any teeth—she can't eat the skin. And the reason they don't have any teeth is because they didn't eat the skin. So she takes a knife. And she peels off those eight minerals and four vitamins as if they were poison. Then she throws them in the garbage can. There go their eyes and their teeth. Then she notices the little brown specks, the eye—the Vitamin E. That's the vitamin that reproduces the potato. That's the vitamin that she and poppa must have if they reproduce. The reproductive vitamin—vitamin E. She doesn't want it—she gouges it out, she throws it in the garbage can. And then she takes the knife, she cuts the potato half in two, puts it in a pot of water, and for twenty-five minutes now she does give it the works. She boils out every mineral and vitamin. And after she does get them all boiled out, what does she do with them? Why she trots right over to the kitchen sink and drains the whole works down the sewer. * * *

* * * Do you know that half of the people over twenty-seven years of age haven't got a tooth in their mouth except what they bought of the dentist? And a great deal of it is caused by malnutrition. Do you know that a high percentage of our children are losing their tonsils because of malnutrition? * * *

* * * So she takes that blessed carrot and she slices and she dices. It says stew thirty-five minutes, so she turns up the gas. She boils out the iodine * * *. She boils out the Vitamin A that builds the eyes, the Vitamin B that builds the nerves, * * * and then she trots over to the kitchen sink and drains them down the sewer. Down the drain goes the Vitamin A that builds resistance against all infectious diseases. Down the drain goes the Vitamin A that builds the eyes. * * *

She cuts it out. She throws it in the garbage can. The Vitamin E. The Anti-Sterility Vitamin.

* * * Why you'll drink that cucumber, skin and all, in just a few minutes time. Here's one of the finest vegetables—one of the finest vegetables on earth for the nerves, for women. * * *

* * * Every vegetable has some therapeutic value. And this one, we are told, is good for the nerves. You know, Grandma used to say lettuce contained opium because it made her sleepy. * * *

* * * Seventy percent of the American people are deficient in calcium according to our government report. * * *

(B) JUICEX

HOW TO HAVE HEALTH, VIGOR, CHARM—THE NATURAL WAY

DRINK JUICES MADE WITH YOUR JUICEX

Look at These Facts on Juices

An unfailing source of life-giving elements are found in fresh juices. Authorities on food and nutrition agree that raw fruit and vegetable juices, if taken fresh and without preservatives, are easily assimilated. They are an organic or life food and will regenerate and build up your whole system. There is no known simpler way to make up for the minerals and vitamins you miss in today's highly refined foods. Eminent medical authorities agree that vitamins and minerals are essential to good health. Don't take chances, make sure you get enough juices every day.

PAR. 11. Through the use of the statements disseminated as aforesaid and others of similar import, not specifically set out herein, the respondents have represented, directly or by implication, that:

(1) the consumption of raw fruits and vegetables prepared in the Vita-Mix will result in better digestion, restful sleep, normal elimination, strong healthy teeth or continued good eyesight;

(2) the consumption of raw fruits and vegetables prepared in the Vita-Mix is an effective treatment for digestive disturbances, insomnia, disorders of elimination, carious or otherwise diseased teeth and impaired eyesight;

(3) the consumption of raw fruits and vegetables prepared in the Vita-Mix will result in good health;

(4) the consumption of vitamins and minerals increases the individual's resistance to most common ailments;

(5) nutritional deficiencies are increasing and, according to the U. S. Department of Agriculture, three out of every four meals in the United States are deficient in the minimum daily requirements of vitamins, minerals and other nutrients;

(6) the consumption of raw fruits and vegetables prepared in the Vita-Mix is an effective treatment for and a cure for diseases of the bowel;

(7) 90% of the rejections in the draft of World War II were because of malnutrition;

(8) cooked and peeled vegetables are so deficient in nutritional qualities that children's teeth and tonsils are adversely affected;

(9) Vitamin E is the anti-sterility vitamin;

(10) the ingestion of Vitamin A will build resistance against all infectious diseases;

(11) the consumption of the entire cucumber is an effective treatment for nervous conditions in women;

(12) the consumption of lettuce is an effective treatment for nervous conditions;

(13) the necessity for the removal of the tonsils of children arises because of malnutrition;

(14) the consumption of fruit and vegetable juices prepared in the Juicex will assure health, vigor and charm;

(15) expressed fruit and vegetable juices will regenerate and rebuild the system.

PAR. 12. The aforesaid statements are false, deceptive and misleading. In truth and in fact:

(1) the consumption of raw fruits and vegetables prepared in the Vita-Mix will not result in better digestion, restful sleep, normal elimination, strong healthy teeth or continued good eyesight;

(2) the consumption of raw fruits and vegetables prepared in the Vita-Mix is not an effective treatment for digestive disturbances,

insomnia, disorders of elimination, and will not improve carious or otherwise diseased teeth or improve eyesight;

(3) the consumption of raw fruits and vegetables prepared in the Vita-Mix will not result in good health;

(4) the consumption of vitamins and minerals does not increase the individual's resistance to most common ailments, and the vast majority of ailments suffered by mankind have no relation to vitamin or mineral deficiencies;

(5) nutritional deficiencies are not increasing but on the other hand some types of nutritional deficiencies which were at one time prevalent have now almost disappeared in this country; in fact the survey made by the U. S. Department of Agriculture referred to by respondents did not show that three out of every four meals are deficient in the minimum daily requirements of vitamins, minerals, and other nutrients, but on the contrary showed that the population sample studied in 1935 and 1936 failed by that extent to consume food which met the allowances of the Food and Nutrition Board of the National Research Council, and these allowances were roughly 50 percent higher than the established minimum daily requirements;

(6) the consumption of raw fruits and vegetables prepared in the Vita-Mix is not an effective treatment for or a cure for diseases of the bowel;

(7) only a relatively small percentage of men were rejected in the draft in World War II because of malnutrition;

(8) cooked and peeled vegetables are not so vitally deficient in nutritional qualities that children's teeth or tonsils are adversely affected;

(9) Vitamin E is not the anti-sterility vitamin;

(10) the ingestion of Vitamin A will not build resistance against any infectious diseases;

(11) the consumption of the entire cucumber is not an effective treatment for nervous conditions of women;

(12) the consumption of lettuce is not an effective treatment for nervous conditions;

(13) the necessity for the removal of children's tonsils does not arise because of malnutrition;

(14) the consumption of raw fruit and vegetable juices prepared in the "Juicex" will not assure health, vigor or charm;

(15) the consumption of raw fruit and vegetable juices will not regenerate and build up the system.

PAR. 13. Through the use of the word "Institute" in their trade name respondents represent that the Natural Foods Institute is an organization for the promotion of research, experimentation, investi-

gation and study in the science of dietetics and related subjects and that a trained technical staff of employees and a properly equipped laboratory are maintained for such purposes.

The use of such term is false, misleading and deceptive. In truth and in fact the Natural Foods Institute is not an organization for the promotion of research, experimentation, investigation and study in the science of dietetics and related subjects and there is no trained technical staff of employees, nor a properly equipped laboratory maintained for such purposes. There are no lectures or courses in dietetics or related subjects given by trained technical lecturers.

PAR. 14. Through the use of the word "sterilizer" in the trade name of the N. F. I. Vegetable and Fruit Washer and Sterilizer, respondents have represented that the apparatus has a germicidal effect. Said term appears in the respondents' catalogs and in other advertising media disseminated as aforesaid. The aforesaid term is false, misleading and deceptive. In truth and in fact said apparatus has no germicidal effect of any nature and is a device consisting essentially of a wire basket and a length of hose to be attached to a water faucet for use in washing vegetables.

PAR. 15. The use by the respondents of the foregoing statements disseminated as aforesaid had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all of such statements and representations were true, and to induce a substantial portion of the purchasing public, because of such erroneous and mistaken belief, to purchase said devices, foods, drugs and other merchandise.

PAR. 16. The complaint alleges that respondents made false or misleading representations concerning the vitamin and mineral content of brown rice, the loss of "most" of the vitamins and minerals in fruits and vegetables when they are peeled, the prevalence of eye troubles, tooth troubles and calcium deficiencies in the United States, and the deficiency in nutritional value of mashed potatoes, peeled potatoes and cooked carrots.

The record does not establish that respondents' representations in these respects were false or misleading.

PAR. 17. The complaint further alleged that respondents represented that certain articles of merchandise could be obtained from them free or as a gift or gratuity. This representation was alleged to be false, misleading and deceptive, as the receipt of said merchandise is conditioned on the purchase of other merchandise or the sale of other merchandise for respondents.

The record shows that respondents represented that upon the purchase, or sale to others, of certain of respondents' merchandise and

the sending in of the purchase price of the merchandise, the person submitting the order would get certain specified merchandise free. There is nothing of record to indicate that this representation is not true. The theory of the complaint is that the merchandise is not free because the recipient must submit an order for other merchandise to get the free item. The Commission is of the opinion that, as the conditions under which the free article can be obtained are fully and clearly stated and as there is no evidence that the price, quality or quantity of the merchandise to be purchased has been changed for the purposes of this free offer, this representation is not misleading or deceptive in any way and does not constitute an unfair or deceptive act or practice in commerce in violation of Section 5 of the Federal Trade Commission Act, as alleged. (For a full discussion of the reasons for the Commission's change in policy on this point, see its decision in the matter of *Walter J. Black, Inc.*, issued September 11, 1953.)

CONCLUSION

The aforesaid acts and practices of respondents, as herein found in Paragraphs 3 through 15 hereof were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

1. *It is ordered*, That the respondents William G. Barnard, Sr., and William G. Barnard, Jr., individually or as copartners trading as Natural Foods Institute, or under any other trade name, and their representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of their various foods, drugs and devices or any other products or devices of substantially similar composition or construction or possessing substantially similar properties, whether sold under the same name or any other names, do forthwith cease and desist from, directly or indirectly:

(a) Disseminating or causing to be disseminated any advertisement concerning respondents' food and drug products and devices, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement represents, directly or by implication:

(1) that their Chic tablets are a reducing formula, or will reduce weight;

(2) that their Garlic Capsules are odorless in use, or that said Garlic Capsules are a disinfectant of the intestinal canal;

(3) that their Papain Tablets are an effective treatment for indigestion;

(4) that mastitis can be contracted by humans;

(5) that their Papaya Pulp does not contain sugar, or is a valuable food for diabetics;

(6) that their Peppermint Tea is a tonic, or sweetens the intestinal tract;

(7) that their Alfalfa Tea produces muscle, bone, or hair in human beings to any significant degree;

(8) that Dr. Gaymont's Yogourt Culture is an effective treatment for stomach ulcers or colitis;

(9) That red beet juice will build red blood or red corpuscles of the blood or tone up the blood to any significant degree;

(10) that dehydrated powdered vegetables are more digestible or nutritious than fresh vegetables;

(11) that celery juice has any therapeutic value in the treatment of arthritis or rheumatic conditions;

(12) that the use of the NFI Vibrator provides benefits in excess of those supplied by massage or stimulates or improves the circulation of the blood generally throughout the body;

(13) that the use of the Oster Stim-U-Lax Junior stimulates or improves the circulation of the blood generally throughout the body;

(b) Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said products in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations prohibited in Paragraph (a) hereof.

2. *It is further ordered*, That the respondents William G. Barnard, Sr., and William G. Barnard, Jr., individually or as copartners trading as Natural Foods Institute, or under any other trade name, and their representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of their various foods, drugs, devices, health books, juice extractors or expressors, kitchen equipment, or any other merchandise related to health problems, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(a) Representing, directly or by implication:

(1) that a deficiency of minerals and salts in the diet is the primary cause of nearly every sickness and disease;

(2) that eating the various vegetable and fruit juices in the manner recommended in the book entitled "Raw Vegetable Juices" is a cure for

arthritis, gall bladder trouble, anemia, tuberculosis, asthma, heart trouble, indigestion, colitis, boils, cancer, convulsions, diabetes, high blood pressure, miscarriage, rheumatism, eczema, goiter, liver trouble, kidney trouble, obesity, nervousness, prostate trouble, chicken pox, the common cold, hernia, or hives, or the common ailments suffered by mankind;

(3) that by eating carrots and the other vegetables in the manner recommended in the book entitled "Health Via the Carrot and Other Vegetables" humans will remain healthy;

(4) that eating carrots and the other vegetables in the manner recommended in the book entitled "Health Via the Carrot and Other Vegetables" is a cure for indigestion, glandular troubles, headaches, rheumatism, disorders of the blood stream, diabetes, asthma, diseases peculiar to women, colds, influenza, arthritis, or cancer;

(5) that eating carrots and other vegetables in the manner set out in the book "Health Via the Carrot and Other Vegetables" will cure a "tired feeling" unless such representation be expressly limited to such condition when due to a dietary deficiency of the type which can be corrected by eating carrots and other vegetables;

(6) that the system or method of treatment outlined in the book entitled "The Grape Cure" will relieve or cure cancer;

(7) that the system or method of treatment recommended in the book entitled "My Water Cure" is an effective cure for any curable disease;

(8) that the consumption of raw fruits and vegetables prepared in the Vita-Mix results in better digestion, restful sleep, normal elimination, strong healthy teeth, or continued good eyesight;

(9) that the consumption of raw fruits and vegetables prepared in the Vita-Mix is an effective treatment for digestive disturbances, insomnia, disorders of elimination, carious or otherwise diseased teeth, or impaired eyesight;

(10) That the consumption of raw fruits and vegetables prepared in the Vita-Mix will result in good health;

(11) that the consumption of vitamins and minerals increases the individual's resistance to most common ailments;

(12) that nutritional deficiencies are increasing or that according to the U. S. Department of Agriculture, three out of every four meals in the U. S. are deficient in the minimum daily requirements of vitamins and minerals and other nutrients;

(13) that the consumption of raw fruits and vegetables prepared in the Vita-Mix is an effective treatment for or a cure for diseases of the bowel;

(14) that 90% or any substantial percentage of the rejections in the draft in World War II was because of malnutrition;

(15) that cooked and peeled vegetables are so deficient in nutritional quantities that children's teeth or tonsils are adversely affected;

(16) that Vitamin E is the anti-sterility vitamin;

(17) that the ingestion of Vitamin A builds resistance against any infectious diseases;

(18) that consumption of the entire cucumber is an effective treatment for nervous conditions in women;

(19) that consumption of lettuce is an effective treatment for nervous conditions;

(20) that the necessity for the removal of the tonsils of children arises from malnutrition;

(21) that the consumption of fruit and vegetable juices prepared in the Juicex will assure health, vigor or charm;

(22) that the consumption of expressed fruit and vegetable juices will regenerate or rebuild the system.

(b) Using the word "Institute" or any simulation thereof as a part of respondents' trade name, or otherwise representing, directly or by implication, that respondents' business is an organization for the promotion of research, experimentation, investigation and study.

(c) Using the term "Sterilizer" or any other word of similar import, either alone or in conjunction with other words, in the trade name of respondents' kitchen implement "NFI Vegetable and Fruit Washer and Sterilizer," or otherwise representing, directly or by implication, that respondents' implement is a sterilizer or possesses germicidal properties or qualities.

3. *It is further ordered*, That, with respect to the issues raised by the complaint other than those to which this order relates, the complaint be, and the same hereby is, dismissed.

4. *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 Carretta not participating.

Commissioner Mead concurs except for the finding regarding use of the word "free." (See Mead dissent in Walter J. Black, Inc., et al., Docket 5571)

IN THE MATTER OF

LOUIS SHAPIRO TRADING AS PURO COMPANY

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 5710. Complaint, Nov. 10, 1949—Decision, Nov. 19, 1953

Where an individual engaged in the manufacture and in the interstate sale and distribution of a water softening cleanser designated "Puro"; in promoting the sale of said product through (1) newspaper advertisements reading "BUY ONE—GET ONE FREE * * * Two 25¢ Packages—25¢"; the use of a coupon included in the package of the product or loose in the grocers' cartons thereof, reading "FREE COUPON—Take this Coupon to your dealer and he will give you one 25 cent box of PURO free with purchase of one box at the regular price. 25¢ * * * BUY ONE—GET ONE FREE"; and the placing upon the package the words "PURO—Free Coupon Inside"; (2) the dropping of the word "free" from the phrase "BUY ONE—GET ONE FREE" in his aforesaid advertising, following an April 1948 conference with the Chicago Better Business Bureau; and (3) following an August 1948 conference with officials of the Commission—outgrowth of earlier communications going back to 1946 and the using up of his existing stock of coupons—the issuance of a new form of coupon in which the word "free" was deleted from the body thereof, but continued in the heading, or in which the word was entirely deleted and there was set forth the depiction of a box of the product, and the inscription "BUY ONE—GET ONE" and the words "More for Your Money—2—25¢ Packages for 25¢"; and legend on package reading "BUY ONE—GET ONE", with no reference to "Free Coupon Inside"—

(a) Represented through the use of the aforesaid statements that the usual and customary retail price of his said product was 25¢ per package; notwithstanding the fact that said product was regularly sold in retail grocery stores at two packages for 25¢; there was no evidence that a single package was ever sold for 25¢; and certain retail stores sold it at 13¢ for a single package and two packages for 25¢;

(b) Represented, as aforesaid, that if one package was purchased at said 25¢ price, a second would be given "free", that is, as a gift or gratuity without cost to the retail purchaser; notwithstanding the fact that it was not thus given without cost to such purchaser, but was included in the regular retail selling price of 25¢ for two packages, as above noted:

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

Before *Mr. John Lewis*, hearing examiner.

Mr. George M. Martin for the Commission.

Mr. Ralph M. Snyder, of Chicago, Ill., for respondent.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Commission, on November 10, 1949, issued and subsequently served its complaint in this proceeding upon Louis Shapiro, an individual trading as Puro Company, charging him with unfair and deceptive acts and practices in commerce in violation of the provisions of that Act. After the issuance of said complaint and the filing of respondent's answer thereto, a hearing was held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, on June 13, 1952, the hearing examiner filed his initial decision herein which was duly served on the parties.

On July 7, 1952, counsel for respondent filed with the Commission an appeal from said initial decision. Thereafter this proceeding regularly came on for consideration by the Commission upon the record herein, including briefs in support of and in opposition to said appeal (oral argument not having been requested) and the Commission issued its order granting said appeal in part and denying it in part; and the Commission, being now fully advised in the premises, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion and order to cease and desist, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent, Louis Shapiro, is an individual doing business under the trade name of Puro Company with his principal office and place of business located at 2600 West Madison Street, in Chicago, Illinois.

PAR. 2. Respondent is now, and for several years last past has been, engaged in the business of manufacturing and offering for sale and selling a water softening cleanser designated as "Puro."

Respondent causes and has caused his said product, when sold, to be shipped from his place of business in the State of Illinois to purchasers thereof located in various other States of the United States. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said product in commerce between and among various States of the United States.

PAR. 3. In the course and conduct of his business and for the purpose of promoting the sale of said Puro, respondent, for more than two

years prior to 1949, made certain statements with respect to the price and method of selling said product, in advertising matter in newspapers, upon coupons accompanying said product, and on the containers in which said product was packaged. Among and typical of statements appearing in newspaper advertisements, inserted either by respondent alone or in cooperative advertising with grocer customers, was the following:

BUY ONE—GET ONE FREE
PURO
Cleans Everything
Softens Water—Saves Soap
Two 25¢ Packages—25¢.

A coupon, which was inclosed within the package of Puro or was placed loose in the cartons in which said product was shipped to the grocer, contained the following legend:

FREE COUPON
Take this Coupon to your dealer and he will give you one 25 cent box of PURO free with purchase of one box at the regular price.
25¢
* * *
BUY ONE—GET ONE FREE

The box in which said product was packaged contained thereon the following statement:

PURO
Free Coupon Inside

Following a conference with representatives of the Chicago Better Business Bureau, respondent, in April 1948, modified his newspaper advertising material somewhat. In such advertising he dropped the word "Free" from the phrase: "BUY ONE—GET ONE FREE," said advertisement thereafter reading typically as follows:

BUY ONE—GET ONE
PURO
* * *
Two 25¢ Packages—25¢.

However, respondent continued to use the same form of coupon and box until after a conference with officials of the Commission in August 1948, said conference being an outgrowth of earlier communications going back to 1946. Several months following the August 1948 conference, and after using up his existing stock of coupons, respondent issued a new form of coupon in which the word "Free" was deleted from the body of the coupon but continued to be used in the heading thereof, said coupon reading as follows:

FREE COUPON
Take this Coupon to your dealer and he will give you one box of PURO at no extra cost with the purchase of one box for 25¢

* * *

BUY ONE—GET ONE

Respondent has continued to use this form of coupon since the latter part of 1948. As an alternate form, respondent has also used another coupon in which the word "Free" has been entirely deleted and which contains a picture of a box of respondent's product with the inscription thereon:

BUY ONE—GET ONE

and the words:

More for Your Money
2
25¢ Packages
for 25¢

The box in which respondent's product is packaged no longer contains any reference to "Free Coupon Inside" but since the latter part of 1948 has contained the inscription:

BUY ONE—GET ONE

PAR. 4. Through the use of the aforesaid statements, respondent has represented and now represents: (a) that the usual and customary retail price of his said product is 25 cents per package, and (b) that if one package is purchased at said price, a second will be given "Free," that is, as a gift or gratuity without cost to the retail purchaser. Respondent claims that it discontinued the latter representation in 1948 after objection was raised by the Commission and the Chicago Better Business Bureau. However, the record discloses that respondent has continued to use a coupon entitled "Free Coupon" and that the box in which the said product is packaged contains the inscription: "BUY ONE—GET ONE." From the entire context of his advertising, it is clear that respondent has continued to represent that a second package of his product is given as a gift or gratuity without cost to the purchaser.

PAR. 5. The foregoing representations are false, misleading, and deceptive.

(a) The record discloses that respondent's product, Puro, is regularly sold in retail grocery stores at two packages for 25 cents. There is no evidence in the record that a single package was ever sold for 25 cents. Certain retail stores have sold it at 13 cents for a single package and two packages for 25 cents.

Respondent contends that his representation of Puro as a 25-cent item is true because he so designated it in his advertising material and in shelf markers distributed to his grocer customers, and because he suggested to the grocers in promotional material accompanying the shelf markers that the "best way" to sell Puro is: "Two 25¢ Packages for 25¢." Respondent's contention cannot be accepted in the face of the affirmative evidence that retail purchasers customarily received two packages upon payment of the sum of 25 cents, and in the absence of any evidence in the record that a customer ever received only a single package upon payment of that sum. Although respondent claims that the retail customer was not paying 25 cents for *two* packages but was only paying for *one* package and receiving the other one "*free*," this self-serving claim has no support in the record but merely reflects the false illusion which respondent sought to maintain in his advertising. It is significant that while respondent, in an effort to maintain the fiction that he was selling a 25-cent item, at one time purported to require the purchaser to present a "Free Coupon" in order to get the second package (a requirement which was widely ignored by the grocer customers), even this pose was dropped in 1949 when respondent advised his grocer customers in a promotional notice issued by him that a purchaser was to receive two packages for 25 cents "with or without a coupon" (albeit respondent still asserted in the notice that "Puro sells at Two 25¢ Packages for 25¢").

Respondent also relies on the fact that he had a "fair trade" agreement with one of his customers in Illinois providing for a minimum retail price of 25 cents for a single package. The agreement, however, also provided that the customer could distribute to the consumer an additional package, supplied by respondent, for the same price. Thus, even under this agreement, it is clear that the usual and customary retail price at which respondent's product is actually sold is not 25 cents per package but is two packages for 25 cents. Thus, the fact that respondent's "fair trade" agreement set the price of a single package at 25 cents is not controlling.

(b) The second package of respondent's product is not "Free," is not a gift or gratuity, and is not given without cost to the retail purchaser as the purchaser pays 25 cents, which is the regular retail selling price for two packages.

PAR. 6. The use by the respondent of the foregoing false and misleading statements and representations has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the mistaken and erroneous belief that such statements and representations are true and to cause the purchase of substantial quantities of respondent's said product because of such mistaken and erroneous belief.

CONCLUSION

The aforesaid acts and practices of the respondent, as herein found are all of 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.

ORDER

It is ordered, That respondent, Louis Shapiro, individually and trading and doing business as Puro Company or under any other name, and his agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of "Puro," or any other merchandise, do forthwith cease and desist from representing, directly or by implication:

(1) That a price which is in excess of the price at which said merchandise is regularly sold is the customary or usual price of said merchandise.

(2) That any article of merchandise is being given free or as a gift or without cost where some or all of the cost of said article has been added to the regular price of other merchandise, the purchase of which is required as a condition for receiving said article.

It is further ordered, That respondent, Louis Shapiro, 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 this order.

Commissioner Mead concurs except he would issue a broader order regarding use of the word "free." (See Mead dissent in Walter J. Black, Inc., et al., Docket 5571.)

IN THE MATTER OF

MARLENE'S, INC. ET AL.

DECISION AND OPINION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 5998. Complaint, June 4, 1952—Decision, Nov. 19, 1953

Where a corporation and its president, engaged in the interstate sale and distribution of their "Mynex" drug preparation which contained vitamins and minerals and to which they had added methylcellulose in such a quantity as they deemed sufficient to give the user of the preparation a feeling of fullness and satisfaction and thereby curb his appetite; and two individuals who were their advertising representatives, and prepared, edited, tested, and placed all advertising material used to promote the sale of said "Mynex"; in advertising the same through newspapers of general circulation, radio and television continuities, and letters and circulars, directly and by implication—

(a) Represented that said "Mynex" tablets, used in conjunction with a calorie-reducing regime, comprised a basically different type of weight reducer greatly superior to any other weight reducer known to medical science;

When in fact said "Mynex Plan" for reducing weight was dependent solely upon the low-calorie diet for its effectiveness, and, as such, was not basically different from or superior to numerous other weight-reducing plans, even with the addition of methylcellulose;

(b) Falsely represented that said tablets possessed weight-reducing properties and that they would prevent the weak, tired, run-down feeling that usually accompanies a restrictive diet, and that through the use of their so-called "Mynex Plan", specific reductions could be achieved within a prescribed period of time;

The facts being they possessed no weight-reducing properties in themselves; a tired, weak, or run-down feeling which might result from following said "Mynex Plan" would ordinarily be caused by the low-calorie diet rather than a lack of vitamins or minerals; since said tablets would only prevent such conditions caused by such deficiency, it could not be truthfully stated that use of said preparation would prevent the same; and no specific predetermined weight reduction can be achieved by using respondents' preparation for a prescribed period of time; and

(c) Falsely represented that their said preparation and low-calorie diet had been approved for advertising by the Canadian Government;

The facts being that while they had relied, in said representation, upon correction and apparent approval of advertising copy by an official of the Canadian Department of National Health and Welfare, advertising of weight-reducing preparations is expressly forbidden by Canadian law and approval of the advertising of "Mynex" in Canada was beyond the power of any official:

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

Before *Mr. Abner E. Lipscomb*, hearing examiner.

Mr. Joseph Callaway for the Commission.

Mr. Henry Junge, of Chicago, Ill., for respondents.

Order denying appeal from initial decision of hearing examiner and decision of the Commission and order to file report of compliance, Docket 5998, November 19, 1953, follows:

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on June 4, 1952, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in commerce in violation of the provisions of said Act. Thereafter, counsel supporting the complaint and counsel for respondents, on December 31, 1952, entered into a stipulation as to the facts, which was subsequently amended by a supplemental stipulation as to the facts filed on January 14, 1953, wherein it was stipulated and agreed that the facts set forth therein might be taken as the facts in this proceeding in lieu of evidence in support of the charges stated in the complaint or in opposition thereto, and that the hearing examiner might, without any intervening procedure, issue his initial decision herein upon the basis of said stipulations. Thereafter, counsel for respondents filed a motion to dismiss the complaint and counsel supporting the complaint filed an answer in opposition thereto. After final consideration of the record, including said motion to dismiss and answer thereto, the hearing examiner, on February 13, 1953, filed his initial decision herein.

Within the time permitted by the Commission's Rules of Practice, counsel for respondents filed an appeal from said initial decision. The Commission having duly considered said appeal and briefs and oral argument of counsel in support of and in opposition thereto and being of the opinion that, for the reasons stated in the accompanying opinion of the Commission, the appeal is without merit:

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

The Commission is of the further opinion, however, that the initial decision of the hearing examiner is inappropriate to dispose of this proceeding, for the reason that the stipulated facts and the hearing examiner's findings based thereon with respect to respondent James O. Webb do not warrant an order against him as an individual. Therefore, the Commission, being now fully advised in the premises, 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, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Marlene's, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 230 North Michigan Avenue, Chicago, Illinois.

PAR. 2. The individual respondent R. J. Smasal is now, and has been since the creation of the corporate respondent, president of Marlene's, Inc. individual respondent Martin P. King (erroneously called M. T. King in the complaint herein) formerly served the corporate respondent as vice president, but disposed of his entire ownership of stock and formally resigned as vice president of said corporate respondent some time before the issuance of the complaint herein. He has had no connection with said corporation since on or about January, 1952, and the complaint will, therefore, be dismissed as to him. The individual respondent James O. Webb is secretary-treasurer of the corporate respondent. The president of the corporate respondent, R. J. Smasal, has directed and controlled the policies of the corporate respondent in regard to acts and practices hereinafter set forth. His address is the same as that of the corporate respondent. It does not appear that respondent James O. Webb has participated in the direction or control of the policies of the corporate respondent in such a manner or to such an extent as to warrant an order against him as an individual. The complaint will, therefore, be dismissed as to him as an individual, but not as an officer of the respondent corporation. As hereinafter used, the term "respondents" does not include James O. Webb as an individual, and Martin P. King.

PAR. 3. The corporate respondent, Marlene's, Inc., and the individual respondent, R. J. Smasal, are now and for several years last past have been engaged in the business of selling and distributing a drug preparation, as "drug" is defined in the Federal Trade Commission Act, in conjunction with a calorie reducing regimen.

The designation used by these respondents for said drug preparation, the directions for use thereof, and until approximately a year ago the formula for said preparation were as follows:

Designation: "Mynex"

63 Tablets of Mynex

2 Green Tablets together contain:

Ferric Pyrophosphate	16 mg.
Tricalcium Phosphate	720 mg.
Diastase of Malt	100 mg.

Each Maroon Tablet Contains:

Vitamin B_1	1 mg.
Vitamin B_2	1 mg.
Vitamin C	16 mg.
Niacin Amide	6 mg.
Vitamin D	200 INT Units
Vitamin B_6	0.4 mg.
Calcium Pantothenate	2 mg.

Directions for Use

For adults only: Take 2 green tablets one half hour before each meal (3 times a day) preferably with grape juice, grapefruit juice, orange juice, skimmed milk or water. Take one maroon tablet soon (after) each meal with a glass of water.

The formula for said preparation was changed approximately a year ago by the addition of methylcellulose in such quantity as these respondents deemed sufficient to give the user of the preparation a feeling of fullness and satisfaction, and in this way curb his appetite. No other effect is claimed for the methylcellulose.

PAR. 4. These respondents cause and have caused the said preparation, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof located in various other States of the United States. These respondents maintain, and at all times mentioned herein have maintained, a substantial volume of trade in said preparation in commerce between and among the various States of the United States.

PAR. 5. Respondents Edward H. Larson and Nelson J. McMahon operate the respondent advertising agency of O'Neil, Larson & McMahon, with its office and principal place of business located at 230 North Michigan Avenue, Chicago, Illinois. These respondents are the advertising representatives of respondent Marlene's Inc., and prepare, edit, test, and place all advertising material used by respondent Marlene's, Inc., to promote the sale of the aforesaid drug preparation.

PAR. 6. The respondents, Marlene's, Inc., R. J. Smasal, Edward H. Larson, and Nelson J. McMahon have acted in conjunction and cooperation with one another in the performance of the acts and practices hereinafter set forth.

PAR. 7. In the course and conduct of their business, these respondents have disseminated, and have caused the dissemination of, advertisements concerning their said preparation, by the United States mails, and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing and

which were likely to induce, directly or indirectly, the purchase of said preparation. These respondents also disseminated, and caused the dissemination of, advertisements concerning said preparation by various means, including, but not limited to, newspapers of general circulation, radio and television continuities, letters, and circulars, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act, but at the present time there is no advertising being employed.

PAR. 8. Among and typical, but not all-inclusive, of the statements and representations, disseminated and caused to be disseminated as hereinabove set out, until approximately one year ago, are the following:

* * * an amazing discovery.

Mynex brings guaranteed, the safest, easiest, fastest reducing discovery ever made by modern medical science.

* * * an amazing new reducer called Mynex was introduced in Canada.

This sensational reducer is called MYNEX.

HOW SMALL TABLET BRINGS AMAZING RESULTS Canadian overeaters who found usual reducing methods too hard * * * acclaimed new MYNEX * * *

* * * try Mynex Reducing Food Tablets * * *

Today, the most popular reducing tablet is * * * called MYNEX * * *

* * * tablets avoid weak, tired, run-down feeling.

* * * if you want to lose fat * * * without feeling tired or rundown * * * ask * * * for MYNEX.

This was the first time I was ever able to reduce without getting headaches, feeling tired, weak and rundown.

5–10 pounds disappear first 7 days eating concentrated vitamin mineral tablets.

3–5 pounds disappear safely first few days.

16–23–35 pounds * * * Even more in a few short weeks.

Start reducing fat very first day.

* * * Mynex is so safe it was actually approved for advertising in Canada * * *

* * * Mynex Reducing method is an Approved Canadian method in food tablet form * * * accepted for advertising by Canadian authorities.

PAR. 9. Through the use of the statements and representations contained in the advertisements hereinabove set forth and others of the same import but not specifically set out herein, the respondents represented, directly and by implication: that Mynex tablets used in conjunction with a calorie reducing regimen comprised a basically different type of weight reducer greatly superior to any other weight reducer known to medical science; that Mynex tablets possess weight-

reducing properties; that Mynex tablets will prevent the weak, tired, run-down feeling that usually accompanies a restrictive diet; that through the use of the so-called Mynex plan specific predetermined weight reductions can be achieved within a prescribed period of time; and that respondents' preparation and low calorie diet have been approved for advertising by the Canadian government.

PAR. 10. The aforesaid representations were misleading in material respects and constituted "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, the Mynex plan for reducing weight is dependent solely upon a low calorie diet for its effectiveness and as such is not basically different from or superior to numerous other weight-reducing plans, even with the addition of methylcellulose. Mynex tablets possess no weight-reducing properties in themselves. A tired, weak, or run-down feeling which might result from following the Mynex plan would ordinarily be caused by the low calorie diet rather than by a lack of vitamins or minerals. Since Mynex tablets will only prevent such conditions when caused by vitamin or mineral deficiency, it cannot be truthfully stated that the use of said preparation will prevent said conditions. No specific predetermined weight reduction can be achieved by using respondents' preparation for a prescribed period of time. Respondents, in representing to the public in this country that Mynex had been approved for advertising by Canadian authorities, were relying upon correction and apparent approval of advertising copy by an official of the Canadian Department of National Health & Welfare. In truth and in fact advertising of weight-reducing preparations is expressly forbidden by Canadian law, and approval of the advertising of Mynex in Canada was and is beyond the power of any official.

PAR. 11. The use by the respondents of the foregoing false advertisements and the false, misleading, and deceptive statements and representations contained therein had the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that all of said statements and representations were true, and into the purchase of respondents' preparation because of such erroneous and mistaken belief.

CONCLUSION

The acts and practices of the respondents as herein found are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondents, Marlene's, Inc., a corporation, its officers, and R. J. Smasal, individually and as an officer of said corporation, and respondents Edward H. Larson and Nelson J. McMahon, individually and doing business as O'Neil, Larson & McMahon, or under any other name, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of respondents' preparation designated as "Mynex", or any other preparation containing substantially similar ingredients 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 respondents' weight-reducing plan is basically different from or superior to other weight-reducing plans requiring a low calorie diet with a dietary supplement;

(b) That Mynex tablets possess weight-reducing properties;

(c) That Mynex tablets will prevent the development of a tired, weak, or run-down feeling except when such conditions result solely from vitamin or mineral deficiencies;

(d) That specific or predetermined weight reduction will be achieved within a prescribed period of time through the use of respondents' plan;

(e) That respondents' preparation or plan has been approved for advertising by the Canadian government;

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

It is further ordered, That the complaint herein be, and it hereby is, dismissed as to Martin P. King and as to James O. Webb in his individual capacity but not in his capacity as an officer of the corporate respondent.

It is further ordered, That Marlene's, Inc., R. J. Smasal, Edward H. Larson, and Nelson J. McMahon shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

OPINION OF THE COMMISSION

By CARRETTA, Commissioner:

This matter is before the Commission upon an appeal by the respondents from the initial decision of the hearing examiner and upon briefs and oral argument of counsel in support of and in opposition to the appeal.

The Commission's complaint in this proceeding charges the respondents with the use of unfair and deceptive acts and practices through the dissemination of false advertisements concerning a drug preparation designated "Mynex", advertised to reduce weight. The complaint sets forth a number of the statements and representations which the respondents have made in their advertising of the product, and alleges that such statements and representations are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. The respondents in their answer to the complaint admitted all the material allegations except with respect to certain of the individual respondents, and alleged that the statements and representations challenged by the complaint were abandoned and that the formula for the product involved was materially changed prior to the issuance of the complaint.

Counsel supporting the complaint and counsel for the respondents entered into a written stipulation as to the facts, which was subsequently amended by a supplemental stipulation as to the facts, in which it was stipulated and agreed, among other things, that the statement of facts contained therein "may be taken as the facts in this proceeding in lieu of evidence in support of the charges stated in the complaint or in opposition thereto; that the Hearing Examiner may proceed upon said statement of facts to make his Initial Decision, stating his findings as to the facts, including inference which he may draw from said stipulation of facts, and his conclusion based thereon, and enter his order disposing of the proceeding, without the filing of proposed findings and conclusions or the presentation of oral argument." The facts so stipulated between counsel are, with certain exceptions, essentially the same as those alleged in the complaint.

The respondents thereafter filed a motion with the hearing examiner for dismissal of the complaint on the grounds that the advertising statements challenged by the complaint had been discontinued and that it would not be in the public interest to continue the proceeding. This motion was denied by the hearing examiner, except as to respondent Martin P. King.

The hearing examiner filed his initial decision, in which he found that the respondents, except individual respondent Martin P. King (erroneously named in the complaint as "M. T. King"), have engaged

in the acts and practices alleged in the complaint, and ordered the respondents, except Martin P. King, to cease and desist disseminating advertisements containing the representations found to be false. He dismissed the complaint as to respondent Martin P. King.

Respondents filed an appeal from the hearing examiner's initial decision in which they contend (1) that no order should be issued because the respondents had discontinued the use of the false advertisements approximately six months prior to the issuance of the complaint; (2) that no order should issue because the formula for the product involved was changed prior to the issuance of the complaint; and (3) that prohibition 1 (e) of the order in the initial decision is not supported by the facts.

It is well settled law that discontinuance or abandonment of an unlawful practice does not constitute a bar to an order of the Commission restraining the respondents from engaging in the unlawful practices. Whether or not the Commission will enter an order in a proceeding where the complained of practices have been discontinued is a matter within the discretion of the Commission and in the exercise of that discretion the Commission must necessarily consider, among other things, whether there is a likelihood that the practice may be resumed. There is nothing in the record in this case upon which to base a determination that the respondents will not resume the practices found to be unlawful. It appears that the respondents are still offering for sale and selling a drug preparation and plan for reducing weight. Under these circumstances, the Commission deems it necessary in the public interest to insure against a resumption of the unlawful practices by the issuance of an order to cease and desist.

The change in the formula for a product concerning which false advertisements have been disseminated obviously does not constitute a bar to the issuance of an order to cease and desist. The change in the formula for the product involved in this proceeding consisted of the addition of a new ingredient, methylcellulose, "in such quantity as these respondents deemed sufficient to give the user of the preparation a feeling of fullness and satisfaction, and in this way curb his appetite." No other effect is claimed for the methylcellulose. It was stipulated that "the Mynex plan for reducing weight is dependent solely upon a low calorie diet for its effectiveness and as such is not basically different from or superior to numerous other weight reducing plans, even with the addition of methylcellulose." The addition of the new ingredient to the preparation in no way changed the situation as to the representations which the respondents have admitted were false.

Paragraph 1 (e) of the order in the initial decision prohibits the respondents from representing that their "preparation or plan has

been approved for advertising by the Canadian government." The complaint alleges, and the respondents in their answer admit, that the respondents have represented that their "preparation and low calorie diet have been approved for advertising by the Canadian government" and that "Said preparation and low calorie diet have not been approved for advertising by the Canadian government. In truth and in fact, advertising of weight reducing preparations is expressly forbidden by Canadian law."

In a stipulation between counsel it was agreed that "Respondents in representing to the public in this country that Mynex had been approved for advertising by Canadian authorities were relying upon correction and apparent approval of advertising copy by an official of the Canadian Department of National Health & Welfare. In truth and in fact advertising of weight reducing preparations is expressly forbidden by Canadian law, and approval of the advertising of Mynex in Canada was and is beyond the power of any official." This stipulated fact may have the effect of showing respondent's reasons for having made the representation, but it in no way changes the fact that the representation was made and that it was false. The hearing examiner's finding is in accordance with the stipulated facts, and fully supports prohibition 1 (e) of the order.

Although respondents did not raise the point in their appeal, we are of the opinion that the stipulated facts and the hearing examiner's findings based thereon with respect to respondent James O. Webb do not warrant an order against him as an individual.

In view of the foregoing, respondents' appeal should be denied. However, the complaint should be dismissed as to respondent James O. Webb in his individual capacity, but not as an officer of the corporate respondent.

IN THE MATTER OF

COUNTRY TWEEDS INCORPORATED AND MARCUS WEISMAN

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 5957. Complaint, Feb. 21, 1952—Decision, Nov. 25, 1953

Where a corporation and its secretary-treasurer, who formulated its policies and directed and controlled all its practices, engaged in the manufacture and competitive interstate sale and distribution of women's coats, including its "Kashmoor" line in which the fabric of the coat, containing no Cashmere, was composed of 80% wool (Alpaca, mohair, and sheep's wool) and 20% nylon—

Made use, without more, of the legend "An exclusive fabric—KASHMOOR—Country Tweeds" on the permanent labels affixed by them to their said coats, as distinguished from the temporary tag attached to the coat in compliance with the Wool Products Labeling Act:

Held, That such acts and practices of the respondents, under the circumstances set out, were all to the prejudice of the public and of respondents' competitors, and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices therein.

Before *Mr. William L. Pack*, hearing examiner.
Mr. George E. Steinmetz for the Commission.
Barshay & Frankel, of New York City, for respondents.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on February 21, 1952, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the provisions of that Act. After the filing by respondents of their answer to the complaint, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of the complaint were introduced before a hearing examiner of the Commission, theretofore duly designated by it, and such testimony and other evidence were duly recorded and filed in the office of the Commission. Thereafter, the said hearing examiner, on April 17, 1953, filed his initial decision.

Within the time permitted by its Rules of Practice, the Commission, having reason to believe that said initial decision did not constitute an adequate disposition of the proceeding, issued an order placing

this case on its docket for review, served on all parties its tentative decision herein and granted to them permission to file with the Commission any objections they might have to said tentative decision. None of the parties having filed any objections to said tentative decision, this proceeding regularly came on for final consideration before the Commission upon the aforesaid complaint and respondents' answer thereto; and the Commission, having duly considered the matter and being now fully advised in the premises, finds that this proceeding is in the interest of the public and being of the opinion that the hearing examiner's initial decision does not constitute an adequate disposition of this proceeding, makes this its findings as to the facts, conclusions and order to cease and desist, the same to be in lieu of the initial decision of the hearing examiner.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Country Tweeds Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 250 West 39th Street, New York, New York. Respondent Marcus Weisman is secretary and treasurer of the corporation, and formulates its policies and directs and controls all of its practices. Respondents are engaged in the manufacture and sale of women's coats.

PAR. 2. Respondents cause their coats, when sold, to be transported from their place of business in the State of New York to purchasers located in various other States of the United States and in the District of Columbia. Respondents maintain a course of trade in their coats in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 3. In the sale and distribution of their coats, respondents are in substantial competition with other corporations and individuals engaged in the sale and distribution of women's coats in commerce between and among the various States of the United States and in the District of Columbia.

PAR. 4. (a) Among the various lines of coats manufactured and sold by respondents is one designated by the trade name "Kashmoor," and it is this trade name which forms the subject matter of the present proceeding. The complaint charges in substance that the name is false and misleading in that it constitutes a representation that the coats so designated are made in whole or in substantial part of cashmere, the wool of the Tibetan or Kashmir goat.

(b) The fabric used in the coats is made to respondents' order by a fabric manufacturer. It is composed of 80 percent wool (alpaca,

mohair and sheep's wool) and 20 percent nylon. It contains no cashmere. The alpaca and mohair lend softness to the fabric, while the nylon increases its durability.

(c) This particular coat was first placed on the market by respondents early in 1950. In searching for a name for the coat respondents or their attorney came upon the name "Kashmoor," which had at one time been the property of another company, Cohen Brothers Corporation. This company had been ordered by the Commission, in 1938, to stop using "Kashmoor" to refer to knitted outerware not made from the wool of the Tibetan or Cashmere (i. e., Kashmir) goat. Upon ascertaining that this company had gone out of business, respondents adopted the name for their coat. While registration of the name has been applied for by respondents, the registration had not been consummated at the time the hearings in the present case were held. It appears, however, that respondents have been successful, through injunction proceedings, in preventing the use of the name or a substantially similar name by another manufacturer.

(d) Since their adoption of the name early in 1950, respondents have featured it both in the label affixed to the coats and in newspaper and magazine advertisements of the coats. In addition to their own advertising, respondents frequently share in the cost of local newspaper advertising of the coats done by their customers (retail stores). While respondents supply to their customers copies of their own advertisements and other suggested advertising material, they do not undertake to censor or supervise the stores' advertising in detail. The record indicates, however, that the stores do follow the general theme used by respondents in their own advertising.

(e) Respondents' advertisements feature the name "Kashmoor" and include such statements as "Soft as Cashmere, Durable as Nylon," "New Coat Fabric Created by Strass-Einiger Exclusively for Famous Country Tweeds Classics," "For the first time—a fabric that so closely resembles costly Cashmere—you can't tell the difference until you see the modest price-tag and marvel at the wear!", and "KASHMOOR, made of 80% precious wool fibers, 20% Dupont nylon staple, has the luxurious softness and feel of Cashmere yet it costs three times less * * * gives five times the wear."

PAR. 5. (a) Ten women members of the public testified with respect to the impression gained by them from reading respondents' advertisements, five of the witnesses being offered in support of the complaint and five by respondents. The testimony of the first group was, in substance, that upon examining the advertisements and seeing the featured name "Kashmoor" their first impression was that the coats contained cashmere, but upon reading further this impression

was dispelled. The testimony of the second group was, in substance, that neither the name Kashmoor nor any other part of the advertisements caused them to think the coats contained cashmere. On the whole, the testimony of the public witnesses would appear to be of doubtful probative value and of little assistance in resolving the issue as to whether the trade name Kashmoor implies cashmere. The issue would appear to be one which must be resolved upon the basis of an examination and consideration of the name itself and the attendant facts and circumstances.

(b) It seems clear that the name Kashmoor suggests the word cashmere, the two words being almost identical in sound. Further, the name Kashmoor closely resembles, not only in sound but in spelling as well, the word Kashmir, which is the name of one of the regions where the Cashmere goat is found. Assuming that members of the public seeing the current advertisements of respondents and their customers would read the advertisements in their entirety and, therefore, be informed as to the fiber content of the coats, there is no assurance that future advertisements will include such information. Moreover, the permanent label affixed by respondents to the coats (not to be confused with the temporary tag attached to the coats in compliance with the Wool Products Labeling Act) contains no information as to fiber content, but reads simply "An exclusive fabric—KASHMOOR—Country Tweeds." It is, therefore, concluded that the use of the name Kashmoor implies a cashmere fiber content and has the tendency and capacity to cause a substantial portion of the public to believe that coats so designated contain at least some cashmere fiber.

(c) The hearing examiner, in reaching the same conclusion and recommending the same order as contained herein, found that cashmere means a fine, soft dress fabric in addition to meaning the wool of the Tibetan or Kashmir goat. The undisputed evidence is that genuine cashmere fibers come from the fleece or hair of the Tibetan or Cashmere goat. Respondent Weisman testified that in the trade fabrics made of this fiber are referred to as "real" or "genuine" cashmere. His testimony and dictionary and encyclopedia definitions in the record indicate that a custom has grown up in the textile trade of referring to certain soft, fine dress fabrics of a texture similar to those made of genuine cashmere fibers, as cashmere. Respondent Weisman's testimony relates to the trade meaning as contrasted with the purchasing public's understanding of these terms.

The testimony of the consumer witnesses clearly indicates that they were of the opinion that a cashmere coat would contain a specific fine, soft fiber called cashmere. Even those who testified that Kashmoor did not imply cashmere to them showed that they did not believe that

coats made of fabrics with the composition of the Kashmoor coats were cashmere. The Commission is of the opinion that a substantial portion of the purchasing public would believe that a coat labeled "Cashmere" would contain genuine cashmere fibers. Insofar as the hearing examiner found to the contrary, his finding was in error.

PAR. 6. (a) Next presented is the question of the remedy necessary to prevent such a false and misleading implication. The theory of the complaint is that nothing short of complete excision of the trade name will suffice. Respondents, on the other hand, protest vigorously against excision of the name. They point out that the name constitutes a valuable business asset, that large sums have been expended in advertising it, and that to deprive them of it would cause them serious financial loss. Respondents express willingness, in the event the name is held to be misleading, to use in connection with it such qualifying or clarifying language as may be necessary to prevent such effect.

(b) If the trade name were "Cashmere" itself, the absolute excision would appear to be inescapable. A complete contradiction of terms such as "Cashmere—contains no cashmere" would not clarify the meaning but would only tend to confuse. However, this is not true of the phrase "Kashmoor—contains no cashmere." While the trade name Kashmoor is a simulation of cashmere and while its use falsely implies a cashmere content in the garments so labeled, it is subject to clarification. An explanation that the garment so labeled is designed to imitate cashmere in appearance and softness, but does not contain any cashmere fibers, is not a flat contradiction of terms, but is a reasonable explanation which would remove the capacity and tendency toward deception inherent in the trade name Kashmoor used alone.

(c) In determining the appropriate remedy in such cases the right of the public and of competitors to adequate protection must be weighed against the injury to the respondent through loss of the trade name, and every effort made to reach a solution which will be fair to all parties, which will afford the public and competitors reasonably adequate protection and which, at the same time, will avoid unnecessary hardship and loss to the owner of the trade name. Trade names are valuable business assets, and should never be prohibited absolutely if less drastic measures will suffice. If reasonably possible, the trade name should be saved. *Jacob Siegel Company* v. *F. T. C.*, 327 U. S. 608. It is concluded that here the excision of the name would not be warranted: that adequate protection will be afforded the public and respondents' competitors if when the name is used, either on labels or in advertising, there is clearly and conspicuously disclosed the fact that the coats contain no cashmere.

PAR. 7. The use by respondents of the trade name Kashmoor, without adequate clarification, to designate and describe their coats has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such coats contain cashmere, and the tendency and capacity to cause such members of the public to purchase such coats as a result of such belief, thereby causing substantial trade to be diverted unfairly to respondents from their competitors.

CONCLUSION

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

ORDER

It is ordered, That respondent Country Tweeds Incorporated, a corporation, and its officers, and respondent Marcus Weisman, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of respondents' coats designated Kashmoor coats, or any coats of substantially similar composition, do forthwith cease and desist from:

Using the word "Kashmoor" to designate, describe or refer to such coats, unless when such word is used, whether on labels or in advertising, other words are used which clearly and conspicuously disclose that such coats contain no cashmere.

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.

IN THE MATTER OF

SEYMOUR SALES COMPANY AND SEYMOUR AND FLAVIA GALTER

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6060. Complaint, Nov. 18, 1952—Decision, Nov. 25, 1953

Where a corporation and its owner engaged in the interstate sale and distribution of cameras, pens, and other articles of merchandise—

Allotted as premiums or prizes to the operators of their push cards and to members of the consuming public who purchased chances on the cards; and

Thereby supplied to and placed in the hands of others the means of conducting games of chance, gift enterprises, or lottery schemes, contrary to the public interest and an established public policy of the United States Government:

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

Before *Mr. John Lewis*, hearing examiner.

Mr. J. W. Brookfield, Jr., for the Commission.

Koven, Koven & Salzman, of Chicago, Ill., for respondents.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission, on November 18, 1952, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair acts and practices in commerce in violation of the provisions of said Act. After the issuance of said complaint and the filing of respondents' answer thereto, hearings were held at which testimony and other evidence in support of and in opposition to the allegations of said complaint were introduced before a hearing examiner of the Commission theretofore duly designated by it, 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 said hearing examiner upon the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions presented by counsel (oral argument not having been requested), and said hearing examiner, on July 30, 1953, filed his initial decision herein.

Within the time permitted by the Commission's Rules of Practice, respondents filed an appeal from said initial decision, and the Commis-

sion, after duly considering said appeal and the record herein, issued its order denying said appeal.

The Commission is of the opinion, however, that the initial decision of the hearing examiner is not appropriate in all respects to dispose of this proceeding, principally because the order therein is inconsistent with the form of order which the United States Court of Appeals for the District of Columbia has determined is appropriate in cases where the facts are essentially similar to those in this case. *Hamilton Manufacturing Company* v. *Federal Trade Commission*, 194 F. 2d 346; *U. S. Printing & Novelty Co., Inc.* v. *Federal Trade Commission*, 204 F. 2d 737. Therefore, the Commission, being now fully advised in the premises, 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, the same to be in lieu of the initial decision of the hearing examiner:

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Seymour Sales Company (incorrectly named in the complaint as Seymour Sales, Inc.) is a corporation organized and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 172 North Union Street, Chicago, Illinois. Respondents Seymour Galter and Flavia Galter are individuals and officers of the corporate respondent. Respondent Seymour Galter has his office and place of business located at the same address as the corporate respondent, and owns and has dominant control of the policies and sales activities of the corporate respondent, and has cooperated and acted in concert with said respondent in doing the acts and things hereinafter found.

Respondent Flavia Galter, although an officer of the corporate respondent, owns no stock therein and takes no active part in the operation of the business. The proceeding will therefore be dismissed as to said respondent in her individual capacity, and the term "respondents" as hereinafter used does not include said Flavia Galter.

PAR. 2. Respondents are now, and since approximately September 1951 have been, engaged in the sale and distribution of cameras, pens, and other articles of merchandise, and have caused said merchandise, when sold, to be transported from their place of business in Chicago, Illinois, to purchasers thereof located in the various States of the United States other than Illinois, and in the District of Columbia. There is now and has been for more than one year last past a substantial course of trade by respondents in such merchandise in commerce, as "commerce" is defined in the Federal Trade Commission

Act, between and among the various States of the United States and in the District of Columbia.

PAR. 3. In the course and conduct of their business as described in Paragraph Two hereof, respondents in soliciting the sale of and in selling and distributing their merchandise furnish and have furnished various plans of merchandising which involve the operation of games of chance, gift enterprises, or lottery schemes when said merchandise is sold and distributed to the purchasing and consuming public. Among the methods and sales plans adopted and used by respondents, and which is typical of the practices of respondents, is the following:

Respondents distribute, and have distributed, by mail, to operators and to members of the public certain literature and instructions including, among other things, push cards, order blanks, circulars containing illustrations and descriptions of said merchandise, and circulars explaining respondents' plan of selling and distributing their merchandise and of allotting it as premiums or prizes to the operators of said push cards and as prizes to members of the purchasing and consuming public who purchase chances or pushes on said cards. The number of mailings sent out by respondents is substantial, amounting to hundreds of thousands, of which approximately 1% result in orders for merchandise. Thus in the latter part of 1951 the number of mailings for a Falcon Camera amounted to approximately 400,000 to 500,000 which resulted in orders being received from approximately 1.3% of the recipients, while in 1952, out of approximately 750,000 mailings for a Flash Master Camera approximately .8% to .9% resulted in orders.

A typical push card bears sixteen feminine names, with ruled columns on the back of said card for writing in the name of the purchaser of the push corresponding to the feminine name selected. Said push card has sixteen partially perforated discs. Each of said discs bears one of the feminine names corresponding to those on the list. Concealed within each disc is a number, which is disclosed only when the customer pushes or separates a disc from the card. The push card also has a larger, master seal and concealed within the master seal is one of the feminine names appearing on the disc. The person selecting the name corresponding with the one under the master seal receives a camera. The push card bears the following legend or instructions:

Lucky Name Under Seal Receives A FALCON Candid Camera and 1 roll of film

Now You Can Take Photos In Black and White And COLOR

Enjoy these features in the FALCON—high speed ground lens, eye level viewfinder, fixed focus plastic case.

No. 1 pays 1¢ No. 9 pays 9¢
No. 19 pays 19¢ No. 22 pays 22¢
All others pay 29¢ NONE HIGHER

(Master)	( )
(Seal)	(Panel bearing seals and)
(Picture of Camera)	(feminine names.)

No. 9 Receives
A Beautiful Pen (New Ball Point Type) (Picture of Pen)
Write Your Name on Reverse Side Opposite Name You Select

A typical circular which is enclosed with one of respondents' mailings advises the recipient that he can receive a camera (or whatever product is being offered) "almost as a gift" and explains how, through the use of the push card (referred to as a "sales card"), "friends, relatives, neighbors and co-workers" can also get a camera "almost as a gift." The following instructions as to the use of the "sales card" are included:

Concealed under each of the names on the enclosed sales card is a number. These numbers are not consecutive. A person who selects a name under which number 1 appears pays 1c, number 9 pays 9c, number 28 pays 28c. All others pay 29c. There are none higher than 29c.

It's easy, isn't it? You'll want to get started at once; and then send the enclosed order form at the earliest possible moment to us. Then, as soon as we receive it, we will rush off to you two "Flash-Masters," and as an extra special two ball point pens—(the new, improved type.)

The operator of the push card, after selling all of the chances and remitting the full amount of the proceeds to respondents, with an order form, receives without additional charge a duplicate of the prizes listed on the card. Thus, in the case of the push card above described, the operator, upon remitting the amount called for, would receive a camera and ball point pen for himself, in addition to the camera awarded as a prize to the person selecting the name under the master seal and the pen awarded to the person selecting number 9 on the card.

Sales of respondents' merchandise by means of said push cards are made in accordance with the above-described legend or instructions, and said prizes or premiums are allotted to the customers or purchasers from said card in accordance with the above legend or instructions. Whether a purchaser receives an article of merchandise or nothing for the amount of money paid, and the amount to be paid for the merchandise or the chance to receive said merchandise, are thus determined wholly by lot or chance. The articles of merchandise have a value substantially greater than the price paid for the chances or pushes.

Respondents furnish and have furnished various other push cards accompanied by order blanks, instructions, and other printed matter for use in the sale and distribution of their merchandise by means of games of chance, gift enterprises, or lottery schemes. The sales plans or methods involved in the sale of all of said merchandise by means of said other push cards are substantially the same as that hereinabove described, varying only in detail as to the merchandise distributed, the prices of chances, and the number of chances on each card.

PAR. 4. While the attorney in support of the complaint offered the testimony of only one person who, on three separate occasions, used push cards received from respondents in selling and distributing respondents' merchandise in accordance with the above-described plan, it may reasonably be inferred that the persons to whom respondents furnish and have furnished said push cards, generally or in a substantial number of instances, use the same in selling and distributing respondents' merchandise in accordance with the aforesaid plan. Even in the absence of any evidence concerning the manner in which the push cards were actually used by the recipients thereof, it is clear, from the cards themselves and from the accompanying literature, that they were designed and intended for use in the manner above described, and it may reasonably be inferred that they were so used generally or in a substantial number of instances. While respondent Seymour Galter testified that there were "numerous" instances in which the push cards were returned unused with orders for merchandise, he was able to offer actual proof of only three such instances. Even accepting his testimony that there were "hundreds" of such instances, the fact remains that these were only a small percentage of the thousands of mailings on which orders were received. It is absurd to suppose that respondents would continue to engage in the empty and financially wasteful practice of enclosing push cards with each mailing of their literature, if such cards were not used in the manner for which they were obviously designed and intended.

It is therefore clear, and it is so found, that respondents thus supply to and place in the hands of others the means of conducting games of chance, gift enterprises, or lottery schemes in the sale of their merchandise in accordance with the sales plan hereinabove set forth. The use by respondents of said sales plans or methods in the sale of their merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plans or methods is a practice which is contrary to an established public policy of the Government of the United States.

PAR. 5. The sale of merchandise to the purchasing public in the manner above described involves a game of chance or the sale of a

chance to procure one of the said articles of merchandise at a price much less than the normal retail price thereof. Many persons are attracted by said sales plans or methods used by respondents and the element of chance involved therein and thereby are induced to buy and sell respondents' merchandise.

The use by respondents of a sales plan or method involving distribution of merchandise by means of chance, lottery, or gift enterprise is contrary to the public interest and constitutes an unfair act and practice in commerce within the intent and meaning of the Federal Trade Commission Act.

CONCLUSION

The aforesaid acts and practices of respondents, as herein found, 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.

ORDER

It is ordered, That respondent Seymour Sales Company (incorrectly named in the complaint as Seymour Sales, Inc.), a corporation, and its officers, representatives, agents, and employees, and respondent Seymour Galter, individually and as an officer of said corporation, and his representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of cameras, pens, or other articles of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Supplying to or placing in the hands of others push cards, sales cards, punchboards, or other lottery devices, either with other merchandise or separately, which said push cards, sales cards, punchboards, or other lottery devices are designed or intended to be used in the sale or distribution of said merchandise to the public.

2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise, or lottery scheme.

It is further ordered, That the complaint be, and it hereby is, dismissed as to the respondent Flavia Galter in her individual capacity but not as an officer of the corporate respondent.

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

IN THE MATTER OF

DOUBLEDAY & CO., INC., LITERARY GUILD OF AMERICA, ET AL.

Docket 5569. Complaint, June 30, 1948—Decision, Dec. 5, 1953

Charge: Advertising falsely or misleadingly by using the words "free" and "Bonus Books"; in connection with the sale of books.

Before *Mr. Abner E. Lipscomb*, hearing examiner.
Mr. Jesse D. Kash for the Commission.
Satterlee, Warfield & Stephens, of New York City, for respondents.

DECISION OF THE COMMISSION

Pursuant to Rule XXII of the Commission's Rules of Practice, the attached decision of the hearing examiner shall, on December 5, 1953, become the decision of the Commission.

Commissioner Mead dissenting.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

The complaint in this proceeding was issued on June 30, 1948, and respondents' answer thereto filed in due course. Thereafter, at the request of counsel, hearing for the purpose of receiving evidence was continued pending the final adjudication of a similar proceeding In the Matter of Book of the Month Club, Inc., et al., Docket No. 5572.

The theory of the instant proceeding and the gravamen of the complaint are set forth in Paragraph Four thereof, wherein allegations and conclusions are made as follows:

"The use by the respondents of the word 'free' and the term 'Bonus Books' is false, misleading and deceptive. In truth and in fact, the books designated as 'free' or as 'Bonus Books' are not gifts or gratuities or without cost to the recipient but on the contrary the prospective purchaser or purchaser, before he is entitled to receive such books, must join respondents' club thereby becoming obligated to purchase at least four books from respondents over the period of a year, the fulfillment of which obligation inures directly to the benefit of, and profit to, the respondents."

The above described acts and practices of respondents in the use of the word "free" are alleged to be to the prejudice and injury of the public and to constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

The same legal concept of the word "free," as is set forth above, was also set forth by the Commission in a policy interpretative statement on January 14, 1948, as follows:

"The use of the word 'free' or words of similar import, in advertising to designate or describe merchandise sold or distributed in interstate commerce, that is not in truth and in fact a gift or gratuity or is not given to the recipient thereof without requiring the purchase of other merchandise or requiring the performance of some service inuring directly or indirectly to the benefit of the advertiser, seller or distributor, is considered by the Commission to be a violation of the Federal Trade Commission Act."

Nearly six years after the promulgation of above-cited policy interpretative statement, the Commission, on September 8, 1953, reconsidered and rescinded that statement. A few days thereafter, on September 11, 1953, the Commission, in a proceeding very similar to the present one, dismissed the complaint In the Matter of Walter J. Black, Inc., et al., Docket No. 5771. In that opinion the Commission phrased the issue before it by the following question:

"May a businessman doing business in interstate commerce be charged with engaging in unfair or deceptive acts or practices in violation of the Federal Trade Commission Act if he uses the word 'free' in his advertising to indicate that he is prepared to give something to a purchaser free of charge upon the purchase of some other article of merchandise?"

The Commission by dismissing the complaint in that proceeding gave a negative answer to the question propounded.

In the light of these events, counsel for the respondents, on October 7, 1953, moved that the complaint herein be dismissed. Oral argument in support of and in opposition to respondents' motion was heard by the above-named duly designated Hearing Examiner on October 13, 1953.

Although counsel supporting the complaint recognized in his argument that the Commission had modified its concept as to the meaning of the word "free" subsequent to the issuance of the complaint herein, he opposed the dismissal asked for on the grounds that other of the respondents' acts and practices (in addition to those set forth in Paragraph Four of the complaint) constitute violations of the Federal Trade Commission Act, within the purview of the Commission's recent statement made at the conclusion of the opinion In the Matter of Walter J. Black, Inc., et al., *supra*. That statement is as follows:

"The use of the word 'Free,' or any other word or words of similar import or meaning, in advertising or in other offers to the public, to designate or describe any article of merchandise sold or distributed in

'commerce,' as that term is defined in the Federal Trade Commission Act, is considered by the Commission to be an unfair or deceptive act or practice under the following circumstances:

(1) When all of the conditions, obligations, or other prerequisites to the receipt and retention of the 'free' article of merchandise are not clearly and conspicuously explained or set forth at the outset so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood; or

(2) When, with respect to the article of merchandise required to be purchased in order to obtain the 'free' article, the offerer either (1) increases the ordinary and usual price; or (2) reduces the quality; or (3) reduces the quantity or size of such article of merchandise."

In particular, counsel supporting the complaint asserted that evidence could be presented to establish that "* * * all of the conditions, obligations, or other prerequisites to the reception and retention * * *" of the book advertised as "free" have not been "* * * clearly and conspicuously explained or set forth at the outset * * *" of respondents' advertisements and that actually recipients of the so-called "free" book have been deceived by such failure to reveal. Thus, he contended that respondents have been engaged in unlawful acts and practices within the purview of the Commission's recent statement concerning the use of the word "free." Such an assertion may be warranted and counsel supporting the complaint may be prepared to make good on his promise to prove. May he legally attempt to do so under the present complaint?

As shown in the first quotation herein presented, the first sentence of Paragraph Four of the complaint makes a broad allegation that, "The use by the respondents of the word 'free' and the term 'Bonus Books' is false, misleading and deceptive." This allegation, standing alone, might warrant the introduction of the proposed proof above referred to. It does not, however, stand alone. It is immediately followed and qualified by the specific and limited explanation of why and wherein the word "free," as used by the respondents, is false. Since no other acts or practices are charged in the complaint to be false, misleading and deceptive, it must be concluded that the complaint places in issue only those statements which are involved in the repudiated concept of the word "free." Furthermore, under the Commission's practice, new or additional charges can only be added to a proceeding by the Commission itself through the issuance of a new, amended or supplemental complaint. It follows, therefore, that the present complaint should be dismissed. In view, however, of the public interest in the possible proof referred to by counsel supporting the complaint, the respondents are not entitled to an unqualified dismissal. Accordingly,

It is ordered, That the complaint herein be, and the same hereby is, dismissed without prejudice.

Interlocutory Order

IN THE MATTER OF

THE MAICO COMPANY, INC.

Docket 5822. Order and opinion, Dec. 7, 1953

Before *Mr. Webster Ballinger* and *Mr. Frank Hier*, hearing examiners.

Mr. William C. Kern and *Mr. Andrew C. Goodhope* for the Commission.

Dorsey, Colman, Barker, Scott & Barber, of Minneapolis, Minn., for respondent.

ORDER GRANTING APPEAL IN PART, SETTING ASIDE INITIAL DECISION AND REMANDING PROCEEDING TO HEARING EXAMINER

This matter is before the Commission upon respondent's appeal from the initial decision of the hearing examiner, briefs in support of and in opposition to said appeal and oral argument of counsel.

In support of its appeal respondent contends that the record herein does not establish that its exclusive dealing contracts with its distributors has had or may have any adverse effect on competition and that, therefore, the complaint herein should be dismissed. Respondent also takes exception to certain of the findings, to the conclusion and to the order in the initial decision. It also excepts to the hearing examiner's rulings granting a motion to strike certain evidence, excluding certain exhibits and rejecting certain offers of proof.

An examination of the record shows that the hearing examiner struck or excluded from the record certain evidence relating to the effect on competition of the exclusive dealing provisions in respondent's contracts with its distributors. For the reasons stated in the written opinion of the Commission, which is being issued simultaneously herewith, the Commission is of the opinion that evidence relating to the effect of these contractual provisions on competition is relevant and material to the issues herein and should have been received and considered.

The Commission, however, does not believe that this matter should be dismissed but is of the opinion that the initial decision should be set aside and the proceeding returned to the hearing examiner for the reception and consideration of such material evidence. Respondent's exception to the hearing examiner's failure to dismiss the complaint, therefore, should be denied.

Consideration of respondent's other objections to the initial decision is not believed necessary as that decision is being set aside.

Opinion

The Commission, therefore, being of the opinion that material evidence necessary for a proper consideration of this matter has been erroneously excluded from the record:

It is ordered, That respondent's appeal from the initial decision is granted in part and denied in part in the manner and to the extent hereinabove indicated.

It is further ordered, That the initial decision is hereby set aside.

It is further ordered, That this matter is hereby remanded to the hearing examiner for reconsideration of all rulings rejecting or striking evidence in the light of this decision, for reception of proper evidence relating to the competitive effect of the exclusive dealing provisions of respondent's contracts, and for further appropriate proceedings in due course.

Commissioner Gwynne not participating for the reason that oral argument herein was heard prior to his appointment to the Commission.

Commissioner Mead concurs in the result in the light of the facts in this case.

OPINION OF THE COMMISSION

By MASON, Commissioner:

This matter is before the Commission upon an appeal by the respondent from an initial decision holding that it has entered into and enforced exclusive dealing contracts with retail dealers of hearing aids in violation of Section 3 of the Clayton Act. The hearing examiner found in his initial decision that this exclusive dealing contract requirement may have, has had, and now has the effect of substantially lessening competition and has a tendency to create a monopoly.

Upon examination of the record, however, we find that the hearing examiner has excluded or stricken all evidence relating to the actual competitive effect of respondent's exclusive dealing requirement. His entire decision is based on the presumption that there must have been lessening of competition because respondent is either the "fourth, fifth, or sixth" largest company in the hearing-aid field; it has had exclusive dealing contracts with its retail distributors since 1945 (123 distributors in 1950) and during that period of time its business has increased greatly:

1945	(Approx.)	$600,000
1947–8		1,912,736
1948–9		1,891,287
1949–50		1,927,733

The hearing examiner rejected all of respondent's attempts to p sent evidence for the purpose of showing (1) that there has beer

increase in the number of its competitors, (2) that the volume of business of its competitors has increased, (3) that its share of the market has been decreasing, (4) that its dealers constitute a small percentage of the total number of hearing-aid dealers in the country, and (5) other matters relating to effect on competition.

These factors, in our opinion, all have a very real bearing on whether there may be, or already has been, a substantial lessening of competition due to respondent's exclusive dealing contracts. The examiner likewise refused to allow counsel supporting the complaint to present testimony by competitors of actual foreclosure of a portion of the market to them as a result of respondent's contracts.

The hearing examiner presumed the existence of a lessening of competition yet excluded evidence which might show facts to the contrary. This exclusion was based on an interpretation of the Supreme Court's decision in the Standard Stations case* to the effect that such evidence as to the economic effect of the challenged contract is immaterial and surplusage.

From our reading of the statute, we cannot conclude that evidence of the effect of an exclusive dealing agreement on competition is immaterial in a Federal Trade Commission proceeding alleging violation of Section 3 of the Clayton Act. The Supreme Court did not require evidence of competitive effect under the circumstances of the *Standard Stations* case, ruling that it was sufficient to show that competition has been foreclosed in a substantial share of the line of commerce affected. In its decision, it stated that courts were most ill suited to make an appraisal of economic data to determine the actual effect of a practice on competition, such a determination being virtually impossible for ascertainment by the courts.

It is significant that at the same time the Court pointed out the Federal Trade Commission was adequately equipped to weigh all relevant economic factors. For it noted:

> "Our interpretation of the Act therefore, should recognize that an appraisal of economic data which might be practical if only the latter [i. e., the Federal Trade Commission] were faced with the task may be quite otherwise for a judge unequipped for it either by experience or by the availability of skilled assistance." (*Standard Oil Co.* v. *U. S.*, supra, p. 310).

The view of the Commission's functions is not novel. Congress created the Commission:

> "with the avowed purpose of lodging the administrative functions committed to it in 'a body specially competent to deal with them by reason of information, experience, and careful study of

Standard Oil Co. of California v. *United States*, 337 U. S. 293, 69 S. Ct. 1051 (1949).

the business and economic conditions of the industry affected,' and it was organized in such a manner, with respect to the length and expiration of the terms of office of its members, as would 'give to them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience.' Report of Senate Committee on Interstate Commerce, No. 597, June 13, 1914, 63d Cong. 2d Sess., pp. 9, 11." (*Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U. S. 304, 314, (S. Ct., 1934)).

The need for specialized consideration in matters involving complex economic factors and the intention of Congress that the Federal Trade Commission should give such consideration to these matters has often been recognized by the Supreme Court, as for instance, in the Cement case in which is stated:

"In the Keppel case the Court called attention to the express intention of Congress to create an agency whose membership would at all times be experienced, so that its conclusions would be the result of an expertness coming from experience. We are persuaded that the Commission's long and close examination of the questions it here decides has provided it with precisely the experience that fits it for performance of its statutory duty. The kind of specialized knowledge Congress wanted its agency to have was an expertness that would fit it to stop at the threshold every unfair trade practice—that kind of practice which if left alone, 'destroys competition and establishes monopoly.' *Federal Trade Comm'n* v. *Raladam Co.*, 283 U. S. 643, 647, 750, (S. Ct., 1951)". *Federal Trade Commission* v. *Cement Institute, et al.*, 333 U. S. 683. (S. Ct., 1948).

A reading of Section 3 of the Clayton Act clearly indicates Congress intended to outlaw only those exclusive dealing agreements which are lessening or which if allowed to continue will probably lessen competition or tend to create a monopoly. We believe the structure of the Federal Trade Commission was specifically designed to make decisions involving this type of complex economic problem. To refuse to exercise our talents as an administrative tribunal in these cases because the courts feel "ill suited" to weigh all of the relevant factors, would deprive the country of the very services which we were created to furnish.

We cannot decide this matter on the record before us. To reach a reasoned decision we must have the facts. Therefore, this matter must be remanded to the hearing examiner for the development of a record sufficient to enable us to determine the effect of respondent's practices on competition.

Decision

IN THE MATTER OF

ELLIOTT MELVIN FISHER ET AL. DOING BUSINESS AS PHILMOR COMPANY

DECISION IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 6121. Complaint, Aug. 25, 1953—Decision, Dec. 8, 1953

Where four partners engaged in the interstate sale and distribution of assortments of merchandise packed and assembled to involve the use of a game of chance, gift enterprise, or lottery scheme, when sold and distributed to the purchasing public, including, as typical, two watches, along with a small punchboard, for use under a plan whereby the purchaser by chance of one of 156 numbers concealed in the board, corresponding to the prize punch number, received a watch; those who by chance secured two other specified numbers received automatic lighters; the amount paid for a punch, if any, was similarly chance determined; and whether the purchaser received an article, the retail value of which exceeded the price of a chance, or nothing, and the amount paid was wholly thus determined—

Sold and distributed such assortments to retail dealers, salesmen, and others, including members of the purchasing public, by whom said punchboards or push cards were made use of in the sale of their merchandise to the purchasing public in accordance with the aforesaid plan involving a game of chance or the sale of a chance to procure one of said articles at much less than the normal retail price thereof; and

Thereby supplied to and placed in the hands of others the means of conducting lotteries or games of chance in the sale of their products, contrary to an established public policy of the U. S. Government:

Held, That such acts and practices, under the circumstances set forth, 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.

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 8, 1953, 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 August 25, 1953, issued and sub-

sequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with the use of unfair acts and practices in commerce in violation of the provisions of that Act. Respondents filed no answer to the complaint, nor did they enter any appearance at a hearing held on October 20, 1953, by the above-named hearing examiner, theretofore duly designated by the Commission, such hearing being held in accordance with notice given in the complaint and supplemental notice issued by the hearing examiner and duly served upon respondents. Thereafter the proceeding regularly came on for final consideration by the hearing examiner upon the complaint, 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. Respondents Elliot Melvin Fisher, Edward Shores, Irvin Katz (also known as Irwin Katz) and Lucius D. Smith, Jr., are individuals and partners trading and doing business as Philmor Company, with their office and principal place of business located at 218 East Saratoga Street in the city of Baltimore, Maryland. Respondents are now, and for more than one year last past have been, engaged in the sale and distribution of watches, silverware, novelties and other articles of merchandise and have caused such merchandise, when sold, to be transported from their place of business in the city of Baltimore, Maryland, to purchasers thereof at their respective points of location in the various States of the United States other than Maryland and in the District of Columbia. There is now and has been for more than one year last past a course of trade by respondents in such merchandise 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 their business, as described in Paragraph One, respondents sell and have sold to dealers and members of the public certain assortments of merchandise so packed and assembled as to involve the use of a game of chance, gift enterprise, or lottery scheme when such merchandise is sold and distributed to the purchasing public; and have furnished various plans of merchandising which involve the operation of a game of chance, gift enterprise, or lottery scheme when such merchandise is sold and distributed to the purchasing and consuming public. One method or sales plan adopted and used by the respondents is substantially as follows:

Respondents advertise for and obtain salesmen and through them sell certain merchandise deals consisting of punchboards and mer-

chandise and push cards and merchandise. Respondents also sell directly to members of the purchasing public these deals, of which a typical one is described as follows:

The punchboard deal sold by respondents consists of a small punchboard and two watches. Each of the punchboards contains 156 punches and a prize punch, which is not punched until all of the punches are sold. Accompanying the punchboard is a list on which is to be written the name of the purchaser of each punch opposite the number which is revealed when he purchases a punch. The purchaser of the punch pays the price for his punch as shown by the punch received. When all of the punches have been sold, the prize punch is punched and the winner is disclosed. The person who has purchased a punch corresponding to the number disclosed by the prize punch is awarded a watch. The punchboard has on its face the following instructions:

Lucky No. Receives (arrow) (Picture of star)

BENRUS

OFFICIAL WATCH OF
FAMOUS AIRLINES

FREE—Nos. 1 to 15—FREE
Nos. 16 to 59 Pay What You Draw
Nos. Over 59 Pay ONLY 59¢
Nos. 44 & 55 Each Receive
Evans FULLY AUTOMATIC
RED SEAL LIGHTER

and the list on which the names of punchers are written bears the following legend:

NUMBER UNDER STAR PRIZE RECEIVES
BENRUS WATCH

Official Watch of Famous Airlines
Nos. 44 and 55 Each Receive
Fully Automatic
RED SEAL LIGHTER

Respondents sell their punchboard deals as above described to persons located in the various States of the United States, and these customers of respondents make sales of respondents' merchandise by means of said punchboards in accordance with the above described legend or instructions, and said watches and merchandise are awarded to the customers or purchasers from said punchboard in accordance with the above described legend. Whether a purchaser receives an article of merchandise or nothing for the amount of money paid, and

the amount to be paid for the chance to receive said merchandise is thus determined wholly by lot or chance. The watches and other merchandise have a retail value greater than the price paid for any of the chances.

Respondents sell and distribute various other punchboard and push card and merchandise deals, all of which involve the sale of merchandise by means of said other punchboard and push card deals and vary only in detail. All of said merchandise plans embody the distribution of merchandise by game of chance, gift enterprise, or lottery schemes.

PAR. 3. Retail dealers, operators and others who purchase respondents' push card and punchboard and watch assortments or deals, directly or indirectly, use the said push cards or punchboards for distribution of the watches to the purchasing public in accordance with the sales plan above described. Respondents thus supply to and place in the hands of others the means of conducting lotteries or games of chance in the sale of their products in accordance with the sales plans hereinabove set forth. The use by respondents of said sales plans and methods in the sale of their merchandise and the sale of said merchandise by and through the use thereof and by the aid of said sales plans or methods is a practice which is contrary to an established public policy of the Government of the United States.

PAR. 4. The sale of merchandise to the purchasing public in the manner above described involves a game of chance or the sale of a chance to procure one of the said articles of merchandise at a price much less than the normal retail price thereof. Many persons are attracted by said sales plans or methods used by respondents and the element of chance involved therein and thereby are induced to buy and sell respondents' merchandise.

CONCLUSION

The acts and practices of respondents as herein found 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 respondents, Elliott Melvin Fisher, Edward Shores, Irvin Katz (also known as Irwin Katz) and Lucius D. Smith, Jr., individually and as partners trading under the name Philmor Company, or any other name, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce,

as "commerce" is defined in the Federal Trade Commission Act, of watches, silverware, novelties or any other merchandise do forthwith cease and desist from:

1. Supplying to or placing in the hands of others punchboards, push cards or other lottery devices, either with other merchandise or separately, which punchboards, push cards or other lottery devices are designed or intended to be used in the sale or distribution of said merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

2. Selling or otherwise disposing of any merchandise by means of a game of chance, gift enterprise or lottery scheme.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist [as required by said declaratory decision and order of December 8, 1953].

IN THE MATTER OF

LEVER BROTHERS CO.

Docket 5585. Amended and supplemental complaint, Apr. 26, 1951—Order denying appeal, etc., and opinion, Dec. 16, 1953

Charge: Discriminating in price by selling soap products in commerce to certain customers, usually small businessmen, at higher prices than to other and generally larger competing customers, in violation of subsection 2 (a) of the Clayton Act, as amended; and

Entering into advertising arrangements with certain customers whereby respondent paid or contracted to pay them compensation for services or facilities furnished by them in connection with the sale, etc., of respondent's soap products without making comparable payments or consideration available to their competitors, in violation of subsection 2 (d) of the Clayton Act, as amended.

Before *Mr. Randolph Preston* and *Mr. Earl J. Kolb*, hearing examiners.

Mr. John L. York and *Mr. William H. Smith* for the Commission.

Arnold, Fortas & Porter, of Washington, D. C., and *Mr. Martin J. Pendergast*, of New York City, for respondent.

ORDER DENYING APPEAL FROM INITIAL DECISION OF HEARING EXAMINER, AND DECISION OF THE COMMISSION

This matter having come on to be heard by the Commission upon the appeal of counsel supporting the complaint from the initial decision of the hearing examiner and upon the briefs and oral argument of counsel in support of and in opposition to said appeal; and

The Commission having duly considered said appeal and the record herein and being of the opinion, for the reasons stated in the written opinion of the Commission which is being issued simultaneously herewith, that the appeal should be denied and that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the appeal of counsel supporting the complaint from the initial decision of the hearing examiner be, and it hereby is, denied.

It is further ordered, That the initial decision of the hearing examiner, a copy of which is attached, shall, on the 16th day of December, 1953, become the decision of the Commission.

ORDER DISMISSING AMENDED AND SUPPLEMENTAL COMPLAINT

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding came on to be considered by the above-named hearing examiner theretofore duly designated by the Commission, upon the

amended and supplemental complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions, and brief thereon submitted by counsel for respondent, and oral argument of counsel.

The original complaint in this proceeding was issued on September 27, 1948, charging the respondent, Lever Brothers Company, a corporation, with having violated the provisions of subsection (a) of Section 2 of the Clayton Act, as amended.

Testimony and other evidence in support of the allegations of the complaint were introduced before Randolph Preston, a duly designated hearing examiner of the Commission, but prior to the introduction of any evidence in opposition to the charges of the complaint the said Hearing Examiner, Randolph Preston, became unavailable to the Commission by reason of his retirement from the Government service, and the Commission by order issued August 24, 1950, designated Earl J. Kolb as hearing examiner in this proceeding to take testimony and receive evidence in the place and stead of Hearing Examiner Randolph Preston.

Thereafter, prior to the introduction of any testimony and other evidence by the respondent in opposition to the charges of the complaint, the Commission on April 26, 1951, issued and subsequently served its amended and supplemental complaint in this proceeding charging the respondent with having violated subsections (a) and (d) of Section 2 of the Clayton Act as amended.

On June 4, 1951, after hearing upon certain motions of the respondent, the hearing examiner issued his order that all testimony and other evidence heretofore taken in this proceeding be stricken from the record as not being applicable to the issues raised by the amended and supplemental complaint.

Thereafter, on November 26, 1951, the Commission approved a stipulation executed by counsel in support of the complaint and counsel for respondent, pursuant to which the hearing examiner issued his order dismissing the charges contained in subparagraphs 2 and 5 of Paragraph Five of Count 1 of the amended and supplemental complaint dealing respectively with quantity discounts and price protection on price increase, and, further ordered, that the testimony and other evidence theretofore taken in support of the original complaint be reinstated and considered as testimony and other evidence taken in support of the amended and supplemental complaint.

Thereafter, testimony and other evidence were introduced before Hearing Examiner Earl J. Kolb in support of and in opposition to the allegations of the amended and supplemental complaint, which testimony and other evidence were duly recorded and filed in the office of the Commission.

Respondent, Lever Brothers Company, a corporation, is engaged in the manufacture and in the sale and distribution of soap and soap products in interstate commerce to retail grocers, jobbers and other purchasers. A substantial portion of respondent's business consists of sales of soap and soap products direct to thousands of retail grocers located in virtually every city and town in the United States. Among such retailer customers there are approximately 2,300 who operate chains of two or more stores and the remainder are single-store operators.

The differences in price and allowances charged in the amended and supplemental complaint to be in violation of Section 2 (a) and 2 (d) of the Clayton Act arise out of the following practices of respondent in connection with sales of soap and soap products to its retailer customers: (1) Price protection of warehouse stocks upon price decline; (2) Count and recount; and (3) Advertising allowances.

I. Price Protection of Warehouse Stocks Upon Price Decline

Allowances to cover price decline in warehouse stocks is a general practice in the grocery industry and has the following purposes: (1) To provide adequate stocks immediately behind point of sale; (2) To avoid necessity of maintaining greater number of warehouses by the manufacturer; (3) To pass on to the customer delivery cost; and (4) To induce the trade to maintain an adequate reservoir of stock.

Many single store retailers throughout the United States belong to cooperative associations or purchase all or part of their requirements of soap and soap products from jobbers. Respondent extends price protection to the warehouse stocks of such associations and jobbers enabling them to offer their members or customers the new lower price immediately upon the announcement of a price decline.

Price declines on respondent's soap and soap products were relatively few and at infrequent intervals and for the most part were made for the purpose of offsetting the higher prices existing during World War II and were due to the lower price of raw materials and the greater availability of such materials. When such price declines occurred, respondent immediately reduced the price on all of its own warehouse stock which reduction applied to goods in transit. During the four-year period immediately preceding the issuance of the amended and supplemental complaint there were six declines in price of respondent's soap and soap products ranging from 6 percent to 10 percent or roughly 25¢ to 50¢ per case.

At the time of these price declines, respondent made adjustments to all of its customers having storage or warehouse stocks held by such customers for further handling, transportation and distribution to

the site of retail sale. In making such adjustments the respondent did not protect any of its customers on stocks in their warehouses or stores which were purchased from jobbers or others and not directly from the respondent. Following such price declines, respondent determined the number of unopened cases held in the warehouse space of its various customers for distribution to two or more retail stores and made an allowance or rebate on such cases to such customers equal to the price reduction. Respondent made no payment on cases, opened or unopened, held in retail store stocks regardless of the size of the retailer or the number of stores owned. In determining the amount of allowance to be made, respondent accepted the count of the customer who carried a running inventory, but as to those who did not, actual count was made by salesmen of respondent. No price protection was extended to operators of one store who bought and took delivery solely for the needs of that store. An exception to this is the carload purchaser operating a single store to whom stock protection was granted on unopened cases in the warehouse or storage space and only on merchandise received as part of a carload shipment. No price protection was extended to a customer operating several stores on soap or soap products delivered to a unit store for resale solely in that store.

Respondent did not require that the warehouse or storage stock should be in a separate building not in any way physically connected with any retail store. Instead, respondent included in its definition of warehouse and storage stocks any stocks located in a warehouse or storage space from which distribution was made at the customer's expense to the site of retail sale in two or more retail stores. Some of respondent's customers, who received price protection on such warehouse or storage stocks, kept such stock in warehouse or storage space physically connected in some way to one of the retail stores from which further distribution was made.

In the administration of its price protection policy respondent carefully determined the eligibility of stocks for payment; carefully determined the number of cases on which payment should be made in accordance with its policy; and limited payments to the amounts so determined. No issue was raised in this proceeding of any arbitrary or improper allowances being made to particular customers separate and apart from the general plan hereinbefore described. There is some evidence of improper classification of customers in several isolated instances through carelessness or improper conduct of salesmen, but these were immediately corrected by the respondent and such isolated instances are not at issue in this proceeding. The charges of the amended and supplemental complaint were instead directed to the general practice of affording warehouse protection to

the operators of two or more stores while not extending the same protection to the operators of single stores.

This issue was further limited by the following stipulation on the record by the attorney in support of the complaint:

"* * * the attorney supporting the complaint stipulates and agrees and will announce for purposes of this record that he raises no question as to the price protection given to the warehouse stocks of chains, voluntaries, cooperatives, or others, kept in a warehouse in a separate building not in any way physically connected with any retail store, while denying floor stock protection to certain other customers who operate retail stores but who maintain no separate warehouses.

"The attorney supporting the complaint will, however, contend that section 2 (a) of the Robinson-Patman Act is being violated by granting floor stock protection to what is claimed to be warehouse stock stored in a building used as a retail store by the same customer who operates two or more stores while refusing this protection to other retail customers who operate only one store. This would include, among other things, warehouse stock of two or more jointly-owned stores which stock is stored in a building occupied by one of the retail stores." (Tr. 3372–73).

By this stipulation the issue was limited to the granting of price protection to what is claimed to be warehouse stock stored in a building used as a retail store by customers who operate two or more stores while refusing this protection to other retail customers who operate only one store. This stipulation was made prior to the introduction of any testimony in opposition to the charges of the amended and supplemental complaint respecting warehouse stock protection and the testimony in defense was based solely upon the issue as so limited.

It is uncontradicted in this record that when respondent granted an allowance on stock stored in a building occupied by one of the stores, such allowance was made only on stock stored in the warehouse section for distribution to two or more stores and no allowance was made on cases opened or unopened on the floor of the store for replenishment of the retail stock.

There is no evidence in this record that any injury to competition was sustained by the single store by reason of the respondent's practice of granting warehouse stock protection. No price protection was granted by the respondent on normal operating stock, which is that stock which the retailer requires to refill his shelves and rebuild display. This includes all stock in the individual-member store other than that stored in the warehouse section for distribution to two or more stores. It is uncontradicted in this record that the normal oper-

ating stocks, including shelf stock, in unit stores of chains of two or more stores upon which no price protection was granted by the respondent were greater in size than that in single stores and that such units have as a part of their normal working stock more unopened cases than do single stores.

On the basis of the present record, it appears that there has been a total failure to sustain the charges of the amended and supplemental complaint relative to price protection on decline in price, for the following reasons:

1. The stipulation entered into by counsel in support of the complaint, prior to the introduction of any evidence in opposition to the charges of the amended and supplemental complaint, in effect abandoned the original theory of the amended and supplemental complaint; admitted the legality of the practice of extending price protection to warehouse or storage stocks and removed as an issue in this proceeding the granting of price protection to warehouse stocks stored in a separate warehouse.

2. By reason of this stipulation it must be considered, for the purpose of this proceeding, that a retail customer maintaining a separate and distinct warehouse for supplying two or more stores performs a warehousing function which entitles him to the allowances made on warehouse stock in the case of price decline.

3. A customer maintaining a separate warehouse stock in one of its units for distribution to two or more stores, including the unit store, performs the same warehousing function as the customer maintaining a separate warehouse.

4. While it was stipulated in the record that single stores who were not accorded price protection compete with customers who operate two or more stores and who receive price protection but do not have physically separate warehouses, there is no evidence in this record that the failure of unprotected customers to receive price protection affects their competitive position, ability or opportunity to compete with protected customers who do not have physically separate warehouses. The evidence on competitive effect relates to competition between unprotected customers and chain stores which have physically separate warehouses.

5. There is no competitive injury to the single-store operator who does not receive price protection because his unprotected stock at the time of any price decline is less than the normal operating stock of the units of chains of two or more stores which is likewise unprotected.

6. On the basis of the present record, the inventory loss to a single-store operator resulting from failure to receive price protection on

price declines occurring at infrequent intervals is at best *de minimis* and cannot affect his competitive position or opportunities.

II. Count and Recount

The practice known as Count and Recount is a promotional plan, common to the grocery industry, which is designed to stimulate the movement of goods which are moving slowly. It is an operation for only a short period of time and usually involves only one product. During the past ten years this plan has been used by the respondent on only two occasions: in Los Angeles on the product Breeze in 1948, and countrywide on the product Swan soap from March 14 to April 15, 1949.

In the operation of this plan in 1949, the respondent issued a promotional allowance or rebate to chains of two or more stores and to jobbers amounting to 50¢ a case on Swan soap large, and 30¢ a case on Swan soap regular, based upon the number of cases moved into the retail store from the warehouse during the period from March 14, 1949, to April 15, 1949. The quantity on hand at the warehouse of such customers was counted at the beginning of the campaign period to which was added the quantity purchased and delivered to the warehouse during the campaign period and from the total the quantity on hand in the warehouse at the end of the period was subtracted. The difference being the amount moved from the warehouse to the individual store, which formed the basis for the promotional allowance or rebate. All independent or single stores received no allowance or rebate for stock on hand but were charged the lower price on all Swan soap ordered or shipped during the sale period. No allowance or rebate was granted to chains of two or more stores on cases opened or unopened in their various units. It was the practice of the respondent to notify all of its direct customers of the institution of a Count and Recount promotion and to have its salesmen make a special effort to sell all single-store operators the promotional merchandise during the period.

There is no evidence that an opportunity to participate in the Count and Recount Plan was not offered to all chains of two or more stores or that single stores did not have an opportunity to purchase at the reduced price during the campaign period, or that any injury to competition was suffered by any customer of the respondent by reason of the operation of said Count and Recount Plan.

The amended and supplemental complaint further charged that by reason of a general reduction in price, which frequently followed the Count and Recount Plan, certain customers received a second rebate

on the same merchandise. While it is true that a general reduction in price by respondent did become effective on April 15, 1949, there is no evidence that any customer of respondent received a promotional allowance on Count and Recount and a price protection allowance on warehouse stock covering the same merchandise. In fact, in the operation of these two plans the promotional allowance is received only on merchandise moved to the individual stores and the price protection allowance only on warehouse stocks, so that no duplication of allowance is possible on the same merchandise. There is no evidence that any injury to competition was suffered by any customer by reason of the fact that a general price reduction followed the Count and Recount campaign on April 15, 1949.

On the basis of the present record, it appears that there has been a total failure to sustain the charges of the amended and supplemental complaint relative to the Count and Recount practice.

III. Advertising Allowances

Count II of the amended and supplemental complaint charged the respondent with violation of Section 2 (d) of the Clayton Act, in that: (1) Payments of allowances for newspaper advertising were not made available to all of respondent's customers because it is not reasonably possible for those who purchase smaller quantities of respondent's products to avail themselves of the higher rate which respondent pays and agrees to pay for newspaper advertising; and (2) that the amounts received by the respondent's customers were disproportionate to the cost of advertising furnished by them in that purchasers of large quantities of soap products received sums which were grossly in excess of the cost of the advertising which they furnished, whereas purchasers of lesser quantities received much lesser amounts in relation to the cost of the advertising they furnished.

Respondent, in the course of its business in commerce, entered into contracts with and made payments to its customers for promotional services and facilities furnished by such customers. In the granting of such allowances the respondent used two forms of contract—(1) Cooperative Merchandising Agreement, which was offered as a contract to be entered into on an annual basis, and (2) Cooperative Merchandising Plan, which was a contract physically incorporated as part of the order blank on each order written for customers who had not executed the annual contract.

In the Cooperative Merchandising Agreement, often referred to as the annual contract, respondent agreed to pay to the customer an allowance per case ranging from 10¢ to 20¢ per case purchased, depend-

ing upon the product, on the condition that the customer render sales promotions and advertising service by conducting nine feature sales annually on each product, three of which to be scheduled during each of the four-month advertising periods. As a part of the feature sales the customer was required to place newspaper advertising which shall be included in the customer's regular consumer advertising and that each sale be supported by a prominent store display of the product advertised. The annual contract also provided for an option whereby the customer instead of advertising in newspapers could conduct the nine sales as required and use handbills, radio or television in lieu of newspaper advertising. In this event the customer was paid 9¢ per case on all products except Gold Dust on which 8¢ per case was paid.

In the Cooperative Merchandising Plan which was offered by salesmen to customers at the time the order was taken the respondent agreed to pay to the customer an allowance of 6¢ per case purchased on the condition that the customer render sales promotional service, consisting of a prominent mass store display, together with a feature sale for one week. The Cooperative Merchandising Plan provided for an option whereby the customer might advertise one or more of respondent's products in newspapers, handbills or by radio or television, and receive the allowances provided for by the Cooperative Merchandising Agreement, or annual contract, covering the number of cases ordered of the product so advertised.

The Cooperative Merchandising Agreement, or annual contract, required that advertising space used in newspapers shall be at least equivalent to that given to competitive products. While one column inch consisting of 14 agate lines is generally considered as being required under the contract, there is testimony that respondent has accepted advertising of less than one column inch as compliance with its contract and that in practice no minimum space was required to be devoted to each brand. The size of newspaper advertisements actually run and actually accepted by respondents as compliance ranged from 2 or 3 agate lines to advertisements considerably in excess of 14 agate lines. There is no required media to be used in newspaper advertising other than that used for regular consumer advertising. According to the testimony, any newspaper carrying consumer advertising distributed in the territory covered by the customer is acceptable. This includes, in addition to metropolitan newspapers, local, neighborhood, and foreign-language papers, and shopping news, either daily, weekly or monthly, the rates of which are comparatively inexpensive.

The existence and availability of said contracts and payments were made known by respondent to all of its customers and respondent offered said contracts and the opportunity to receive said payments

to all of its customers. Respondent through its sales employees endeavored to persuade all customers to avail themselves of the contracts and payments and to furnish the services and facilities provided. All direct customers of respondent were offered the choice of executing either the annual contract or the Cooperative Merchandising Plan and the decision in each case was a matter for the retailer's own judgment and decision based on the retailer's own merchandising policies and choice.

Many of respondent's customers, including small, single-store customers belonged to cooperative or voluntary associations and where such associations wished to advertise for their members in newspapers it was the practice of respondent to enter into its annual contract with such associations and to pay to them the advertising allowance based upon the total purchases of the members of such associations.

The advertising allowances provided for in its Cooperative Merchandising Agreement were paid to customers by respondent at the end of the four-month period, specified in the agreement, after verification of the advertising placed by the customer, either through report of check made by an independent audit bureau or submission of tear sheets, particularly of those publications not covered by the audit bureau. Allowances were paid only upon those products which were actually advertised. In the event the feature sales were not conducted in all the stores as, for example, in the case where the customer failed to provide newspaper advertising serving all of the areas of location of all the specified stores, payment to the customer was proportionately reduced. The same was true in the event the customer failed to conduct the minimum of nine feature sales annually. In that case payment was also proportionately reduced. Respondent required that handbill advertisments supporting feature sales must be printed and copies submitted to respondent. This was required as a practical method of insuring that the advertisement had been prepared and distributed in good faith.

The attorney in support of the complaint did not file proposed findings or briefs with the Hearing Examiner but instead argued the matter orally, which argument, together with that of the attorney for the respondent, has been incorporated in and made a part of the record. In the argument the attorney in support of the complaint stated the following issues which may now be considered as the issues in this proceeding:

(a) That it is not reasonably possible for customers who purchase smaller quantities of respondent's products to avail themselves of the higher rate which respondent pays, and agrees to pay for newspaper advertising because respondent's contract provides that the advertising

placed must be included in the advertiser's regular consumer advertising and, consequently, if a customer does not do newspaper advertising, the rates provided by the annual contract are unavailable to him under any conditions.

(b) That respondent's Cooperative Merchandising Plan contract by providing that payment will be made for advertising placed at the rates provided for by the annual contract carries over to the Cooperative Merchandising Plan the requirement that the advertisement placed must be included in the advertiser's regular consumer advertising.

(c) That among the customers who receive advertising allowances under the annual contract there is a lack of proportionality because such allowances which are paid upon a per case basis have no relationship to the advertising required to be placed, because there is no cutoff point between the per case allowance and the number of advertisements to be placed with the result that allowances are paid for advertising not placed as distinguished from allowances for advertising which is placed.

As to the first contention, this case was not tried on the theory now advanced by the attorney supporting the complaint in his oral argument. The evidence in this record is not sufficient to support this contention; there is no evidence as to what actually constitutes regular consumer advertising as used in the actual contract, no evidence that an isolated advertisement placed by a customer would not be considered as regular consumer advertising or that the respondent has ever refused to grant an advertising allowance because the advertisement appeared as an isolated advertisement in a newspaper.

As to the second contention, it is a strained interpretation of what is otherwise clear language in the Cooperative Merchandising Plan contract and is not supported by any testimony or other evidence in this record. It is perfectly clear that if a customer advertises under the Cooperative Merchandising Plan contract he is paid for such advertisement at the rate provided for by the annual contract—namely, from 10¢ to 20¢ per case, depending on the particular product purchased and advertised.

Aside from counsel's contentions on availability, this question arises when the requirements for participation are such that only certain customers can in fact participate. There is no evidence in this record to support a finding that even the highest rate of payment offered by respondent for feature sales, including newspaper advertising, is not reasonably available to all of respondent's customers. The customer can avail himself of this rate either through use of the annual

contract by advertising one or more products three times each contract period of four months, or on such products which he cares to advertise through the Cooperative Merchandising Plan with only one insertion of the advertisement. The respondent places no restrictions on the newspapers which he may use except that it cover the area where his store or stores are located thus enabling the use of neighborhood papers or weekly or monthly papers at a greatly reduced rate. The respondent has accepted as low as 2 or 3 lines of advertising as compliance with the contract which reduces the advertising expense. In the absence of evidence that respondent has refused or withheld its annual contract from customers for not advertising all of its products or a substantial number thereof it must be assumed that even a customer executing the annual contract could, if he so desired, participate by advertising only one or more products as his financial condition or needs might dictate. No witness has appeared in this proceeding who testified that he wished to participate in the advertising allowance but could not do so because of the expense. Furthermore, any customer, who for any reason does not wish to advertise, can avail himself of promotional allowances at the rates provided by using handbills, radio or television or by conducting feature sales with display only.

As to the third contention that there is a lack of proportionality because allowances are paid on a per case basis with no relationship to the advertising required to be placed, the evidence in this record is such that no finding whatsoever could be made on this point. All the record shows is that various newspapers charge different rates; that customers use different newspapers; that varying amounts of advertising are used by different customers to comply with their contracts with respondent; and that lineage rates are different as between customers even though same newspapers might be used. Furthermore, the allowances paid are for feature sales of which advertising is a part. Consequently, there is no comparative basis in this record which might be used to determine the relationship between the allowances paid and the advertising required to be placed, and the deficiencies of this record are such as to be fatal to any finding on this point.

On the basis of the present record, it appears that there has been a total failure to sustain the allegations of Count II of the amended and supplemental complaint charging that the method used by the respondent in granting allowances for advertising to its various customers is in violation of Section 2 (d) of the Clayton Act.

It is therefore ordered, That the amended and supplemental complaint in this proceeding be, and the same is hereby, dismissed.

OPINION OF THE COMMISSION

By GWYNNE, Commissioner:

The above cases were tried simultaneously. While the evidence pertaining to each is not in all respects identical, nevertheless as to the questions presented on the appeal of counsel supporting the complaint they may be considered together. These questions have to do with alleged violations of Section 2 (d) of the Clayton Act by respondents in their advertising and promotional allowances.

The amended and supplemental complaint in each case alleges in Count Two, Paragraph Three, as follows:

"Among the payments made and contracted to be made by respondent as alleged in Paragraph Two hereof are payments of money for advertising purposes with respect to respondent's soap products. Said payments made, or contracted to be made, are not available to all customers competing in the resale of said soap products on proportionally equal terms by reason of the following facts:

1. Said payments are made and contracted to be made at different rates per case of said soap products purchased by the customer depending upon the form of advertising used by him, and it is not reasonably possible for those who purchase smaller quantities of respondent's products to avail themselves of the higher rate which respondent pays and agrees to pay for newspaper advertising.

2. The amounts received by respondent's customers are disproportionate to the cost of the advertising furnished by them in that purchasers of large quantities of said soap products receive sums which are grossly in excess of the cost of the advertising which they furnish, whereas purchasers of lesser quantities receive much lesser amounts in relation to the cost of the advertising they furnish."

Each of said respondents is a large corporation engaged in the sale of soap and soap products to retailers throughout the country. In addition to their nationwide advertising programs, each respondent engages in "point of sale" advertising in cooperation with its customers. In other words, each respondent offers to enter into contracts with its customers, by the terms of which it agrees to pay certain amounts for services rendered by the customers in promoting the sale of respondent's products. The terms and conditions of the offer are set out in written contracts, copies of which are attached to the briefs of counsel supporting the complaint.

For example, respondent Lever Brothers offers two types of contracts: first, the Cooperative Merchandising Agreement, or second, the Cooperative Merchandising Plan. The Merchandising Agreement is for one year. Under it the customer agrees to conduct a minimum of

nine feature sales of respondent's products, to be promoted by advertising either in a newspaper or by radio or handbill, and in all cases to be supported by a store display of respondent's products. "Advertising space * * * shall be at least equivalent to that given to competitive products and shall be included in the advertiser's regular consumer advertising." Payment for services rendered is based on the number of cases of each product purchased by the customer during the contract period. The amount paid varies with the product and with the type of advertising, ranging from 12½¢ to 20¢ per case for newspaper advertising and from 8¢ to 9¢ for handbill or radio advertising. If less than nine sales are held, payment is made on a proportional basis.

The Cooperative Merchandising Plan is incorporated with the individual orders of those customers who do not choose the annual plan. Under it, the respondents pay 6¢ for each case purchased, in return for a feature sale supported by a store display. These customers also have the option of promoting this sale by advertising one or more of respondent's products through newspapers, radio, or handbills and of receiving payment at the per case figure set out in the annual merchandising agreement.

In all cases payments are to be made on proper showing of the services rendered.

The contracts of the other respondents and their methods of procedure thereunder are substantially the same.

Section 2 (d) of the Clayton Act, as amended, reads as follows:

"That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

The question presented is, are the payments made for newspaper advertising (1) "available" within the meaning of Section 2 (d), and (2) available on proportionally equal terms to all customers competing in the sale of respondent's products?

It is well established that respondent offered to all customers payments for services rendered by newspaper advertising. That is, it made its several promotional plans known to all. Every customer knew, or could have easily learned, what payments were being offered

and what he must do to get any of them. There was no singling out of favorite customers and making private and different deals with them as appeared in the matter of *John D. Stetson Company*, 41 F. T. C. 244. There was no making of special allowances for promotional services to certain customers which were not made known (or even denied) to other customers, "who were able and willing to furnish the same services and facilities" as in *American Art Clay*, 38 F. T. C. 463, *American Crayon Company*, 32 F. T. C. 306, *Lifesavers Corp.*, 34 F. T. C. 472, and other cases.

Counsel supporting the complaints argues that the newspaper advertising allowances are not "available" because they are not suitable or usable to certain of the customers of the respondents. He cites Black's law dictionary as to the meaning of the word "available." He points out groups of customers who he claims could not make practical use of the newspaper program. These groups are:

(1) Those Who Do Not Do Consumer Advertising Within the Meaning of That Term in the Contract.

Counsel construes the quoted sentences of the contracts to mean that the only advertising which respondents would pay for is that which is a part of the regular advertising of the customer in which he calls his wares generally to the attention of the public; as some did not do that type of advertising, therefore they could not avail themselves of respondents' offer and consequently the advertising programs were not usable or suitable.

The meaning of the quoted sentences is not entirely clear. They might be construed as counsel suggests. On the other hand, they might be construed to require advertising of respondents' products in the customer's regular consumer advertising *only in the event he did such advertising.*

There is some evidence that respondents paid for advertising which was restricted to their own products, which has a bearing on how the contracts were actually construed.

On this point, we adopt the finding of the trial examiner, which is as follows:

"As to the first contention, this case was not tried on the theory now advanced by the attorney supporting the complaint in his oral argument. The evidence in this record is not sufficient to support this contention. There is no evidence as to what actually constitutes regular consumer advertising as used in the actual contract, no evidence that an isolated advertisement placed by a customer would not be considered as regular consumer advertising or that the respondent has ever refused to grant an advertising allowance because the advertisement appeared as an isolated advertisement in a newspaper."

(2) Those Who Because of their Smaller Purchases of Respondents' Products do not Receive Enough in Payment to Pay for Newspaper Advertising Even Though Restricted to Respondents' Products.

Several proprietors of small grocery stores testified that the number of cases of respondents' products purchased by them would not be sufficient to pay the cost of newspaper advertising; that in their particular situation any newspaper advertising would not be practical and that therefore the newspaper allowances of respondents were not usable.

While this evidence has a bearing on the "availability" of the newspaper allowances generally, its value is somewhat weakened by other facts in evidence as follows:

(a) The figures as to the advertising rates offered by these particular customers had to do with newspapers whose circulation was considerably more extensive than the particular customers' trading area. The possibility of advertising in local or neighborhood papers confined to his own trade area (for which payments were made by respondents) does not seem to have been sufficiently explored in the testimony.

(b) Respondents' advertising allowances were offered to, and, to some extent at least, used by cooperatives, of which individual retail grocers were members. This would naturally increase the number of small grocers who could avail themselves of respondents' allowances.

(c) The evidence was confined to New York City where the retail grocery situation is not typical of the country generally. Taking the figures for the country as a whole, the evidence is that, of the customers using Lever Brothers annual advertising contract, 30% purchase less than 400 cases a year; 49% less than 1,000 cases; and 55% less than 1,500 cases. About 50% of the chain store customers do not take advantage of Lever Brothers allowances for newspaper advertising.

On this feature of the case, we adopt the finding of the trial examiner, which is as follows:

"* * * There is no evidence in this record to support a finding that even the highest rate of payment offered by respondent for feature sales, including newspaper advertising, is not reasonably available to all of respondent's customers. The customer can avail himself of this rate either through use of the annual contract by advertising one or more products three times each contract period of four months, or on such products which he cares to advertise through the Cooperative Merchandising Plan with only one insertion of the advertisement. The respondent places no restrictions on the newspapers which he may use except that it cover the area where his store or stores are located thus enabling the use of neighborhood papers

or weekly or monthly papers at a greatly reduced rate. The respondent has accepted as low as 2 or 3 lines of advertising as compliance with the contract which reduces the advertising expense. In the absence of evidence that respondent has refused or withheld its annual contract from customers for not advertising all of its products or a substantial number thereof, it must be assumed that even a customer executing the annual contract could, if he so desired, participate by advertising only one or more products as his financial condition or needs might dictate. No witness has appeared in this proceeding who testified that he wished to participate in the advertising allowance but could not do so because of the expense. Furthermore, any customer, who for any reason does not wish to advertise, can avail himself of the promotional allowances at the rates provided by using handbills, radio or television or by conducting feature sales with display only."

Each of the respondents offers alternative promotional allowances for those who do not for any reason use the advertising allowances. These offers are also made to all customers. For example, in the case of Lever Brothers, a retail customer who holds a feature sale supported by handbill or radio advertising is paid 8¢ or 9¢ per case of products purchased. There is also a second option—to wit, for a sale supported only by a store display, 6¢ per case is allowed.

In other words, the newspaper advertising allowance is a part of the comprehensive plan of payment for promotional services offered by respondents to their several hundred thousand customers throughout the country. The conditions under which these customers operate, of course, vary. Although it appears that the use of advertising by means of newspaper, handbills, or store displays is general throughout the country, we will assume that among these many customers will be found some who do not find newspaper advertising practical. There is no proof, however, that either handbills or store displays are not reasonably practical for all.

There is no evidence in these cases that the promotional plans were tailored to fit the needs of favored customers as was condemned in *Elizabeth Arden, Inc.*, v. *Federal Trade Commission*, 156 F. 2d 132, a case arising under Section 2 (c). Nor does the law require that a comprehensive plan must be so tailored that every feature of it will be usable or suitable for every customer. In many cases that would be an impossibility.

Considering the entire record, we believe that the payments offered for advertising allowances were "available" within the meaning of Section 2 (d) of the Clayton Act.

The next question is, do the payments, which are based on the number of cases sold, meet the test of proportionality as required by Section 2 (d)?

The Congressional history of that legislation as well as statements by the courts and the Commission indicate that such a method of measurement is a proper one. For example, see Senate Report No. 1502 and House of Representatives Report No. 2287, 74th Congress, 2nd Session: *Elizabeth Arden Sales Corp.* v. *Gus Blass Company*, 150 F. 2d 988; *International Salt Company* and *Eastern Salt Company*, Docket No. 4307.

During the course of the trial, the trial examiner made the following statement:

"Let's get this straightened out. I am permitting you to prove in this case whether or not the allowances are, in fact, given on proportionally equal terms to either customers; in other words, whether there is a discrepancy in the contracts on the allowance made or whether or not the advertising which is required is so high as to exclude any customers, but I do not intend by my ruling to permit you to go into the very testimony which we have in question; in other words, what the man spends as to show his profit. I suppose you could put a man on the stand to show that his advertising costs so much and as a result he couldn't advertise, but that is as far as I am going to let you go."

Section 2 (d) permits payments for services or facilities actually furnished. Certainly, payments for services or facilities not furnished are not authorized. The same would be true of payments grossly in excess of the cost or value of the services rendered. If by his statement, the trial examiner meant that any examination into the relation between the payments made and the cost of rendering the services would not be permitted, then we think the ruling was too restrictive.

In connection with this ruling, the examiner stated he would permit an offer of proof for the record. No proof was offered and the error, if any were thereby waived. There is no evidence from which it can be found that payments to any customers are in excess of their cost or value.

An additional question arises because of the fact that respondents' payments covered different types of services for which a differing scale of payment was fixed—a certain amount per case for newspaper advertising, a lesser amount for handbills, and still less for store displays. The argument is made that, to meet the requirement of proportionality, payment per case should be the same for each type of service rendered.

While a few instances are cited to the contrary, the proof generally is to the effect that advertising by newspaper is more expensive and

more effective than advertising by either handbill or store display. Evidently respondents considered it of more value to them and their payments are made on that basis.

The law does not prohibit a seller from paying for services of various types. In some cases it might be his duty to do so in order to meet the test of availability. Nor does the law require a seller to pay at the same rate, per unit of product sold, for types of services which are of unequal cost or value. The practical result of such a rule would be to restrict the payments to some type of service that every single customer could furnish. It would adopt uniformity as its goal rather than proportionality. Payments must be made in good faith for services or facilities actually rendered and there should be a fair and reasonable relation between the amount of the payment and the type of service rendered. Congressman Utterback, a member of the Judiciary Committee, had this to say in the debate on the Robinson-Patman bill in the House:

"But proportional to what? Proportional naturally to customers' purchases and to their ability and equipment to render or furnish the services or facilities to be paid for."

While Section 2 (d) requires that payments shall be made available on proportionally equal terms to all competing customers, no standards are laid down in the law for accomplishing this result. Indeed no standard could be laid down which would insure exact proportionality with the mathematical accuracy of a slide rule. Although standards are not laid down, nevertheless the intent of Congress in enacting Section 2 (d) is clear. Prior to the enactment of the Robinson-Patman Act, payments for services and facilities rendered (particularly in the advertising field) were often used for the purpose of discriminating among customers. It was that evil that Section 2 (d) was intended to eliminate. Consequently, every plan providing payment for promotional services and facilities should be carefully scrutinized to see that it does conform to the express Congressional intent. It must be honest in its purpose and fair and reasonable in its application.

We agree with the initial decision of the trial examiner that, on the basis of the present record, there has been a failure to sustain the allegations of Count Two of the amended and supplemental complaint charging that the method used by respondents in granting allowances for their various customers is in violation of Section 2 (d) of the Clayton Act.

IN THE MATTER OF

THE PROCTER & GAMBLE DISTRIBUTING CO. ET AL.

Docket 5586. Amended and supplemental complaint, Apr. 26, 1951—Order denying appeal, etc., and opinion,[1] Dec. 16, 1953

Charge: Discriminating in price by selling soap products in commerce to certain customers, usually small businessmen, at higher prices than to other and generally larger competing customers, in violation of subsection 2 (a) of the Clayton Act, as amended; and

Entering into advertising arrangements with certain customers whereby respondent paid or contracted to pay them compensation for services or facilities furnished by them in connection with the sale, etc., of respondents' soap products without making comparable payments or consideration available to their competitors, in violation of subsection 2 (d) of the Clayton Act, as amended.

Before *Mr. Randolph Preston* and *Mr. Earl J. Kolb*, hearing examiners.

Mr. John L. York and *Mr. William H. Smith* for the Commission.

Dinsmore, Shohl, Sawyer & Dinsmore, of Cincinnati, Ohio, and *Dwight, Royall, Harris, Koegel & Caskey*, of Wasihngton, D. C., for respondents.

ORDER DENYING APPEAL FROM INITIAL DECISION OF HEARING EXAMINER AND DECISION OF THE COMMISSION

This matter having come on to be heard by the Commission upon the appeal of counsel supporting the complaint from the initial decision of the hearing examiner and upon the briefs and oral argument of counsel in support of and in opposition to said appeal; and

The Commission having duly considered said appeal and the record herein and being of the opinion for the reasons stated in the written opinion of the Commission which is being issued simultaneously herewith, that the appeal should be denied and that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the appeal of counsel supporting the complaint from the initial decision of the hearing examiner be, and it hereby is, denied.

It is further ordered, That the initial decision of the hearing examiner, a copy of which is attached, shall, on the 16th day of December 1953, become the decision of the Commission.

[1] For opinion in this case see page 506 of the Lever Brothers case.

Order Dismissing Amended and Supplemental Complaint

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding came on to be considered by the above-named hearing examiner theretofore duly designated by the Commission, upon the amended and supplemental complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions, and brief thereon submitted by counsel for respondents, and oral argument of counsel.

The orginal complaint in this proceeding was issued on September 27, 1948, charging the respondents, The Procter & Gamble Distributing Company, a corporation, and The Procter & Gamble Company, a corporation, with having violated the provisions of subsection (a) of Section 2 of the Clayton Act, as amended.

Testimony and other evidence in support of the allegations of the complaint were introduced before Randolph Preston, a duly designated hearing examiner of the Commission, but prior to the introduction of any evidence in opposition to the charges of the complaint the said hearing examiner, Randolph Preston, became unavailable to the Commission by reason of his retirement from the Government service, and the Commission by order issued August 24, 1950, designated Earl J. Kolb as hearing examiner in this proceeding to take testimony and receive evidence in the place and stead of Hearing Examiner Randolph Preston.

Thereafter, prior to the introduction of any testimony and other evidence by the respondents in opposition to the charges of the complaint, the Commission on April 26, 1951, issued and subsequently served its amended and supplemental complaint in this proceeding charging the respondents with having violated subsections (a) and (d) of Section 2 of the Clayton Act, as amended.

On June 4, 1951, after hearing upon certain motions of the respondents, the hearing examiner issued his order that all testimony and other evidence heretofore taken in this proceeding be stricken from the record as not being applicable to the issues raised by the amended and supplemental complaint.

Thereafter, on November 26, 1951, the Commission approved a stipulation executed by counsel in support of the complaint and counsel for respondents, pursuant to which the hearing examiner issued his order dismissing the charges contained in subparagraph 2 of paragraph Five of Count 1 of the amended and supplemental complaint dealing with quantity discounts, and further ordered that the testimony and other evidence theretofore taken in support of the original complaint be reinstated and considered as testimony and other evidence taken in support of the amended and supplemental complaint.

Thereafter, testimony and other evidence were introduced before Hearing Examiner Earl J. Kolb in support of and in opposition to the allegations of the amended and supplemental complaint, which testimony and other evidence were duly recorded and filed in the office of the Commission.

Respondents, The Procter & Gamble Distributing Company and The Procter & Gamble Company, are corporations organized and existing under the laws of the State of Ohio with their office and principal place of business located in the Gwynne Building, Cincinnati, Ohio.

The Procter & Gamble Distributing Company is a wholly owned subsidiary of The Procter & Gamble Company and is now, and for several years last past has been, engaged in the sale and distribution of soap and soap products, supplied by The Procter & Gamble Company, in interstate commerce to retail grocers, jobbers and other purchasers. A substantial portion of the business of respondent, The Procter & Gamble Distributing Company, consists of sales of soap and soap products direct to thousands of retail grocers located in virtually every city and town in the United States.

The differences in price and allowances, charged in the amended and supplemental complaint to be in violation of Section 2 (a) and 2 (d) of the Clayton Act, arise out of the following practices of respondent, The Procter & Gamble Distributing Company, in connection with sales of soap and soap products to its retailer customers: (1) Price protection of warehouse stocks upon price decline; (2) Count and recount; and (3) Advertising allowances.

I. Price Protection of Warehouse Stocks Upon Price Decline

Allowances to cover price decline in warehouse stocks is a general practice in the grocery industry and has the following purposes: (1) To provide adequate stocks immediately behind point of sale; (2) To avoid necessity of maintaining greater number of warehouses by the manufacturer; (3) To pass on to the customer delivery costs; and (4) To induce the trade to maintain an adequate reservoir of stock.

Many single and two-store retailers throughout the United States belong to cooperative associations or purchase all or part of their requirements of soap and soap products from jobbers. Respondent, The Procter & Gamble Distributing Company, extends price protection to the warehouse stocks of such associations and jobbers enabling them to offer their members or customers the new lower price immediately upon the announcement of a price decline.

Price declines on respondents' soap and soap products were relatively few and at infrequent intervals and for the most part were made for the purpose of offsetting the higher prices existing during

World War II and were due to the lower price of raw materials and the greater availability of such materials. When such price declines occurred, respondent, The Procter & Gamble Distributing Company, immediately reduced the price on all of its own warehouse stock, which reduction applied to goods in transit. During the four-year period immediately preceding the issuance of the amended and supplemental complaint there were six declines in price of said respondent's soap and soap products ranging from 5 percent to 10 percent or roughly 25¢ to 50¢ per case.

At the time of these price declines, respondent, The Procter & Gamble Distributing Company, made adjustments to all of its customers having storage or warehouse stocks held by such customers for further handling, transportation and distribution to the site of retail sale. In making such adjustments said respondent did not protect any of its customers on stocks in their warehouses or stores which were purchased from jobbers or others and not directly from said respondent. Following such price declines, said respondent determined the number of unopened cases held in the warehouse space of its various customers for distribution to three or more retail stores and made an allowance or rebate on such cases to such customers equal to the price reduction. Said respondent made no payment on cases, opened or unopened, held in retail store stocks regardless of the size of the retailer or the number of stores owned. In determining the amount of allowance to be paid, said respondent accepted the count of the customer who carried a running inventory, but as to those who did not, actual count was made by salesmen of respondent. No price protection was extended to operators of one or two stores who bought and took delivery solely for the needs of those stores. An exception to this is the carload purchaser operating one or two stores to whom stock protection was granted on cases over and above his normal operating inventory. No price protection was extended to a customer operating several stores on soap or soap products delivered to a unit store for resale solely in that store.

Respondent, The Procter & Gamble Distributing Company, did not require that the warehouse or storage stock should be in a separate building not in any way physically connected with any retail store. Instead, said respondent included in its definition of warehouse and storage stocks any stocks located in a warehouse or storage space from which distribution was made at the customer's expense to the site of retail sale in three or more retail stores. Some of said respondent's customers who received price protection on such warehouse or storage stocks kept such stock in warehouse or storage space physically connected in some way to one of the retail stores from which further distribution was made.

In the administration of its price protection policy respondent, The Procter & Gamble Distributing Company, carefully determined the eligibility of stocks for payment; carefully determined the number of cases on which payment should be made in accordance with its policy; and limited payments to the amounts so determined. No issue was raised in this proceeding of any arbitrary or improper allowances being made to particular customers separate and apart from the general plan hereinbefore described. There is some evidence of improper classification of customers in several isolated instances through carelessness or improper conduct of salesmen, but these were immediately corrected by the respondent and such isolated instances are not at issue in this proceeding. The charges of the amended and supplemental complaint were instead directed to the general practice of affording warehouse protection to the operators of three or more stores while not extending the same protection to the operators of single or two stores.

This issue was further limited by the following stipulation on the record by the attorney in support of the complaint:

"As attorney supporting the complaint I now announce to the Court that I raise no question as to the price protection given to the warehouse stocks of chains, voluntaries, or cooperatives or others kept in a warehouse in a separate building not in any way physically connected with any retail store while denying for stock protection to certain other customers who operate retail stores but who maintain no separate warehouses.

"I also announce that I shall contend that Section 2 (a) of the Robinson-Patman Act is being violated by granting floor stock protection to what is claimed to be warehouse stock stored in a building used as a retail store by the same customer who operates three or more stores while refusing this protection to other competing customers who operate one or two stores. This would include among other things, warehouse stock of three or more jointly-owned stores which stock is stored in a building occupied by one of the retail stores." (Tr. 2991–92.)

By this stipulation the issue was limited to the granting of price protection to what is claimed to be warehouse stock stored in a building used as a retail store by customers who operate three or more stores while refusing this protection to other retail customers who operate only one or two stores. This stipulation was made prior to the introduction of any testimony in opposition to the charges of the amended and supplemental complaint respecting warehouse stock protection and the testimony in defense was based solely upon the issue as so limited.

It is uncontradicted in this record that when respondent, The Procter & Gamble Distributing Company, granted an allowance on stock stored in a building occupied by one of the stores, such allowance was made only on stock stored in the warehouse section for distribution to three or more stores and no allowance was made on cases opened or unopened on the floor of the store for replenishment of the retail stock or upon the normal operating stock of the warehousing store.

There is no evidence in this record that any injury to competition was sustained by the single store or two-store operator by reason of the practice of granting warehouse stock protection by respondent, The Procter & Gamble Distributing Company. No price protection was granted by said respondent on normal operating stock, which is that stock which the retailer requires to refill his shelves and rebuild display. This includes all stock in the individual-member store other than that stored in the warehouse section for distribution to three or more stores. It is uncontradicted in this record that the normal operating stocks, including shelf stock, in unit stores of chains of three or more stores upon which no price protection was granted by said respondent were greater in size than that in single stores or in units of two-store operations. Units of chains of three or more stores have as a part of their normal working stock more unopened cases than do single stores or two-store units.

On the basis of the present record, it appears that there has been a total failure to sustain the charges of the amended and supplemental complaint relative to price protection on decline in price, for the following reasons:

1. The stipulation entered into by counsel in support of the complaint, prior to the introduction of any evidence in opposition to the charges of the amended and supplemental complaint, in effect abandoned the original theory of the amended and supplemental complaint; admitted the legality of the practice of extending price protection to warehouse or storage stocks and removed as an issue in this proceeding the granting of price protection to warehouse stocks stored in a separate warehouse.

2. By reason of this stipulation it must be considered, for the purpose of this proceeding, that a retail customer maintaining a separate and distinct warehouse for supplying three or more stores performs a warehousing function which entitles him to the allowances made on warehouse stock in the case of price decline.

3. A customer maintaining a separate warehouse stock in one of its units for distribution to three or more stores, including the unit store, performs the same warehousing function as the customer maintaining a separate warehouse.

4. While it was stipulated in the record that single and two stores who were not accorded price protection compete with customers who operate three or more stores and who receive price protection but do not have physically separate warehouses, there is no evidence in this record that the failure of unprotected customers to receive price protection affects their competitive position, ability or opportunity to compete with protected customers who do not have physically separate warehouses. The evidence on competitive effect relates to competition between unprotected customers and chain stores which have physically separate warehouses.

5. There is no competitive injury to the single or two-store operator who does not receive price protection because his unprotected stock at the time of any price decline is less than the normal operating stock of the units of chains of three or more stores which is likewise unprotected.

6. On the basis of the present record, the inventory loss to a single or two-store operator resulting from failure to receive price protection on price declines occurring at infrequent intervals is at best *de minimis* and cannot affect his competitive position or opportunities.

II. Count and Recount

The practice known as Count and Recount is a promotional plan, common to the grocery industry, which is designed to stimulate the movement of goods which are moving slowly. It is in operation for only a short period of time and usually involves only one product. During the past several years this plan has been used by the respondent, The Procter & Gamble Distributing Company, on only six occasions.

In the operation of this plan in 1948, the respondent, The Procter & Gamble Distributing Company, issued a promotional allowance or rebate to chains of three or more stores and to jobbers amounting to approximately 50¢ a case on one product, Dreft, based upon the number of cases moved into the retail store from the warehouse during the periods from March 23, 1948, to April 30, 1948; and from November 8, 1948, to December 15, 1948. The quantity on hand at the warehouse of such customers was counted at the beginning of the campaign period to which was added the quantity purchased and delivered to the warehouse during the campaign period and from the total the quantity on hand in the warehouse at the end of the period was subtracted. The difference being the amount moved from the warehouse to the individual store, which formed the basis for the promotional allowance or rebate. All customers operating less than three stores received no allowance or rebate for stock on hand but were charged the lower

price on all Dreft ordered or shipped during the sale period. No allowance or rebate was granted to chains of three or more stores on cases opened or unopened in their various units. It was the practice of the respondent, The Procter & Gamble Distributing Company, to notify all of its direct customers of the institution of a Count and Recount promotion, and to have its salesmen make a special effort to sell the promotional merchandise, during the period, to all customers operating less than three stores.

There is no evidence that an opportunity to participate in the Count and Recount Plan was not offered to all chains of three or more stores or that operators of less than three stores did not have an opportunity to purchase at the reduced price during the campaign period, or that any injury to competition was suffered by any customer of the respondent, The Procter & Gamble Distributing Company, by reason of the operation of said Count and Recount Plan.

The amended and supplemental complaint further charged that by reason of a general reduction in price, which frequently followed the Count and Recount Plan, certain customers received a second rebate on the same merchandise. While it is true that a general reduction in price by respondent, The Procter & Gamble Distributing Company, did become effective on three occasions, following a Count and Recount promotion, there is no evidence that any customer of said respondent received a promotional allowance on Count and Recount and a price protection allowance on warehouse stock covering the same merchandise. In fact, in the operation of these two plans the promotional allowance is received only on merchandise moved to the individual stores and the price protection allowance only on warehouse stocks, so that no duplication of allowances is possible on the same merchandise. There is no evidence that any injury to competition was suffered by any customer by reason of the fact that a general price reduction followed a Count and Recount campaign.

On the basis of the present record, it appears that there has been a total failure to sustain the charges of the amended and supplemental complaint relative to the Count and Recount practice.

III. Advertising Allowances

Count II of the amended and supplemental complaint charged the respondents with violation of Section 2 (d) of the Clayton Act, in that: (1) Payments of allowances for newspaper advertising were not made available to all customers of respondent, The Procter & Gamble Distributing Company, because it is not reasonably possible for those who purchase smaller quantities of said respondent's products to avail themselves of the higher rate which respondent pays and

agrees to pay for newspaper advertising; and (2) that the amounts received by said respondent's customers were disproportionate to the cost of advertising furnished by them in that purchasers of large quantities of soap products received sums which were grossly in excess of the cost of the advertising which they furnished, whereas purchasers of lesser quantities received much lesser amounts in relation to the cost of the advertising they furnished.

Respondent, The Procter & Gamble Distributing Company, in the course of its business in commerce entered into contracts with and made payments to its customers for promotional services and facilities furnished by such customer. In the granting of such allowances said respondent used two forms of contract—both designated Cooperative Merchandising Agreements, one of which is an annual contract and the other is generally referred to as the trip contract. The trip contract is a contract physically incorporated as part of the order blank on each order written for customers who had not executed the annual contract.

In the annual contract, respondent, The Procter & Gamble Distributing Company, agreed to pay to the customer an allowance per case ranging from 10¢ to 20¢ a case, depending upon the product, on the condition that the customer render sales promotions and advertising services by conducting a minimum of nine feature sales annually on each product, to be spaced as evenly as possible throughout the year, with no more than four features on any brand (3 features on Lava and Kirk's Coca HWC) which shall be counted toward contract performance in any one of the successive four-month periods of the contract. As a part of the feature sales the customer was required to place newspaper advertising in the main body of his advertisements in the newspapers used in his regular consumer advertising, and that each sale be supported by the usual other auxiliaries of special sales promotion. The annual contract also provided for an option whereby the customer instead of advertising in newspapers could conduct the nine sales as required and use, in lieu of newspaper advertising, handbills, radio or television. In this event, the customer was paid 9¢ per case on all products.

In the trip contract, which was offered by salesmen to customers at the time the order was taken, respondent, The Procter & Gamble Distributing Company, agreed to pay to the customer an allowance of 6¢ per case purchased on the condition that the customer render sales promotional service consisting of a prominent mass store display of the brands purchased. The trip contract provided for an option in that if the customer advertised any of the products purchased in newspapers, handbills or by radio or direct mail, he received the allowance of 9¢ per case purchased.

The annual contract required that advertising space used in newspapers should be equal to that which the customer ordinarily used in major feature sales, but in no case less than one column inch, 14 agate lines, per brand with right of customer to use any size space he might elect, provided the total space devoted to advertising any brand during the period of the contract equaled at least the total minimum number of column inches required for full contract performance.

The existence and availability of said contracts and payments were made known by respondent, The Procter & Gamble Distributing Company, to all of its customers and said respondent offered said contracts and the opportunity to receive said payments to all of its customers. Said respondent, through its sales employees, endeavored to persuade all customers to avail themselves of the contracts and payments and to furnish the services and facilities called for. All direct customers of respondent were offered the choice of executing either the annual contract or the trip contract, and the decision in each case was a matter for the retailer's own judgment and decision based on the retailer's own merchandising policies and choice.

Many of said respondent's customers, including small, single-store customers, belonged to cooperative or voluntary associations and where such associations wished to advertise for their members, it was the practice of respondent to enter into its annual contract with such associations and to pay to them the advertising allowance based upon the total purchases of the members of such associations.

The advertising allowances provided for in its annual contract were paid to customers by respondent, The Procter & Gamble Distributing Company, at the end of the four-month period, specified in the agreement, after verification of the advertising placed by the customer, either through report of check made by an independent audit bureau or submission of tear sheets, particularly of those publications not covered by the audit bureau. Allowances were paid only upon those products which were actually advertised. In the event the feature sales were not conducted in all the stores as, for example, in the case where the customer failed to provide newspaper advertising serving all the areas of location of all the specified stores, payment to the customer was proportionately reduced. The same was true in the event the customer failed to conduct the minimum of nine feature sales annually. In that case, payment was also proportionately reduced. Said respondent required that handbill advertisements supporting feature sales must be printed and copies furnished to it. This was required as a practical method of insuring that the advertisement had been prepared and distributed in good faith.

The attorney in support of the complaint did not file proposed findings or briefs with the hearing examiner but instead argued the matter orally, which argument, together with that of the attorneys for the respondents, has been incorporated in and made a part of the record. In the argument the attorney in support of the complaint stated the following issues which may now be considered as the issues in this proceeding:

(a) That it is not reasonably possible for customers who purchase smaller quantities of respondent's products to avail themselves of the higher rate which respondent pays, and agrees to pay, for newspaper advertising because respondent's contract provides that the advertising placed must be included in the advertiser's regular consumer advertising and, consequently, if a customer does not do newspaper advertising the rates provided by the annual contract are unavailable to him under any conditions.

(b) That among the customers who receive advertising allowances under the annual contract there is a lack of proportionality because such allowances, which are paid upon a per case basis, have no relationship to the advertising required to be placed, because there is no cutoff point between the per case allowance and the number of advertisements to be placed, with the result that allowances are paid for advertising not placed as distinguished from allowances for advertising which is placed.

As to the first contention, this case was not tried on the theory now advanced by the attorney supporting the complaint in his oral argument. The evidence in this record is not sufficient to support this contention. There is no evidence that an isolated advertisement placed by a customer would not be considered as regular consumer advertising or that the respondent has ever refused to grant an advertising allowance because the advertisement appeared as an isolated advertisement in a newspaper.

Aside from counsel's contentions on availability, this question arises when the requirements for participation are such that only certain customers can in fact participate. There is no evidence in this record to support a finding that even the highest rate of payment offered by respondent for feature sales, including newspaper advertising, is not reasonably available to all of respondent's customers. The customer can avail himself of this rate either through the use of the annual contract or as a member of an association, cooperative or affiliated group. The respondent places no restrictions on the newspapers which he may use except that it cover the area where his store or stores are located thus enabling the use of neighborhood papers or weekly or

monthly papers at a greatly reduced rate. In addition, respondent pays the allowance only on products advertised under its annual contract. In the absence of evidence that respondent has refused or withheld its annual contract from customers for not advertising all of its products or a substantial number thereof, it must be assumed that even a customer executing the annual contract could, if he so desired, participate by advertising only one or more products as his financial condition or needs might dictate. No witness has appeared in this proceeding who testified that he wished to participate in the advertising allowance but could not do so because of the expense. Furthermore, any customer, who for any reason does not wish to advertise, can avail himself of promotional allowances at the rates provided by using handbills, radio or television or by conducting feature sales with display only.

As to the contention that there is a lack of proportionality because allowances are paid on a per case basis with no relationship to the advertising required to be placed, the evidence in this record is such that no finding whatsoever could be made on this point. All the record shows is that various newspapers charge different rates; that customers use different newspapers; that varying amounts of advertising are used by different customers to comply with their contracts with respondent; and that lineage rates are different as between customers even though same newspaper might be used. Furthermore, the allowances paid are for feature sales of which advertising is a part. Consequently, there is no comparative basis in this record which might be used to determine the relationship between the allowances paid and the advertising required to be placed, and the deficiencies of this record are such as to be fatal to any finding on this point.

On the basis of the present record, it appears that there has been a total failure to sustain the allegations of Count II of the amended and supplemental complaint charging that the method used by the respondent, The Procter & Gamble Distributing Company, in granting allowances for advertising to its various customers is in violation of Section 2 (d) of the Clayton Act.

It is therefore ordered, That the amended and supplemented com- in this proceeding be, and the same is hereby, dismissed.

IN THE MATTER OF

COLGATE-PALMOLIVE-PEET CO.

Docket 5587. Amended and supplemental complaint, Apr. 26, 1951—Order denying appeal, etc., and opinion,[1] Dec. 16, 1953

Charge: Discriminating in price by selling soap products in commerce to certain customers, usually small businessmen, at higher prices than to other and generally larger competing customers, in violation of subsection 2 (a) of the Clayton Act, as amended; and

Entering into advertising arrangements with certain customers whereby respondent paid or contracted to pay them compensation for services or facilities furnished by them in connection with the sale, etc., of respondent's soap products without making comparable payments or consideration available to their competitors, in violation of subsection 2 (d) of the Clayton Act, as amended.

Before *Mr. Randolph Preston* and *Mr. Earl J. Kolb*, hearing examiners.

Mr. John L. York and *Mr. William H. Smith* for the Commission.

Lord, Day & Lord, of New York City, and *Mr. H. Walter Reynolds* and *Mr. B. C. Dunklin*, of Jersey City, N. J. for respondent.

ORDER DENYING APPEAL FROM INITIAL DECISION OF HEARING EXAMINER, AND DECISION OF THE COMMISSION

This matter having come on to be heard by the Commission upon the appeal of counsel supporting the complaint from the initial decision of the hearing examiner and upon the briefs and oral argument of counsel in support of and in opposition to said appeal; and

The Commission having duly considered said appeal and the record herein and being of the opinion, for the reasons stated in the written opinion of the Commission which is being issued simultaneously herewith, that the appeal should be denied and that the initial decision of the hearing examiner is appropriate in all respects to dispose of this proceeding:

It is ordered, That the appeal of counsel supporting the complaint from the initial decision of the hearing examiner be, and it hereby is, denied.

It is further ordered, That the initial decision of the hearing examiner, a copy of which is attached, shall, on the 16th day of December, 1953, become the decision of the Commission.

---

[1] For opinion in this case see page 506 of the Lever Brothers case.

ORDER DISMISSING AMENDED AND SUPPLEMENTAL COMPLAINT

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER.

This proceeding came on to be considered by the above-named Hearing Examiner theretofore duly designated by the Commission, upon the amended and supplemental complaint, the answer thereto, testimony and other evidence, proposed findings as to the facts and conclusions, and brief thereon submitted by counsel for respondent, and oral argument of counsel.

The original complaint in this proceeding was issued on September 27, 1948, charging the respondent, Colgate-Palmolive-Peet Company, a corporation, with having violated the provisions of subsection (a) of section 2 of the Clayton Act, as amended.

Testimony and other evidence in support of the allegations of the complaint were introduced before Randolph Preston, a duly designated Hearing Examiner of the Commission, but prior to the introduction of any evidence in opposition to the charges of the complaint the said Hearing Examiner, Randolph Preston, became unavailable to the Commission by reason of his retirement from the Government service, and the Commission by order issued August 24, 1950, designated Earl J. Kolb as Hearing Examiner in this proceeding to take testimony and receive evidence in the place and stead of Hearing Examiner Randolph Preston.

Thereafter, prior to the introduction of any testimony and other evidence by the respondent in opposition to the charges of the complaint, the Commission on April 26, 1951, issued and subsequently served its amended and supplemental complaint in this proceeding charging the respondent with having violated subsections (a) and (d) of section 2 of the Clayton Act, as amended.

On June 4, 1951, after hearing upon certain motions of the respondent, the Hearing Examiner issued his order that all testimony and other evidence heretofore taken in this proceeding be stricken from the record as not being applicable to the issues raised by the amended and supplemental complaint.

Thereafter, on November 26, 1951, the Commission approved a stipulation executed by counsel in support of the complaint and counsel for respondent, pursuant to which the Hearing Examiner issued his order dismissing the charges contained in subparagraph 2 of Paragraph Five of Count 1 of the amended and supplemental complaint dealing with quantity discounts, and further ordered that the testimony and other evidence theretofore taken in support of the original complaint be reinstated and considered as testimony and other evi-

dence taken in support of the amended and supplemental complaint.

Thereafter, testimony and other evidence were introduced before Hearing Examiner Earl J. Kolb in support of and in opposition to the allegations of the amended and supplemental complaint, which testimony and other evidence were duly recorded and filed in the office of the Commission.

Respondent, Colgate-Palmolive-Peet Company, a corporation, is engaged in the manufacture and in the sale and distribution of soap and soap products in interstate commerce to retail grocers, jobbers and other purchasers. A substantial portion of respondent's business consists of sales of soap and soap products direct to thousands of retail grocers located in virtually every city and town in the United States. Among such retailer customers there are approximately 1,600, exclusive of approximately 800 cooperative chains, who operate chains of three or more stores and the remainder are single-store operators.

The differences in price and allowances charged in the amended and supplemental complaint to be in violation of section 2 (a) and 2 (d) of the Clayton Act arise out of the following practices of respondent in connection with sales of soap and soap products to its retailer customers: (1) Price protection of warehouse stocks upon price decline; (2) Count and recount; (3) Advertising allowances.

I. Price Protection of Warehouse Stocks Upon Price Decline.

Allowances to cover price decline in warehouse stocks is a general practice in the grocery industry and has the following purposes: (1) To provide adequate stocks immediately behind point of sale; (2) To avoid necessity of maintaining greater number of warehouses by the manufacturer; (3) To pass on to the customer delivery cost; and (4) To induce the trade to maintain an adequate reservoir of stock.

Many single and two-store retailers throughout the United States belong to cooperative associations or purchase all or part of their requirements of soap and soap products from jobbers. Respondent extends price protection to the warehouse stocks of such associations and jobbers enabling them to offer their members or customers the new lower price immediately upon the announcement of a price decline.

Price declines on respondent's soap and soap products were relatively few and at infrequent intervals and for the most part were made for the purpose of offsetting the higher prices existing during World War II and were due to the lower price of raw materials and the greater availability of such materials. When such price declines occurred, respondent immediately reduced the price on all of its own warehouse stock which reduction applied to goods in transit. During the four-

year period immediately preceding the issuance of the amended and supplemental complaint there were six declines in price of respondent's soap and soap products ranging from 6 percent to 10 percent or roughly 25¢ to 50¢ per case.

At the time of these price declines, respondent made adjustments to all of its customers having storage or warehouse stocks held by such customers for further handling, transportation and distribution to the site of retail sale. In making such adjustments the respondent did not protect any of its customers on stocks in their warehouses or stores which were purchased from jobbers or others and not directly from the respondent. Following such price declines, respondent determined the number of unopened cases held in the warehouse space of its various customers for distribution to three or more retail stores and made an allowance or rebate on such cases to such customers equal to the price reduction. Respondent made no payment on cases, open or unopened, held in retail store stocks regardless of the size of the retailer or the number of stores owned. In determining the amount of allowance to be made, respondent accepted the count of the customer who carried a running inventory, but as to those who did not, actual count was made by salesmen of respondent. No price protection was extended to operators of one or two stores who bought and took delivery solely for the needs of those stores. An exception to this is the carload purchaser operating one or two stores to whom stock protection was granted on unopened cases in the warehouse or storage space and only on merchandise received as part of a carload shipment. No price protection was extended to a customer operating several stores on soap or soap products delivered to a unit store for resale solely in that store.

Respondent did not require that the warehouse or storage stock should be in a separate building not in any way physically connected with any retail store. Instead, respondent included in its definition of warehouse and storage stocks any stocks located in a warehouse or storage space from which distribution was made at the customer's expense to the site of retail sale in three or more retail stores. Some of respondent's customers who received price protection on such warehouse or storage stocks kept such stock in warehouse or storage space physically connected in some way to one of the retail stores from which further distribution was made.

In the administration of its price protection policy respondent carefully determined the eligibility of stocks for payment; carefully determined the number of cases on which payment should be made in accordance with its policy; and limited payments to the amounts so determined. No issue was raised in this proceeding of any arbitrary

or improper allowances being made to particular customers separate and apart from the general plan hereinbefore described. There is some evidence of improper classification of customers in several isolated instances through carelessness or improper conduct of salesmen, but these were immediately corrected by the respondent and such isolated instances are not at issue in this proceeding. The charges of the amended and supplemental complaint were instead directed to the general practice of affording warehouse protection to the operators of three or more stores while not extending the same protection to the operators of one or two stores.

This issue was further limited by the following stipulation on the record by the attorney in support of the complaint:

"* * * counsel supporting the complaint agrees, and will so state, that he raises no question as to price protection given by respondent to the warehouse stocks of chains, voluntaries, cooperatives or others kept in a warehouse in a separate building not in any way physically connected with any retail store, while at the same time and in connection with the same price reduction denying floor-stock protection to other customers who operate retail stores but who maintain no separate warehouse, but counsel supporting the complaint will continue to contend that section 2 (a) of the Robinson-Patman Act is violated when floor-stock protection is accorded upon respondent's products stored in the building used as a retail store by the particular customer who operates three or more stores under a common ownership while floor-stock protection is at the same time denied to other competing customers who operate one or two stores." (Tr. 2846.)

By this stipulation the issue was limited to the granting of price protection to what is claimed to be warehouse stock stored in a building used as a retail store by customers who operate three or more stores while refusing this protection to other retail customers who operate only one or two stores. This stipulation was made prior to the introduction of any testimony in opposition to the charges of the amended and supplemental complaint respecting warehouse stock protection and the testimony in defense was based solely upon the issue as so limited.

It is uncontradicted in this record that when respondent granted an allowance on stock stores in a building occupied by one of the stores, such allowance was made only on stock stored in the warehouse section for distribution to three or more stores and no allowance was made on cases opened or unopened on the floor of the store for replenishment of the retail stock.

There is no evidence in this record that any injury to competition was sustained by the single-store or two-store operator by reason of

the respondent's practice of granting warehouse stock protection. No price protection was granted by the repondent on normal operating stock, which is that stock which the retailer requires to refill his shelves and rebuild display. This includes all stock in the individual-member store other than that stored in the warehouse section for distribution to three or more stores. It is uncontradicted in this record that the normal operating stocks, including shelf stock, in unit stores of chains of three or more stores upon which no price protection was granted by the respondent were greater in size than that in single stores or in units of two-store operations. Units of chains of three or more stores have as a part of their normal working stock more unopened cases than do single stores or two-store units.

On the basis of the present record, it appears that there has been a total failure to sustain the charges of the amended and supplemental complaint relative to price protection on decline in price, for the following reasons:

1. The stipulation entered into by counsel in support of the complaint, prior to the introduction of any evidence in opposition to the charges of the amended and supplemental complaint, in effect abandoned the original theory of the amended and supplemental complaint; admitted the legality of the practice of extending price protection to warehouse or storage stocks and removed as an issue in this proceeding the granting of price protection to warehouse stocks stored in a separate warehouse.

2. By reason of this stipulation it must be considered, for the purpose of this proceeding, that a retail customer maintaining a separate and distinct warehouse for supplying three or more stores performs a warehousing function which entitles him to the allowances made on warehouse stock in the case of price decline.

3. A customer maintaining a separate warehouse stock in one of its units for distribution to three or more stores, including the unit store, performs the same warehousing function as the customer maintaining a separate warehouse.

4. While it was stipulated in the record that single and two stores who were not accorded price protection compete with customers who operate three or more stores and who receive price protection but do not have physically separate warehouses, there is no evidence in this record that the failure of unprotected customers to receive price protection affects their competitive position, ability or opportunity to compete with protected customers who do not have physically separate warehouses. The evidence on competitive effect relates to competition between unprotected customers and chain stores which have physically separate warehouses.

5. There is no competitive injury to the single or two-store operator who does not receive price protection because his unprotected stock at the time of any price decline is less than the normal operating stock of the units of chains of three or more stores which is likewise unprotected.

6. On the basis of the present record, the inventory loss to a single-store operator resulting from failure to receive price protection on price declines occurring at infrequent intervals is at best *de minimis* and cannot affect his competitive position or opportunities.

II. *Count and Recount*

The practice known as Count and Recount is a promotional plan, common to the grocery industry, which is designed to stimulate the movement of goods which are moving slowly. It is in operation for only a short period of time and usually involves only one product. During the past ten years this plan has been used by the respondent on only two occasions.

In the operation of this plan in 1948, the respondent issued a promotional allowance or rebate to chains of three or more stores and to jobbers amounting to 50¢ a case on Vel, based upon the number of cases moved into the retail store from the warehouse during the periods from March 23, 1948, to April 30, 1948, and November 8, 1948, to December 4, 1948. The quantity on hand at the warehouse of such customers was counted at the beginning of the campaign period to which was added the quantity purchased and delivered to the warehouse during the campaign period and from the total the quantity on hand in the warehouse at the end of the period was subtracted. The difference being the amount moved from the warehouse to the individual store, which formed the basis for the promotional allowance or rebate. All customers operating less than three stores received no allowance or rebate for stock on hand but were charged the lower price on all Vel ordered or shipped during the sale period. No allowance or rebate was granted to chains of three or more stores on cases opened or unopened in their various units. It was the practice of the respondent to notify all of its direct customers of the institution of a Count and Recount promotion and to have its salesmen make a special effort to sell the promotional merchandise during the period to all customers operating less than three stores.

There is no evidence that an opportunity to participate in the Count and Recount Plan was not offered to all chains of three or more stores or that operators of less than three stores did not have an opportunity to purchase at the reduced price during the campaign period, or that

any injury to competition was suffered by any customer of the respondent by reason of the operation of said Count and Recount Plan.

The amended and supplemental complaint further charged that by reason of a general reduction in price, which frequently followed the Count and Recount Plan, certain customers received a second rebate on the same merchandise. While it is true that a general reduction in price by respondent did become effective on May 5, 1948, and December 20, 1948, there is no evidence that any customer of respondent received a promotional allowance on Count and Recount and a price protection allowance on warehouse stock covering the same merchandise. In fact, in the operation of these two plans the promotional allowance is received only on merchandise moved to the individual stores and the price protection allowance only on warehouse stocks, so that no duplication of allowances is possible on the same merchandise. There is no evidence that any injury to competition was suffered by any customer by reason of the fact that a general price reduction followed the Count and Recount campaign.

On the basis of the present record, it appears that there has been a total failure to sustain the charges of the amended and supplemental complaint relative to the Count and Recount practice.

III. Advertising Allowances

Count II of the amended and supplemental complaint charged the respondent with violation of section 2 (d) of the Clayton Act, in that: (1) Payments of allowances for newspaper advertising were not made available to all of respondent's customers because it is not reasonably possible for those who purchase smaller quantities of respondent's products to avail themselves of the higher rate which respondent pays and agrees to pay for newspaper advertising; and (2) that the amounts received by the respondent's customers are disproportionate to the cost of advertising furnished by them in that purchasers of large quantities of soap products receive sums which are grossly in excess of the cost of the advertising which they furnish whereas purchasers of lesser quantities receive much lesser amounts in relation to the cost of the advertising they furnish.

Respondent, in the course of its business in commerce, entered into contracts with, and made payments to, its customers for promotional services and facilities furnished by such customers. In the granting of such allowances the respondent used two forms of contract—(1) Cooperative Advertising Agreement, which was offered as a contract to be entered into on an annual basis, and (2) Display Feature Advertising Agreement, which was a contract physically incorporated as part of the order blank on each order written for customers who had not executed the annual contract.

In the Cooperative Advertising Agreement, often referred to as the annual contract, respondent agreed to pay to the customer an allowance per case ranging from 10¢ to 50¢ per case purchased, depending upon the product, on the condition that the customer render sales promotions and advertising service by conducting nine feature sales annually on each product, three of which to be scheduled during each of the four-month advertising periods. As a part of the feature sales the customer was required to place newspaper advertising which shall be run in such newspapers as dealer normally uses and that each sale be supported by a prominent store display of the product advertised and other usual promotional material used on major feature sales. The annual contract also provided for an option whereby the customer instead of advertising in newspapers could conduct the nine sales as required and use handbills in lieu of newspaper advertising. In this event the customer was paid 8¢ to 30¢ per case on all products purchased and advertised.

In the Display Feature Advertising Agreement, which was offered by salesmen to customers at the time the order was taken, the respondent agreed to pay to the customer an allowance of 6¢ per case purchased on the condition that the customer render sales promotional service, consisting of a prominent mass store display, together with a feature sale for one week.

The Cooperative Advertising Agreement, or annual contract, required that advertising space used in newspapers should be at least equivalent to that given to competitive products, and not less than one column inch. While one column inch consisting of 14 agate lines was specified in the contract, in practice this provision, identifying a minimum of one column inch to constitute a newspaper feature, was not observed and respondent has accepted advertising of less than one column inch as compliance with its contract. There is no required media to be used in newspaper advertising other than that used for regular consumer advertising. According to the testimony, any newspaper carrying consumer advertising distributed in the territory covered by the customer is acceptable. This includes, in addition to metropolitan newspapers, local, neighborhood, and foreign-language papers, and shopping news, either daily or weekly.

The existence and availability of said contracts and payments were made known by respondent to all of its customers and respondent offered said contracts and the opportunity to receive said payments to all of its customers. Respondent through its sales employees endeavored to persuade all customers to avail themselves of the contracts and payments and to furnish the services and facilities called for. All direct customers of respondent were offered the choice of

executing either the annual contract or the Display Feature Advertising Agreement and the decision in each case was a matter for the retailer's own judgment and decision based on the retailer's own merchandising policies and choice.

Many of respondent's customers, including small, single-store customers, belonging to cooperative or voluntary associations, including retailers who have affiliated themselves for the purpose of joint buying or joint warehousing, and where such associations wished to advertise for their members, it was the practice of respondent to enter into its annual contract with such associations and to pay to them the advertising allowance based upon the total purchases of the members of such associations. For this purpose, the respondent, in addition to its regular annual contract, has two forms of annual contracts: (1) Cooperative Advertising Agreement for Cooperative Jobbers available and offered to jobber groups and cooperatives, and (2) Cooperative Feature Advertising Agreement available and offered to any group of independent dealers who select a single agent to advertise for the benefit of all the group.

The advertiser allowances provided for in its annual contracts were paid to customers by respondent at the end of the four-month period, specified in the agreement, after verification of the advertising placed by the customer, either through report of check made by an independent audit bureau or submission of tear sheets, particularly of those publications not covered by the audit bureau. Allowances were paid only upon those products which were actually advertised. In the event the feature sales were not conducted in all the stores as, for example, in the case where the customer failed to provide newspaper advertising serving all of the areas of location of all the specified stores, payment to the customer was proportionately reduced. The same was true in the event the customer failed to conduct the minimum of nine feature sales annually. In that case payment was also proportionately reduced. Respondent required that handbill advertisements supporting feature sales must be printed and copies submitted to respondents. This was required as a practical method of insuring that the advertisement had been prepared and distributed in good faith.

The attorney in support of the complaint did not file proposed findings or briefs with the Hearing Examiner but instead argued the matter orally, which argument, together with that of the attorney for the respondent, has been incorporated in and made a part of the record. In the argument the attorney in support of the complaint stated the following issues which may now be considered as the issues in this proceeding:

(a) That it is not reasonably possible for customers who purchase smaller quantities of respondent's products to avail themselves of the higher rate which respondent pays, and agrees to pay, for newspaper advertising because respondent's contract provides that the advertising placed must be included in the advertiser's regular consumer advertising and, consequently, if a customer does not do newspaper advertising, the rates provided by the annual contract are unavailable to him under any conditions.

(b) That among the customers who receive advertising allowances under the annual contract there is a lack of proportionality because such allowances which are paid upon a per case basis have no relationship to the advertising required to be placed, because there is no cutoff point between the per case allowance and the number of advertisements to be placed with the result that allowances are paid for advertising not placed as distinguished from allowances for advertising which is placed.

As to the first contention, this case was not tried on the theory now advanced by the attorney supporting the complaint in his oral argument. The evidence in this record is not sufficient to support this contention. There is no evidence that the respondent required advertising of its products to be included in the customer's regular advertising and the contract does not so state. There is no evidence that an isolated advertisement placed by a customer would not be considered compliance with the contract or that the respondent has ever refused to grant an advertising allowance because the advertisement appeared as an isolated advertisement in a newspaper.

Aside from the counsel's contentions on availability, this question arises when the requirements for participation are such that only certain customers can in fact participate. There is no evidence in this record to support a finding that even the highest rate of payment offered by respondent for feature sales, including newspaper advertising, is not reasonably available to all of respondent's customers. The customer can avail himself of this rate either through use of the annual contract or as a member of an association, cooperative or affiliated group. The respondent places no restrictions on the newspaper which he may use except that it cover the area where his store or stores are located thus enabling the use of neighborhood papers or weekly or monthly papers at a greatly reduced rate.

In the absence of evidence that respondent has refused or withheld its annual contract from customers for not advertising all of its products or a substantial number thereof, it must be assumed that even a customer executing the annual contract could, if he so desired, participate by advertising only one or more products as his financial

condition or needs might dictate. No witness has appeared in this proceeding who testified that he wished to participate in the advertising allowance but could not do so because of the expense. Furthermore, any customer, who for any reason does not wish to advertise, can avail himself of promotional allowances at the rates provided by using handbills, radio or television or by conducting feature sales with display only.

As to the third contention that there is a lack of proportionality because allowances are paid on a per case basis with no relationship to the advertising required to be placed, the evidence in this record is such that no finding whatsoever could be made on this point. All the record shows is that various newspapers charge different rates; that customers use different newspapers; that varying amounts of advertising are used by different customers to comply with their contracts with respondent, and that lineage rates are different as between customers even though same newspaper might be used. Furthermore, the allowances paid are for feature sales of which advertising is a part. Consequently, there is no comparative basis in this record which might be used to determine the relationship between the allowances paid and the advertising required to be placed, and the deficiencies of this record are such as to be fatal to any finding on this point.

On the basis of the present record it appears that there has been a total failure to sustain the allegations of Count II of the amended and supplemental complaint charging that the method used by the respondent in granting allowances for advertising to its various customers is in violation of Section 2 (d) of the Clayton Act.

It is therefore ordered, That the amended and supplemental complaint in this proceeding be, and the same is hereby, dismissed.