Appearances

IN THE MATTER OF

NATIONAL PAPER TRADE ASSOCIATION OF THE UNITED STATES, INC., ET AL.

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

Docket 5592. Complaint, Oct. 5, 1948—Decision, Sept. 24, 1954

Order requiring a national and 22 regional and local trade associations, and nearly 100 wholesalers and distributors of fine and wrapping paper to cease their planned common course of action to restrict competition through concerted action, including the dissemination, as price books, of the national association's "Blue Book" for fine paper, and "Yellow Book" and "Brown Book" for wrapping paper, containing average mark-up percentages, tables, etc.; and including surveys, studies, cooperative group discussions, and other action directed to the establishment of uniform cash discounts and schedules of cutting charges in the respective trade areas; in the course of which conspiracy they concertedly—

(a) Established uniform and identical prices, terms, and discounts for both fine and wrapping paper in their respective trade areas;

(b) Classified paper products and agreed upon uniform and identical prices, terms, and discounts to be charged for each classification;

(c) Established uniform and identical additions to and deductions from prices within each classification, including differentials for individual items or classes of items, quantity, color, cutting, trimming, packaging, or delivering;

(d) Established uniform and identical mark-ups for use in arriving at the selling prices for their products in the respective trade areas;

(e) Established uniform charges in certain trade areas for cutting or trimming to a purchaser's specifications;

(f) Held meetings at which prices, terms and conditions of sale, and trade practices designed to eliminate competition among them were discussed and acted upon; and

(g) Disseminated among themselves, at frequent intervals, current and future quotations of prices, terms, and conditions of sale offered to the trade.

Before *Mr. Everett F. Haycraft*, hearing examiner.

Mr. Earl W. Kintner, *Mr. Floyd O. Collins* and *Mr. Peter J. Dias* for the Commission.

Javits, Levitan & Held, of New York City, for National Paper Trade Association of the United States, Inc., and various officers and members thereof, and along with—

Mr. George E. Landis, of Columbus, Ohio, for The Central States Paper Trade Ass'n, John L. Richey, Diem & Wing Paper Co., Cincinnati Cordage and Paper Co., Indiana Paper Co., The Middle States Wrapping Paper Ass'n, The Globe Paper Co., National Paper and Twine Co. and The Central Ohio Paper Co.;

Mr. Arthur M. Kracke, of Chicago, Ill., for Swigart Paper Co.;

Tenney, Sherman, Rogers & Guthrie, of Chicago, Ill., for Bradner Smith & Co.;

Reno & Wright, of Champaign, Ill., for Duckett Paper Co.;

Mr. David H. Rice, of Irvington, N. J., for Paper Trade Association of New Jersey, David H. Rice, Jersey Paper Co., Inc., J. Liberman & Co., Commercial Paper Bag Co., Inc. and H. G. Mooney Co.; and

Mr. Isadore G. Alk, of Washington, D. C., for Brauman Paper Co.;

Harmon, Colston, Goldsmith & Hoadly, of Cincinnati, Ohio, also represented Diem & Wing Paper Co.

Mr. Robert Engel, of Pittsburgh, Pa., for Interstate Cordage & Paper Co. and along with—

Kittelle & Lamb, of Washington, D. C., for Pittsburgh Paper Ass'n, Robert Engel and Morris Paper Co.; and

Taft, Stettinius & Hollister, of Cincinnati, Ohio, for The Chatfield & Woods Co. of Pennsylvania, who also represented—Chatfield Paper Corp., Union Paper and Twine Co. and Whitaker Paper Co.

Kirkland, Fleming, Green, Martin & Ellis, of Chicago, Ill., for Bermingham & Prosser Co.

Wells, Martin & Lane, of Omaha, Nebr., *Mr. James Perkins Parker*, of Washington, D. C., and *Mr. George E. Frazer*, of Chicago, Ill., for Carpenter Paper Co.

Barshay & Frankel, of New York City, for Metropolitan Bag & Paper Distributors Ass'n, Inc., Fred Free, Jr., A. E. MacAdam & Co., Inc. John H. Free, Inc., Shuttleworth Wollny Co., Inc., S. Posner Sons, Inc. and Yorkville Paper Co., Inc.

Wechsler & Solodar, of New York City, for Cosmopolitan Twine & Paper Ass'n, Inc., David Kasson, Harlem Paper Products Co., Imperial Bag & Paper Co., Inc. and Liberty Bag & Paper Co.

Ridgway, Ridgway & Slote, of New York City, for Paper Association of New York City, Irwin Slote, Bonded Paper Products Co., Graphic Paper Corporation, Capital Paper Co. and Royal Paper Corporation.

Lewis, Rice, Tucker, Allen & Chubb, of St. Louis, Mo., and *Cleary, Gottlieb, Friendly & Ball*, of Washington, D. C., for Graham Paper Co.

Statement of the Case

This is a proceeding under the Federal Trade Commission Act wherein the Commission on October 5, 1948, issued and subsequently served its complaint on the respondents named in the caption hereof, charging them and others listed in the complaint as members of respondent trade associations with having entered into and carried out

an unlawful agreement or conspiracy to hinder, lessen and restrain competition in prices and otherwise between and among themselves in the sale and distribution in interstate commerce of fine and wrapping paper. The complaint was subsequently amended to specify that the Carpenter Paper Company, named respondent herein, is a Delaware corporation with principal offices in Omaha, Nebraska. This amended complaint was served on that respondent.

On February 28, 1949, the Commission duly designated Everett F. Haycraft as trial examiner in this proceeding. After an initial hearing, held in New York City on May 2, 1949, negotiations were held looking to a settlement of the case. On December 5, 1949, at a hearing held in Pittsburgh, Pennsylvania, all of the respondents named in the caption hereof, with the exception of respondents Graham Paper Company, Pittsburgh Paper Association, Robert Engel, Chatfield & Woods Co. of Pennsylvania, Morris Paper Company, Anderson Paper & Twine Company, and Clarence E. Dobson filed substitute answers.

With the exception of those filed by respondents Metropolitan Bag & Paper Distributors Association, Inc., A. E. MacAdam & Company, Inc., John H. Free, Inc., Shuttleworth Wollny Co., Inc., S. Posner Sons, Inc., Yorkville Paper Company, Inc., Fred Free, Jr., and Irwin Slote, all of said substitute answers concede that, solely for the purpose of this proceeding, the enforcement or review thereof before a United States Court of Appeals or in the United States Supreme Court, or to enforce the order to be entered herein, inferences may be drawn from such answer and documentary evidence received in evidence, that the acts and practices thereby indicated may be deemed to reflect in effect an agreement or understanding, and that they do not and will not contend otherwise. Said respondents state further that, solely for the purposes aforesaid, they consent that documentary and other evidence to be offered by counsel in support of the complaint may be admitted without objection. Further, solely for the purposes aforesaid, said respondents also state that they will not offer explanation of or evidence to contradict the evidence which they consent to be made a part of the record, and agree that the acts and practices indicated or reflected by said evidence may have tended to, and, if continued in the future, may affect adversely competition in price between merchant respondents. Said substitute answers also waived hearing on the complaint and consented that the Commission may without trial, without the taking of testimony, and without other procedure, except for the trial examiner's report, enter its findings as to the facts including such inferences as may be drawn from the facts

admitted in the answer and as may be drawn from the facts otherwise shown by the record, and issue its order thereon.

The remaining substitute answers were the same in substance except that they did not concede that the acts and practices indicated may be deemed to reflect in effect an agreement or understanding or that they may have tended to and, if continued in the future, may affect adversely competition in price between merchant respondents. However, respondent Slote states in his substitute answer that he will not contend that the findings and order of the Commission are not supported by the record. The other respondents filing such substitute answers agreed that they would not introduce any evidence to rebut such inferences drawn from the evidence of record and will not offer explanation of such evidence.

Respondent Anderson Paper & Twine Company filed no answer to this complaint. Each of the other respondents named in the caption hereof who did not file a substitute answer as aforesaid, filed an answer denying that they had violated the Act as alleged.

Respondents Butler Paper Co., Inc., Fort Wayne, Indiana, J. W. Butler Paper Company, Chicago, Illinois, and Butler Paper Co., Minneapolis, Minnesota, not named in the caption hereof, filed substitute answers in the form first described above.

Hearings were held thereafter at Washington, D. C., and Pittsburgh, Pennsylvania, between December 5, 1949, and March 30, 1950, inclusive, at which documents were admitted by agreement of counsel, and also testimony and other evidence was presented with respect to the allegations of the complaint as to respondents which had not filed substitute answers.

On September 28, 1951, the trial examiner filed his recommended decision in which he concluded that all of the respondents, with the exception of respondents Robert Engel and Graham Paper Company have violated section 5 of the Federal Trade Commission Act as alleged.

Thereafter, this proceeding regularly came on for final hearing before the Commission on the complaint, as amended, the answers and substitute answers, evidence, recommended decision of the hearing examiner and the exceptions thereto, briefs in support of and in opposition to said complaint, and oral arguments of counsel; 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 this its findings as to the facts and its conclusion drawn therefrom.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent National Paper Trade Association of the United States, Inc. (sometimes hereinafter referred to as respondent National Association) is a membership corporation, consisting of twenty-three constituent regional associations, whose members, by virtue of said membership and the payment of dues to the National Association, all as provided for by the by-laws of the National Association, were at the time of the issuance of the complaint members of said National Association. Certain additional corporations, partnerships and individuals, who were not members of any constituent regional association, also held membership in said National Association or contributed financially to the support of its activities. Said National Association was organized under the laws of the State of New York and has its office at 220 East 42nd Street, New York, New York.

Respondent Arthur H. Chamberlain, an individual, was, at the time of the issuance of the complaint, and had been since 1931, the Executive Secretary of the National Association, and has been actively engaged in supervising the affairs of the National Association and its constituent regional associations.

Respondent W. G. Leathers, an individual, was, at the time of the issuance of the complaint, and had been since 1943, the Assistant Executive Secretary of respondent National Association, and has been actively engaged in supervising the affairs of the National Association and its constituent regional associations.

Respondent J. H. Londergan, an individual, was, at the time of the issuance of the complaint, and had been since 1934, the Director of the Statistical Research Division of respondent National Association, and has actively supervised and carried on statistical research for said National Association, as well as assisting generally in supervising the affairs of said National Association and its constituent regional associations.

PAR. 2.

(1) Respondent The Central States Paper Trade Association (sometimes hereinafter referred to as respondent Central States Association) is a voluntary unincorporated association, organized by and composed of individuals, partnerships and corporations engaged in the purchase, sale and distribution of fine paper at wholesale to wholesale and retail dealers in the States of Indiana, Kentucky, Michigan and Ohio and in neighboring States, with its office in the office of its Secretary, respondent John L. Richey, in the Hotel Sinton, Cincinnati, Ohio. Said respondent is a constituent member association of

respondent National Association. The following paper merchants, among others, are members of said respondent Central States Association and of respondent National Association:

Respondent Diem & Wing Paper Company, an Ohio corporation with its principal office at Gilbert Ave. Viaduct, Cincinnati.

Respondent Chatfield Paper Corporation, an Ohio corporation with its principal office at 3265 Colerain Ave., Cincinnati, Ohio.

Respondent Cincinnati Cordage and Paper Company, an Ohio corporation with its principal office at 889 Williams Ave., Columbus, Ohio.

Respondent Indiana Paper Company, an Indiana corporation with its principal office at 151 Neal St., Indianapolis, Indiana.

Respondent Butler Paper Co., Inc., an Indiana corporation with its principal office at 110 W. Columbia, Fort Wayne, Indiana.

Respondent John L. Richey, an individual, was, at the time of the issuance of the complaint, the Secretary of the respondents The Central States Paper Trade Association, The Chicago Paper Association, Illinois State Paper Merchants Association, The Middle States Wrapping Paper Association, and Wisconsin Paper Merchants Association, with his office located in the Hotel Sinton, Cincinnati, Ohio, and has been actively engaged in supervising the affairs and activities of said respondents.

(2) Respondent The Fine Paper Association of Chicago, Inc. (sometimes hereinafter referred to as respondent Fine Paper Association of Chicago), located at 801 South Wells Street, Chicago, Illinois, is a membership corporation organized and existing under and by virtue of the laws of the State of Illinois, organized by and composed of individuals, partnerships, and corporations engaged in the business of selling fine paper and paper products at wholesale to wholesale and retail dealers in the State of Illinois and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member association of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent Fine Paper Association of Chicago and of respondent National Association:

Respondent Chicago Paper Company, an Illinois corporation with its principal office at 801 S. Wells St., Chicago, Illinois.

Respondent Hobart Paper Company, an Illinois corporation with its principal office at 111 W. Washington St., Chicago, Illinois.

Respondent Swigart Paper Company, an Illinois corporation with its principal office at 723 S. Wells St., Chicago, Illinois.

Respondent Bradner Smith & Company, an Illinois corporation with its principal office at 333 Desplaines St., Chicago, Illinois.

Respondent J. W. Butler Paper Company, an Illinois corporation with its principal office at 223 West Monroe St., Chicago, Illinois.

Respondent G. Forrest Gillett, an individual, was, at the time of the issuance of the complaint, Secretary of respondent Fine Paper Association of Chicago, directing and administering its business and affairs.

(3) Respondent The Chicago Paper Association (sometimes hereinafter referred to as Chicago Association), with principal office located in the office of its Secretary, respondent John L. Richey, the Hotel Sinton, Cincinnati, Ohio, is a voluntary unincorporated association, organized by and composed of individuals, partnerships and corporations, engaged in the business of selling wrapping paper and paper products at wholesale to wholesale and retail dealers in the State of Illinois and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member association of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent Chicago Association and, with the exception of Commercial Paper & Bag Company, of respondent National Association:

Respondent Acme Twine & Paper Company, an Illinois corporation with its principal office at 329 No. Racine St., Chicago, Illinois.

Respondent Commercial Paper & Bag Company, an Illinois corporation with its principal office at 205 So. Water Mark., Chicago, Illinois.

Respondent Eagle Wrapping Products Company, an Illinois corporation with its principal office at 312 N. Carpenter St., Chicago, Illinois.

Respondent Joseph Weil & Sons, Inc., an Illinois corporation with its principal office at 1401 S. Clinton St., Chicago, Illinois.

(4) Respondent The District of Columbia Paper Merchants Association (sometimes hereinafter referred to as respondent District of Columbia Association), located at Tower Building, Washington, D. C., is a voluntary unincorporated association organized by and composed of individuals, partnerships, and corporations engaged in the business of selling fine and wrapping paper and paper products at wholesale to wholesale and retail dealers in the District of Columbia and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member association of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said

respondent District of Columbia Association and of respondent National Association:

Respondent Charles G. Stott and Company, Inc., a West Virginia corporation with its principal office at 1935 5th St., N. E., Washington, D. C.

Respondent Frank Parsons Paper Company, Inc., a Delaware corporation with its principal office at 1550 Okie St., N. E., Washington, D. C.

Respondent Stanford Paper Company, a Delaware corporation with its principal office at 3001 V St., N. E., Washington, D. C.

Respondent Jacob N. Freedman and Joseph Freedman, individually and as copartners doing business under the trade name of S. Freedman & Sons, with their principal office at 618 K St., N. W., Washington, D. C.

Respondent William N. Schaefer, an individual, was at the time of the issuance of the complaint, Secretary of respondent District of Columbia Association, directing and administering its business and affairs.

(5) Respondent Empire State Paper Association, Inc. (sometimes hereinafter referred to as respondent Empire Association), located at 123 West Park Avenue, Auburn, New York, is a membership corporation organized and existing under and by virtue of the laws of the State of New York, composed of individuals, partnerships and corporations, engaged in the business of selling fine and wrapping paper and paper products at wholesale to wholesale and retail dealers in the State of New York and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent Empire Association and of respondent National Association:

Respondent The Miller Paper Company, Inc., a New York corporation with its principal offices at 204 East Willow St., Syracuse, New York.

Respondent J. & F. B. Garrett Company, a New York corporation with its principal office at 239 West Fayette Street, Syracuse, New York.

Respondent W. H. Smith Paper Corporation, a New York corporation with its principal office at 121 Hudson Avenue, Albany, New York.

Respondent Geneva Paper Company, a New York corporation with its principal office at Middle Street, Box 422, Geneva, New York.

Respondent W. B. Dunning, an individual, with office at 123 Park Avenue, Auburn, New York, was, at the time of the issuance of the complaint, the Secretary and Treasurer of the respondent Empire Association, directing and administering its business and affairs.

(6) Respondent Illinois State Paper Merchants Association (sometimes hereinafter referred to as respondent Illinois Association), with principal office located in the office of its Secretary, respondent John L. Richey, in the Hotel Sinton, Cincinnati, Ohio, is a membership corporation organized and existing under and by virtue of the laws of the State of Illinois, composed of individuals, partnerships, and corporations engaged in the business of selling fine and wrapping paper and paper products at wholesale to wholesale and retail dealers in the States of Illinois and Iowa and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constitutent member association of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent Illinois Association and of respondent National Association:

Respondent Duckett Paper Company, an Illinois corporation with its principal office at 516 N. Hickory St., Champaign, Illinois.

Respondent Rockford Wholesale Paper Company, an Illinois corporation with its principal office at 611 Chestnut St., Rockford, Illinois.

Respondent Capital City Paper Company, an Illinois corporation with its principal office at 4th & Madison Sts., Springfield, Illinois.

Respondent The Intercity Box & Paper Company, an Illinois corporation with its principal office at 730 S. Hancock Ave., Freeport, Illinois.

(7) Respondent Iowa Paper Distributors Association (sometimes hereinafter referred to as respondent Iowa Association), located at 100 8th Street, Des Moines, Iowa, is a voluntary unincorporated association, organized by and composed of individuals, partnerships, and corporations, engaged in the business of selling fine and wrapping paper and paper products at wholesale to wholesale and retail dealers in the States of Iowa and Illinois and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member association of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent Iowa Association and of respondent National Association:

Respondent Clinton Paper Company, an Iowa corporation with its principal office at 132 Sixth Ave. So., Clinton, Iowa.

Respondent Pratt Paper Company, an Iowa corporation with its principal office at 100 8th St., Des Moines, Iowa.

Respondent The Peterson Paper Company, an Iowa corporation with its principal office at 301 E. 2nd St., Davenport, Iowa.

Respondent Bermingham & Prosser Company, a Michigan corporation with its principal office at 118 10th St., Des Moines, Iowa.

Respondent Herbert F. Stoffle, an individual, with office located at 100 Eighth Street, Des Moines, Iowa, was, at the time of the issuance of the complaint, Secretary of respondent Iowa Association, directing and administering its business and affairs.

(8) Respondent Maryland Paper Trade Association, Inc. (sometimes hereinafter referred to as respondent Maryland Association), located at 624 N. Calvert Street, Baltimore, Maryland, is a membership corporation organized and existing under and by virtue of the laws of the State of Maryland, composed of individuals, partnerships and corporations engaged in the business of selling fine and wrapping paper and paper products at wholesale to wholesale and retail dealers in the State of Maryland and in neighboring States and the District of Columbia. Said respondent, at the time of the issuance of the complaint, was a constituent member association of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent Maryland Association, Inc., and of respondent National Association:

Respondent Mudge Paper Company, a Maryland corporation with its principal office at 501 Water Street, Baltimore, Maryland.

Respondent Bradley-Reese Company, a Maryland corporation with its principal office at 415 Gilford Ave., Baltimore, Maryland.

Respondent Robins Paper Company, Inc., a Maryland corporation with its principal office at 310 W. Pratt St., Baltimore, Maryland.

Respondent The Barton, Duer & Koch Paper Company, a Maryland corporation with its principal office at 415 E. Lombard St., Baltimore, Maryland.

Respondent Charles B. Leonard, an individual, with address at 624 N. Calvert Street, Baltimore, Maryland, was, at the time of the issuance of the complaint, Secretary of respondent Maryland Association, directing and administering its business and affairs.

(9) Respondent The Middle States Wrapping Paper Association (sometimes hereinafter referred to as respondent Middle States Association), located in the office of its Secretary, respondent John L. Richey, in the Hotel Sinton, Cincinnati, Ohio, is a voluntary and unincorporated association, organized by and composed of individuals,

partnerships, and corporations engaged in the business of selling wrapping paper and paper products at wholesale to wholesale and retail dealers in the States of Indiana, Kentucky, Ohio, Michigan and West Virginia, and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member association of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent The Middle States Association and of respondent National Association:

Respondent Union Paper and Twine Company, an Ohio corporation with its principal office at 1614, E. 40th St., Cleveland, Ohio.

Respondent The Central Ohio Paper Company, an Ohio corporation with its principal office at 226 North Fifth Street, Columbus, Ohio.

Respondent The Globe Paper Company, an Ohio corporation with its principal office at 1506 Superior Avenue, Cleveland, Ohio.

Respondent National Paper and Twine Company, an Ohio corporation with its principal office at 1240 E. 55th St., Cleveland, Ohio.

(10) Respondent Midwest Paper Merchants Group (sometimes hereinafter referred to as respondent Midwest Group), located at 1210 Waltower Building, Ninth and Walnut Streets, Kansas City, Missouri, is a voluntary unincorporated association, organized by and composed of individuals, partnerships and corporations engaged in the business of selling fine and wrapping paper and paper products at wholesale to wholesale and retail dealers in the State of Missouri and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member association of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent Midwest Group and of respondent National Association:

Respondent Wertgame Paper Company, a Missouri corporation with its principal office at 2015 Grand St., Kansas City, Missouri.

Respondent The Butler Paper Company, an Illinois corporation with its principal office at 608 Wyandotte Street, Kansas City, Missouri.

Respondent Kansas Paper Company, Inc., a Kansas corporation with its principal office at 1401 Fairfax Trafficway, Kansas City, Kansas.

Respondent Weber Paper Company, a Missouri corporation with its principal office at 1312 West Eighth Street, Kansas City, Missouri.

Respondent Carll V. Kretsinger, an individual, with address at 1210

Waltower Building, 9th and Walnut Streets, Kansas City, Missouri, was, at the time of the issuance of the complaint, Executive Secretary of respondent Midwest Group, directing and administering its business and affairs.

(11) Respondent New England Paper Merchants Association, Inc. (sometimes hereinafter referred to as New England Association), located at 10 High Street, Boston, Massachusetts, is a membership corporation organized and existing under and by virtue of the laws of the State of Massachusetts, composed of individuals, partnerships and corporations engaged in the business of selling fine and wrapping paper and paper products at wholesale to wholesale and retail dealers in the States of Connecticut, Massachusetts, Maine, Rhode Island, and Vermont and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member association of the National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent New England Association and of respondent National Association:

Respondent Cook-Vivian Company, Inc., a Massachusetts corporation with its principal office at 354 Congress St., Boston, Massachusetts.

Respondent The Century Paper Company, Inc., a Massachusetts corporation with its principal office at 295 Congress Street, Boston, Massachusetts.

Respondent Tileston & Hollingsworth Co., a Massachusetts corporation with its principal office at 213 Congress Street, Boston, Massachusetts.

Respondent John Carter & Company, Inc., a Massachusetts corporation with its principal office at 595 Atlantic Avenue, Boston, Massachusetts.

Respondent Norman E. Scott, with address at 10 High Street, Boston, Massachusetts, was, at the time of the issuance of the complaint, Executive Secretary of respondent New England Association, directing and administering its business and affairs.

(12) Respondent Northwestern Paper Trade Association (sometimes hereinafter referred to as Northwestern Association), located at 529 S. Seventh Street, Minneapolis, Minnesota, is a voluntary unincorporated association, organized by and composed of individuals, partnerships and corporations engaged in the business of selling fine and wrapping paper and paper products at wholesale to wholesale and retail dealers in the States of Minnesota, Montana, North Dakota, and South Dakota, and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member

association of the National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent Northwestern Association, and of respondent National Association:

Respondent John Leslie Paper Company, a Minnesota corporation with its principal office at 500 South Third Street, Minneapolis, Minnesota.

Respondent Paper Supply Company, Inc., a Minnesota corporation with its principal office at 240 Portland Avenue, Minneapolis, Minnesota.

Respondent Anchor Paper Company, a Minnesota corporation with its principal office at 480 Broadway, St. Paul, Minnesota.

Respondent Newhouse Paper Company, a Minnesota corporation with its principal office at 1312 South 5th Street, Minneapolis, Minnesota.

Respondent Butler Paper Company, a Minnesota corporation with its principal office at 700 South 4th Street, Minneapolis, Minnesota.

Respondent Wendell O. Hawkins, an individual, with address at 529 S. Seventh Street, Minneapolis, Minnesota, was, at the time of the issuance of the complaint, Secretary of respondent Northwestern Association, directing and administering its business and affairs.

(13) Respondent Paper Trade Association of New Jersey (sometimes hereinafter referred to as New Jersey Association), located at 1000 Spring Ave., Irvington, New Jersey, is a membership corporation organized and existing under and by virtue of the laws of the State of New Jersey, composed of individuals, partnerships, and corporations, engaged in the business of selling wrapping paper and paper products at wholesale to wholesale and retail dealers in the State of New Jersey and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member association of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent New Jersey Association and of respondent National Association:

Respondent Jersey Paper Company, Inc., a New Jersey corporation with its principal office at 187 French Street, New Brunswick, New Jersey.

Respondent David Liberman and Isidore Liberman, individually and as copartners doing business under the trade name of J. Liberman & Co., with their principal office at 577 Communipaw Avenue, Jersey City, New Jersey.

Respondent Commercial Paper Bag Company, Inc., a New Jersey corporation with its principal office at 108 Mulberry Street, Newark, New Jersey.

Respondent H. G. Mooney Company, a New Jersey corporation with its principal office at 301 Frelinghuysen Avenue, Newark, New Jersey.

Respondent David H. Rice, an individual, with address at 1000 Springfield Ave., Irvington, New Jersey, was, at the time of the issuance of the complaint, Executive Secretary of respondent New Jersey Association, directing and administering its business and affairs.

(14) Respondent Paper Trade Association of Philadelphia (sometimes hereinafter referred to as Philadelphia Association), located at Drexel Building, Philadelphia, Pennsylvania, is a membership corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, composed of individuals, partnerships, and corporations engaged in the business of selling fine and wrapping paper and paper products at wholesale to wholesale and retail dealers in the States of Pennsylvania and New Jersey and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member association of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent Philadelphia Association and of respondent National Association:

Respondent Acorn Paper & Twine Company, a Pennsylvania corporation with its principal office at 118 South Front Street, Philadelphia, Pennsylvania.

Respondent Eagle Paper Co., a Pennsylvania corporation with its principal office at 116 North 6th Street, Philadelphia, Pennsylvania.

Respondent Mather Paper Company, a Pennsylvania corporation with its principal office at 611 South Front Street, Philadelphia, Pennsylvania.

Respondent Quaker City Paper Co., a Pennsylvania corporation with its principal office at 305 Vine Street, Philadelphia, Pennsylvania.

Respondent David S. Stockslager, an individual, with address at Drexel Building, Philadelphia, Pennsylvania, was, at the time of the issuance of the complaint, Executive Secretary of respondent Philadelphia Association, directing and administering its business and affairs.

(15) Respondent Pittsburgh Paper Association (sometimes hereinafter referred to as Pittsburgh Association), located at 504 Union Trust Building, Pittsburgh, Pennsylvania, is a voluntary unincorpo-

rated association, organized by and composed of individuals, partnerships and corporations engaged in the business of selling fine and wrapping paper and paper products at wholesale to wholesale and retail dealers in the States of Pennsylvania and West Virginia and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member association of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent Pittsburgh Association and of respondent National Association:

Respondent Chatfield & Woods Co. of Pennsylvania, a Pennsylvania corporation with its principal office at 1717 Merriman Street, Pittsburgh, Pennsylvania.

Respondent Interstate Cordage & Paper Co., a Pennsylvania corporation with its principal office at 1901 Breble Avenue, Pittsburgh, Pennsylvania.

Respondent Morris Paper Company, a Pennsylvania corporation with its principal office at Arsenal Terminal, Pittsburgh, Pennsylvania.

Respondent Anderson Paper & Twine Co., a Pennsylvania corporation with its principal office at Johnstown, Pennsylvania.

Respondent Robert Engel, an individual, with address at 504 Union Trust Building, Pittsburgh, Pennsylvania, was, at the time of the issuance of the complaint, Executive Secretary of said respondent Pittsburgh Association, directing and administering its business and affairs.

(16) Respondent Southern Paper Trade Association (sometimes hereinafter referred to as Southern Association), located at Room 819 Carondelet Building, 226 Carondelet Street, New Orleans, Louisiana, is a membership corporation organized and existing under and by virtue of the laws of the State of Louisiana, composed of individuals, partnerships and corporations engaged in the business of selling fine and wrapping paper at wholesale to wholesale and retail dealers in the States of Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi and Tennessee, and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member association of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent Southern Association and of respondent National Association.

Respondent The D & W Paper Company, Inc., a Louisiana corpora-

tion with its principal office at 523 Magazine Street, New Orleans, Louisiana.

Respondent Columbia Paper Co., Inc., a Louisiana corporation with its principal office at 525 South Peters Street, New Orleans, Louisiana.

Respondent Alco Paper Co., a Louisiana corporation with its principal office at 441 Poydras Street, New Orleans, Louisiana.

Respondent E. C. Palmer & Co., Ltd., a New York corporation with its principal office at 523 Lafayette Street, New Orleans, Louisiana.

Respondent Clarence E. Dobson, an individual, Room 819, Carondelet Building, 226 Carondelet Street, New Orleans, La., was, until September 25, 1948, Secretary of respondent Southern Association. On that date, Sara Meredith, an individual, c/o Jackson Paper, P. O. Box 3501, W. Jackson, Mississippi, assumed the duties of that position and was acting in that capacity on the date of the issuance of the complaint. The said Sara Meredith has filed a substitute answer as a respondent herein in her capacity of Secretary of said Association, and has consented to the issuance of an order herein without further proceeding. She, therefore, is included in the term respondent as used hereinafter in her capacity as Secretary of said Association.

(17) Respondent Southeastern Paper Trade Association, Inc. (sometimes hereinafter referred to as Southeastern Association), located c/o Spaugh Paper Co., Hickory, North Carolina, is a membership corporation, organized and existing under and by virtue of the laws of the State of Virginia, composed of individuals, partnerships and corporations engaged in the business of selling fine and wrapping paper at wholesale to wholesale and retail dealers in the States of North Carolina, South Carolina, and Virginia and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member association of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent Southeastern Association and of respondent National Association.

Respondent Spaugh Paper Co. of Hickory, Inc., a North Carolina corporation with its principal office at Hickory, North Carolina.

Respondent Dillard Paper Company, a North Carolina corporation with its principal office at 524 South Ashe Street, Greensboro, North Carolina.

Respondent B. W. Wilson Paper Co., Inc., a Virginia corporation with its principal office at 20–24 Governor Street, Richmond, Virginia.

Respondent Richmond Paper Company, Inc., a Virginia corporation with its principal office at 201 Governor Street, Richmond, Virginia.

Respondent Harry M. Snyder, an individual, with address at Hickory, North Carolina, was, at the time of the issuance of the complaint, Secretary of respondent Southeastern Association, directing and administering its business and affairs.

(18) Respondent Southwestern Paper Merchants Association (sometimes hereinafter referred to as respondent Southwestern Association), located at 315–16 Mayo Building, 420 S. Main Street, Tulsa, Oklahoma, is a voluntary unincorporated association, organized by and composed of individuals, partnerships and corporations engaged in the business of selling fine and wrapping paper and paper products at wholesale to wholesale and retail dealers in the States of Oklahoma and Texas and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member association of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent Southwestern Association and of respondent National Association:

Respondent Olmsted-Kirk Co., a Texas corporation with its principal office at 1033 Young Street, Dallas, Texas.

Respondent Magnolia Paper Co., a Texas corporation with its principal office at Hogan Street at Crockett (P. O. Box 1406), Houston, Texas.

Respondent Southwestern Paper Co., a Texas corporation with its principal office at 2224 Shearn Street, Houston, Texas.

Respondent Carpenter Paper Co., a Delaware corporation with its principal office at 9th and Harney Streets, Omaha, Nebraska. Said respondent and The Carpenter Paper Company, Grand Rapids, Michigan, are different companies.

Respondent Lewis C. Johnson, an individual, with address at 315–16 Mayo Building, 420 S. Main Street, Tulsa, Oklahoma, was, at the time of the issuance of the complaint, the Executive Secretary of respondent Southwestern Association, directing and administering its business and affairs.

(19) Respondent Wisconsin Paper Merchants Association (sometimes hereinafter referred to as respondent Wisconsin Association), with principal office located in the office of its Secretary, respondent John L. Richey, in the Hotel Sinton, Cincinnati, Ohio, is a voluntary unincorporated association, organized by and composed of individuals, partnerships and corporations engaged in the business of selling wrapping paper and paper products at wholesale to wholesale and retail dealers in the States of Illinois and Wisconsin and in neighboring States. Said respondent, at the time of the issuance of the

complaint, was a constituent member association of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent Wisconsin Association and of respondent National Association:

Respondent Brauman Paper Company, a Wisconsin corporation with its principal office at 116 North Pearl Street, Green Bay, Wisconsin.

Respondent Universal Paper Company, a Wisconsin corporation with its principal office at 1800 West Rogers Avenue, Appleton, Wisconsin.

Respondent Sawyer Paper Company, a Wisconsin corporation with its principal office at 344 Smith Street, Neenah, Wisconsin.

Respondent Standard Paper Company, an Illinois Corporation, with its principal office at 316 North Milwaukee Avenue, Milwaukee, Wisconsin.

(20) Respondent Fine Paper Association of Wisconsin, Inc., located at 21 N. Broadway, Milwaukee, Wisconsin, is a membership corporation organized and existing under and by virtue of the laws of the State of Wisconsin, composed of individuals, partnerships and corporations engaged in the business of selling fine paper and paper products at wholesale to wholesale and retail dealers in the State of Wisconsin and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member association of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent Fine Paper Association of Wisconsin, Inc., and of respondent National Association:

Respondent Nackie Paper Company, a Wisconsin corporation with its principal office at 405 South 6th Street, Milwaukee, Wisconsin.

Respondent Oshkosh Paper Company, a Wisconsin corporation with its principal office at 58 Algoma Boulevard, Oshkosh, Wisconsin.

Respondent Moser Paper Company, a Wisconsin corporation with its principal office at 1206 West Bruce Street, Milwaukee, Wisconsin.

Respondent The Bouer Paper Company, a Wisconsin corporation with its principal office at 305 South 3rd Street, Milwaukee, Wisconsin.

Respondent Curtis W. Boyce, an individual, with address at 121 N. Broadway, Milwaukee, Wisconsin, was, at the time of the issuance of the complaint, Secretary of respondent Fine Paper Association of Wisconsin, directing and administering its business and affairs.

(21) Respondent Metropolitan Bag & Paper Distributors Association, Inc. (sometimes hereinafter referred to as respondent Metropolitan Association), located at 521 Fifth Avenue, New York, New York, is a membership corporation organized and existing under and by virtue of the laws of the State of New York, composed of individuals, partnership and corporations engaged in the business of selling wrapping paper and paper products at wholesale to wholesale and retail dealers in the State of New York and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member association of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent Metropolitan Association and of respondent National Association:

Respondent Yorkville Paper Company, Inc., a New York corporation with its principal office at 431 East 77th Street, New York, New York.

Respondent A. E. MacAdam & Co., Inc., a New York corporation with its principal office at 95 Lexington Avenue, Brooklyn, New York.

Respondent John H. Free, Inc., a New York corporation with its principal office at 330 Himrod Street, Brooklyn, New York.

Respondent Shuttleworth Wollny Co., Inc., a New York corporation with its principal office at 1051 Wyckoff Avenue, Brooklyn, New York.

Respondent S. Posner Sons, Inc., a New York corporation with its principal office at 23 Borden Avenue, Brooklyn, New York.

Respondent Fred Free, Jr., an individual, with address at 330 Himrod Street, Brooklyn, New York, was, at the time of the issuance of the complaint, Secretary of respondent Metropolitan Association, directing and administering its business and affairs.

(22) Respondent Cosmopolitan Twine & Paper Association, Inc. (sometimes hereinafter referred to as respondent Cosmopolitan Association), erroneously named in the complaint as Cosmopolitan Twine & Paper Association, located % Biltmore Paper Co., Morris Avenue & 161st Street, New York, N. Y., is a membership corporation organized and existing under and by virtue of the laws of the State of New York, composed of individuals, partnerships and corporations engaged in the business of selling wrapping paper and paper products at wholesale to wholesale and retail dealers in the State of New York and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member association of respondent National Association. The following pa-

per merchants, among others, at the time of the issuance of the complaint, were members of said respondent Cosmopolitan Association and of respondent National Association:

Respondent Harlem Paper Products Corporation, a New York corporation with its principal office at 1260 Oak Point Avenue, Bronx, New York.

Respondent Imperial Bag & Paper Co., Inc., a New York corporation with its principal office at 620 Tiffany Street, Bronx, New York.

Respondent Daniel W. Margolin, doing business as Liberty Bag & Paper Co., (erroneously named in the complaint as Liberty Bag & Paper Company, a corporation) with its principal office at 20 Siegel Street, Brooklyn, New York.

Respondent David Kasson, an individual, with address at 260 E. 161st Street, New York, New York, was, at the time of the issuance of the complaint, President of respondent Cosmopolitan Association, directing and administering its business and affairs.

(23) Respondent Paper Association of New York City (sometimes hereinafter referred to as New York City Association), located at 41 Park Row, New York, New York, is a membership corporation organized and existing under and by virtue of the laws of the State of New York, composed of individuals, partnerships and corporations engaged in the business of selling fine and wrapping paper and paper products at wholesale to wholesale and retail dealers in the State of New York and in neighboring States. Said respondent, at the time of the issuance of the complaint, was a constituent member association of respondent National Association. The following paper merchants, among others, at the time of the issuance of the complaint, were members of said respondent New York City Association and of respondent National Association:

Respondent Bonded Paper Products Co., a New York corporation with its principal office at 44–35 Purvis Street, Long Island City, New York.

Respondent Graphic Paper Corp., a New York corporation with its principal office at 174 Hudson Street, New York, New York.

Respondent Capital Paper Co., a New York corporation with its principal office at 106 7th Avenue, New York, New York.

Respondent Royal Paper Corp., a New York corporation with its principal office at 210 11th Avenue, New York, New York.

Respondent Irwin Slote, an individual, with address at 41 Park Row, New York, New York, was, at the time of the issuance of the complaint, Secretary of respondent New York City Association, directing and administering its business and affairs.

(24) Respondent Whitaker Paper Company, a corporation organized under the laws of the State of Ohio, with its principal office and place of business at 6th & Lock Streets, Cincinnati, Ohio, is a member of respondents Central States Association and Pittsburgh Association, but is not a member of respondent National Association. Said respondent has supported the policies and activities of respondent National Association, has been active in the affairs of the aforesaid National Association, and has cooperated, aided and abetted in the activities in which the respondents are found to have been engaged.

(25) Respondent Graham Paper Company is a corporation organized under the laws of the State of Missouri, with its principal office and place of business at 1014 to 1030 Spruce Street, St. Louis, Missouri.

PAR. 3.

(a) The term "fine paper," as used throughout these findings, means such papers as are usually sold to printers, lithographers and stationers, and includes such types of paper as sulphite and rag bond, mimeograph and duplicator papers, book paper, cover paper and stationery.

(b) The term "wrapping paper," sometimes referred to as "coarse paper," as used herein, means paper used in wrapping articles and includes various other products such as Kraft paper, paper bags, gummed tape, toilet tissue, paper board, corrugated paper, and drinking cups.

PAR. 4.

(a) All of the parties respondent named and referred to hereinbefore, except respondent National Association, its constituent regional associations, and respondent officers of said associations, have for varying periods since 1933 been engaged in the purchase, sale and distribution of either fine or wrapping paper, or both of such products.

(b) A substantial portion of the fine and wrapping paper purchased, sold and distributed by respondent merchants herein is sold and distributed in interstate commerce, and most of said respondents are engaged in interstate commerce.

The Commission is of the opinion that the allegations of the complaint have not been sustained as to respondents Graham Paper Company, Pittsburgh Paper Association, Robert Engel, individually and as Executive Secretary of said Association, Morris Paper Company, Anderson Paper & Twine Company and Clarence E. Dobson, individually, for the reasons stated hereinafter. Therefore, they

are not included in the term "respondents" as used hereinafter unless it is specifically so stated.

The Commission is of the further opinion that, with the exception of those which filed substitute answers, no order should issue as to the respondents named in the complaint only by reference to the membership lists of the respondent associations appended to the complaint. This decision is based solely on the ground that an order as to these respondents is not required in the public interest and does not pass in any way on the power or jurisdiction of the Commission to bring representative class suits. Therefore, the term "respondents" as used hereinafter will not include this class of respondents unless it is specifically so stated.

PAR. 5. To the extent that competition has not been restrained, lessened or destroyed as a result of the unlawful planned common course of action hereinafter found to exist among and between said respondents, respondent merchants in the various trade areas are in competition with each other therein in the purchase, sale and distribution of their respective products among and between the several states of the United States and in the District of Columbia, and are engaged in competition with others in said trade areas engaged in selling fine and wrapping paper.

PAR. 6. The paper merchant members of respondent local and regional associations purchase and distribute a substantial part of the fine and wrapping paper distributed in the United States through jobber, wholesaler and dealer channels.

PAR. 7. The respondent National Association since the year 1934, through its Statistical Research Division, has conducted annual cost and selling price surveys among its fine paper merchant members in all sections of the country, and from time to time has published for the use of merchant members what is known as the "Paper Merchants Blue Book," containing average markup percentages indicated by such surveys to be in use by reporting merchants, and the trade practices generally applied by such merchants from whom such results were obtained. Ready reference charts have been included in the Blue Book showing the percentages in the schedule translated into dollars and cents on the basis of varying cost of merchandise within normal range. As changes made by fine paper merchants have been reported from the field, revisions and modifications of the schedules and ready reference charts or tables have been made in an effort to keep the information as current as possible. In addition, analyses of operations have been made from time to time during each year and, based upon such analyses, such changes have been

made in the schedules as appeared warranted to keep the figures current. The Blue Book thus has contained a yearly survey of fine paper merchants' operations and has served as a reflection of operations of the merchants applying the principles outlined under the various schedules in the Blue Book. When originally offered to the membership, it was held out by the Survey Committee of respondent National Association's Fine Paper Division as being a suggested outline of principles covering all classifications of fine paper in various units of sale.

Data for a survey completed on June 2, 1947, was furnished by 143 fine paper merchants located in 32 different States and covered in classification A–1 papers 1293 brands of paper. The white sheets contained in respondent National Association's Blue Book showed the average percentages of markup or, in instances, a designated amount per pound to be added to the manufacturer's price to the merchant for each of several quantity brackets. The yellow sheets comprising a "Ready Reference Table" translate manufacturers' prices to the merchant for a designated quantity into a price for each of various quantity groups ranging, on some pages, from less than package up to 36,000 pounds and over. The price computations on the yellow sheets reflecting the markup percentages appearing on the white sheets are rounded to the nearest 5 cents in the case of some quantities and the nearest 25 cents as to others. Also set out are additions or deductions to be applied to the listed price of the item in the quantity desired, for special finishes, colors, trimming and packaging.

PAR. 8. Respondent National Association has sold its Blue Book for the price of $10 to its members and members of the respondent local associations. Although the record does not contain evidence as to the exact number sold in recent years, respondent National Association's published proceedings for the year of 1934 reveal that, by September of that year, 1200 copies were in the hands of members of the trade and that the publication was being used by merchants all over the country. Purchase of one of the copies has entitled the merchant upon payment of a nominal amount annually to the supplemental sheets issued by respondent National Association in keeping the book current. Early in that year, respondent National Association estimated that receipts from Blue Book subscribers for the year 1948 would amount to $5,200. As previously stated, the edition last published prior to the institution of this proceeding contained a report of cost and selling prices for certain paper products based on data furnished by 143 fine paper merchants located in 32 different States.

The Blue Book has been considered by the respondent fine paper merchants to be a price book and has been used by them in determining the prices at which they sold their products. The ready reference tables in the Blue Book provide an easy method for calculating selling prices based on the average markup for the product. These tables set out the dollars and cents price at which the product will be sold if that average markup is used. The price is calculated for every possible quantity in which the product may be sold. And it allows for any likely change in the manufacturer's price. To accomplish this it applies the average markup to the manufacturer's price for each quantity price bracket. Many different calculations are made to allow for the possible changes in the manufacturer's prices for the product, usually at intervals of every five cents and covering a wide range of prices. On some products calculations are made for every likely variation of manufacturer's prices at one-half cent intervals. These tables are so designed that if the fine paper members of respondent National Association followed and observed the prices contained in the ready reference tables on commodities purchased from manufacturers at the same price, the resale price on any given item would automatically be the same.

PAR. 9. That members of respondent National Association have recognized and used the Blue Book as a price book in the sale of fine paper is clearly established by the record. Typifying its recognition in that respect by the respondent merchants have been letters to respondent National Association requesting in one instance "a copy of the Bluebook for pricing the Fine Line," and request in another for "one Blue Book with the suggested resales for all commodities of paper." Not only were copies of the Blue Book used as price books by members of respondent National Association and the respondent regional associations but such use in the sale of fine paper was with the knowledge that the prices of the Blue Book's schedules were being used simultaneously by other paper merchant competitors in formulating their prices. Among the exhibits contained in the record corroborating these conclusions is a letter dated March 25, 1947, from the vice president of Tayloe Paper Company of Oklahoma to respondent National Association explaining why that concern deemed it unnecessary for it to make detailed report in response to one of respondent National Association's questionnaires directed to Blue Book subscribers, it being stated in such connection:

By that I mean all of our prices are arrived at by following minutely and exactly the Blue Book resale schedules for the various

quantities. That is the practice for this entire territory insofar as I am aware.

Membership reliance on, and the paramount importance to them of, the Blue Book with respect to pricing practices, is evidenced additionally in the record by numerous requests from the members for pricing interpretations as to types of products not specifically treated in the book and by letters to respondent National Association expressing members' concern over errors in the publication, alleged and real, and noted in passing, also, is the circumstance that some members ordered numerous copies for their use. Widespread use of and reliance on the Blue Book as a reflection of current and future prices is apparent also from the following letter directed by the vice president of respondent Carpenter Paper Company, Oklahoma City, to respondent National Association under date of November 15, 1941:

The Leader Card Works are suggesting a 75% markup in place of the old 60% markup on cut cards and wedding announcements.

We feel that any change in the Blue Book Markup should come from the Association and not from a manufacturer, and we wish you would check into this and if the majority of the members feel that the 75% markup is in line, we then feel the Blue Book Sheet should be corrected.

Another letter indicating that respondent members recognized that there was widespread adherence to the Blue Book's prices and that such prices were essentially resale prices and likewise in reference to the markups on commercial and wedding announcements was directed to respondent Chamberlain under date of November 13, 1941, by an official of respondent Bouer Paper Company, Milwaukee, in which it was stated:

I believe the suggested mark-up in the Blue Book might be changed from 60% to 75% so that we would have a better chance on breaking on these smaller sales. With this it might be advisable to apply a larger discount in quantity than that which we had at the present time. We certainly should have a better mark-up on the smaller units.

I wish you would give this some consideration and see what might be done in this respect.

According to another of the exhibits received into the record which pertains to the activities of one of the respondent regional associations, the Blue Book schedules were maintained by its respondent members in the territory of that constituent association on the major portion of the fine paper business.

PAR. 10. During the period of the Emergency Price Control Act of 1942, as amended, Maximum Price Regulation No. 349 providing for distributors' maximum price for certain coarse paper products was promulgated by the Office of Price Administration and a booklet was prepared and distributed by respondent National Association in 1943 and again in 1945 interpreting such regulation and a subsequent amendment thereto. This publication described as "Maximum Price Regulation No. 349 & Ready Reference Tables" was popularly known as the "Yellow Book." This Book contained maximum distributor' prices for wrapping paper and other coarse paper products. At the time the price controls ended on November 9, 1946, the Yellow Book was in use and being observed by the members of respondent Association who were engaged in the sale of wrapping paper and other coarse paper products. Respondent National Association continued to distribute the Yellow Book to its members upon request and to new members when they joined throughout the year 1947 and part of the year 1948 for their use.

PAR. 11. During the year 1947 the Statistical Research Division of respondent National Association conducted a survey among the members of respondent Association engaged in the distribution of wrapping paper and other coarse papers similar to the surveys conducted in the preparation of the Blue Book, and the members of respondent local and regional associations cooperated in the survey by furnishing information with respect to cost and selling prices to determine the average national margin at which these products were sold. This survey was a matter of discussion at the Wrapping Paper Division meetings of respondent National Association, and a comparison was made between the amounts allowed by the Office of Price Administration during the time when Maximum Price Regulation No. 349 (Yellow Book) was effective and what would be required on the basis of 1946 operating costs. Special bulletins were issued by respondent National Association to the members of the Wrapping Paper Division of that Association, entitled "Statistical Service for Wrapping Paper Merchants," which announced the introduction by respondent National Association of a new service in the coarse paper field to inform subscribers concerning average national markups and other average conditions of sale with regard to the most important items in the coarse paper field.

That there was interest in this announcement on the part of the membership of respondent National Association and the regional associations is indicated by a bulletin disseminated to its membership by respondent Paper Association of New York City under date of

December 1, 1947, which characterized such announcement as "An Important Move" and stated, among other things:

* * * How many times have we all heard among our members the cry—"Oh, if we only had a Blue Book for the coarse paper field, the same as the fine paper merchants have!" Well, here it is—and the first questionnaire covering various grades of Kraft and other wrapping papers is now in your hands. Remember that what you do with this questionnaire will determine to a large extent whether the project really gets under way. Remember too, that every benefit usually carries with it an obligation. It's your obligation now to fill out this questionnaire—it is quite simple and to the point—return it promptly to the N. P. T. A. Office and help to inaugurate a service that you have been saying is a long felt need for the Wrapping Paper Division of our Association. * * *

PAR. 12. In the spring of 1948, respondent National Association issued its "Compilation of Average Percentage Mark-ups of Wrapping Paper Merchants," referred to herein as the "Brown Book." The Brown Book contained the results of a survey conducted by the Statistical Research Division of respondent National Association and reported the average national markup applied by wrapping paper merchants when selling certain wrapping paper products, including Kraft, Kraft Butchers, Butchers, Machine Glazed, and other papers, based upon replies received from 111 merchants located in 27 different States. Percentage amounts of cost were rounded to the nearest 1% in all quantities less than a car-load, and the percentage amount on car-load quantities had been rounded to the nearest one-half of 1%. The Brown Book also contained supplementary tables predicated on the average national percentages of markups and on the most common practices relating to the handling of such variations. These tables are generally similar to those found in the Blue Book and set forth in the first columns varying costs of merchandise per hundred weight followed in succeeding columns by the prices at which the paper should be sold to reflect the markup described on the preceding white page. Although this Book covered a limited number of commodities, it was contemplated that additional commodities would be added from time to time.

PAR. 13. Officials of respondent National Association attended local and regional association meetings and discussed the work of respondent National Association with respect to the preparation and use of the Blue Book, the Yellow Book and the Brown Book, and urged the membership to make replies to respondent National Asso-

ciation's questionnaires on fine and coarse paper costs prepared by committees of respondent National Association. Instructions were also given by the officials of respondent National Association to newly designated executive-secretaries of local and regional associations with respect to the functions of the Statistical Research Division, and, in particular, the survey reports for fine and wrapping paper operations; and copies of respondent's Blue Books, Yellow Books and Brown Books were furnished such newly elected secretaries and were the subject of discussion thereafter at local and regional meetings of respondent member merchants.

PAR. 14. A substantial number of respondent paper merchants, the exact number of which is not known, made use of the Blue Books, Yellow Books and Brown Books, furnishing copies thereof to their sales forces for their use, and said members issued price lists from time to time containing prices, terms and trade practices based upon the Blue Book, Yellow Book and Brown Book, respectively. The said prices, terms and trade practices quoted by the said respondent merchants have been the same on a substantial number of items in their respective trade areas. The record does not reveal, however, the exact extent of the uniformity prevailing in any particular trade area.

Certain of the respondents urge, however, that the evidence introduced in this proceeding is an insufficient basis for a conclusion that respondents have agreed upon and established price quotations or prices which are uniform and assert, in this connection, that price uniformity would not be expected among merchants adhering to the suggested resale prices listed in the Blue Book in instances where the merchants acquired merchandise from manufacturers charging different prices for paper. Respondents additionally state that, under the procedures of the Brown Book wherein the tabulated prices are arrived at by uniform additions to merchants' cost of merchandise, price uniformity among merchants paying different prices to manufacturers or those using divergent methods of computing merchandise costs would be absent likewise even though such merchants were adhering to the Brown Book. In this connection, the Commission has noted that, in the wrapping paper survey, four slightly different methods appear to have been used by the reporting merchants in computing merchandise costs.

Respondents' contentions that the use of these books would not eliminate price competition because, in cases where the companies using them pay different manufacturers' prices or use a different method of calculating their cost, the resulting prices would not be the same, are not persuasive. Because where competitors in the same trade area use

the same method of calculating costs and pay the same manufacturers' price, uniformity of selling price will result. The Commission is of the opinion that the evidence adequately supports the conclusion that the prices quoted by respondents located in each respective trade area have been so calculated in a uniform manner on a substantial number of items and that respondents have agreed upon and established uniform prices. One basis for this conclusion is the fact that it was an implicit purpose of the books to place merchant users in a position where they would be profitably in line price-wise with other merchants in their areas. For instance, in answer to an inquiry by L. S. Bosworth Company, Inc., Houston, Texas, as to the markup to apply on a certain type of paper formerly listed in the Blue Book but absent from the then current edition, respondent National Association by letter of February 13, 1947, informed in part as follows:

In New York City, certain areas of New England and some other places, practically all of the merchants use the same listing which is in the Blue Book for Tag, namely, G–2. We believe that if you follow this procedure you will be in line with your competitors on this particular paper.

The documentary exhibits of minutes and bulletins disseminated by certain of the respondent constituent regional associations show, moreover, that the respondent merchants and local secretaries utilized the publications of National Association for the purpose of making their prices uniform. In a bulletin to the members of respondent Central States Paper Trade Association under date of July 12, 1937, prepared by respondent John L. Richey, such members were informed:

You will note from Page 34 of the Blue Book, dated June 5th, that a new basis of pricing Tagboards is provided for, at least in the higher-price items. I understand that among the mills Port Huron has recently announced suggested resales on the basis of this Blue Book suggestion. I have had no information as to the reason for this change and am writing the National Paper Trade Association to get it as a matter of information, but I suggest that effective July 15th this basis be put into effect on your list, for the sake of uniformity of practice. I am also asking the National whether or not the cheaper grades of Tag will be put on the same basis.

That conditions in their local areas were important considerations to the respondent members of the constituent regional associations in making surveys and compiling data for respondent National Association is demonstrated by correspondence between the aforesaid respondent individual and a paper merchant newly named to a survey committee of respondent Central States who had inquired as to the

nature of his duties. Mr. Richey, under date of February 3, 1940, stated in part:

The Survey Committee has charge of the work of compiling statistical data throughout the United States, upon which the National Paper Trade Association's consolidated operating figures are sent out to the membership. The Central States Committee, under its Chairman, would have to do that, gathering from the members, in cooperation with the Secretary, any ideas they might have, having the figures compiled on a basis that is practical and applicable to conditions in the Central States territory.

Additional support for a conclusion that prices have been established and agreed upon and that they have been uniform prices applicable to a substantial number of the respondent merchants, is found in a letter dated May 20, 1942, written by the president of respondent Alling & Cory Company, Rochester, New York, a member of respondent National Association and various respondent regional associations, which letter, addressed to respondent Arthur H. Chamberlain, read in part:

We all know that the majority of the fine paper mills are more nationally minded than the wrapping paper ones when it comes to establishing and maintaining uniform resale prices throughout the country. For this very reason the Fine Paper members of the National Association probably derive more benefit from the National Association as a whole because the local problems affecting Fine Paper merchants are not subject to change by the local group.

When we come to consider the Wrapping Paper situation, quite the contrary is true. Few wrapping paper mills have nation-wide resale prices and practically no effort is made to enforce those that are established. The local Associations in the Wrapping Paper field, particularly in our territories, have been very successful in getting the local merchants to cooperate, consequently a smooth running, friendly local Association, might be considered more valuable to the members than benefits derived from the National Association as a whole.

PAR. 15. Prior to 1946, practically all paper mills sold their products to paper merchants on the basis of 3% cash discount if paid within thirty days from date of invoice, and most of the paper merchants, in turn, allowed their customers 2% cash discount on the same basis. During the year 1941, some attempts were made by some of the local and regional associations to establish a 1% cash discount basis as a part of the regular terms to be observed by them, but no nation-wide attempt was made to accomplish this until after No-

vember 1946, the date of the termination of the Office of Price Administration.

During the year 1946, many of the paper mills began to reduce their cash discount terms to paper merchants from 3% to 2%, and the Statistical Research Division of respondent National Association made a study of the effect of the new discount terms and published the results of this study, showing the effects on fine paper merchants from an earnings standpoint, suggesting the percentages of the manufacturers' prices to be added to or subtracted from the merchants' selling prices to avoid reduction or increase in the merchants' gross trading margin, all based upon the various cash discount terms then being observed by the different paper mills. There were also prepared by this Division under the direction of respondent John H. Londergan, and furnished to the members of respondent National Association upon request, tables showing the amounts to be added to the individual merchant's selling prices under various circumstances to preserve the gross trading margin then in effect. Respondent John H. Londergan, as Director of the Statistical Research Division of respondent National Association, advised the individual members of respondent National Association with respect to the matter of cash discounts in 1947 and assisted the local and regional associations in arriving at uniform cash discounts in the respective trade areas.

The executive officers of the local and regional associations, in turn, cooperated with the Statistical Research Division of respondent National Association in advising the member paper merchants and assisting them in arriving at uniform cash discounts in the respective trade areas. The respondent member paper merchants in the respective trade areas, during the years 1947 and 1948, discussed at meetings of respondent local and regional associations the matter of cash discount terms to be observed by them in the sale of fine wrapping paper, and, in many of the trade areas, respondent paper merchants adopted and put into effect uniform cash discount terms inspired and suggested by respondent National Association.

PAR. 16. The respondent National Association, through its Statistical Research Division, at or about the time of the end of the Office of Price Administration in 1946, made studies and surveys of cutting charges being observed by respondent member paper merchants in various trade areas, and representatives of respondent National Association discussed the matter of cutting charges with local and regional associations. This matter was also discussed at many meetings of local and regional associations during 1947, with the re-

sult that in certain local trade areas, new uniform cutting schedules were adopted and put into effect by respondent paper merchants. As was the case when the respective regional and local groups proceeded to treat the matter of a change in cash discounts as a problem requiring group solution, the open discussions respecting schedules of cutting charges which were carried on at regional association meetings, the statements of members as to what they could do or had done and the steps taken by others in such connection necessarily tended to a meeting of the minds and an understanding as to the future of the respondent merchants.

PAR. 17. Each of the respondent regional associations has engaged in activities relating to the pricing by its members of their paper products. The record contains numerous exhibits relating to the activities of these associations which indicate that they have concurred in and implemented activities of the National Association which have a dangerous tendency unduly to restrain competition between the respondent paper merchants.

Typical examples of such evidence are the following:

(a) Minutes of a meeting held by respondent Central States Association on October 20, 1936, show that the members present discussed the question of coated gummed papers on which manufacturers' resale schedules were believed to be lower than those provided by the Blue Book, and that it was unanimously decided to use the Blue Book instead of manufacturers' resale schedules effective immediately. At the meeting of September 26, 1939, writing papers were discussed and it was pointed out that merchants' costs required an additional three cents per pound in broken ream lots and one cent per pound in one ream lots, in connection with marking up these brackets for resale, in order to break even and "by a bare majority the opinion of those present was expressed that this policy would be sound."

Respondent Central States Association distributed price lists for its members upon request. The subject of resale prices for writing paper in reams and broken ream lots was again discussed at the meeting of January 18, 1940, which meeting was attended and addressed by respondent J. H. Londergan. A bulletin directed by respondent John L. Richey to members of this respondent constituent association and respondent Middle States Association under date of August 21, 1945, contains the following:

To merchants, we say, in the event some drastic change should come over night in OPA price regulations, that the past has shown that the use of the blue book as a formula of pricing fine papers

and the use of the yellow book as a formula of pricing wrapping paper and paper products is both sound and moderately profitable. Every wholesaler should give thought to the continued use of these formulae in the post war period.

Another of the exhibits received into the record indicates that a cash discount of 1%—ten days was to be effective January 1, 1947, on sales of coarse paper products by certain of the members of this respondent association.

(b) The members present at the meeting of respondent Fine Paper Association of Chicago on January 8, 1946, "all agreed to change prices in accordance with the Blue Book paper setup the same day they were received."

(c) Attending a meeting of June 26, 1946, held by respondent Empire Association was a representative of respondent National Association, who is reported in minutes thereof to have repeated a previous request to the members that they issue new price lists and send copies to respondent National Association. Minutes of a meeting held April 2, 1937, by the Fine Paper Division of this association show that the question of pricing of news print was discussed and the result, as reported, was that most of the members preferred their then current method.

Respondent W. B. Dunning, secretary of respondent Empire Association in a letter to its president under date of December 17, 1947, referred to a general meeting of respondent New England Association which he had attended and in which he participated by telling of the adoption of a one per cent discount and other terms then in vogue in respondent Empire Association. The letter relates that though no vote was taken as to what policy should be followed, he received the impression from ensuing discussion that most of the wrapping paper merchants would adopt the new discount plan within the next few months. It appears also that so much time was taken up with consideration of the terms and discount program that respondent W. G. Leathers, who was in attendance, was unable to explain another program of respondent National Association relating to simplification of several items of coarse paper.

(d) The pricing publications of respondent National Association were topics of discussion at meetings of respondent Wisconsin Association and such books were in the possession of many of its members. In a letter of April 22, 1947, requesting copies of the Blue Book and Yellow Book, a representative of a respondent member of respondent National Association and holding membership also in respondent Wisconsin Association, stated that he felt like an "outsider" at a re-

cent meeting of that group by reason of never having seen these books. At its meeting of February 12, 1947, all members of respondent Wisconsin Association there present indicated they were using the "pricing formula" of the Yellow Book and the appointment of a committee to meet in Chicago on March 12th and to consider and recommend changes in this book was discussed. The minutes do not show whether official action on the matter occurred.

(e) At a meeting held on November 13, 1946, members of respondent Fine Paper Association of Wisconsin, Inc., were urged to turn in annual and monthly statistical reports called for by respondent National Association and a discussion took place on "the cutting schedules and the proposed revision recommended by the National Paper Trade Association." The minutes state no official action was taken.

(f) Respondent Midwest Group on May 12, 1948, disseminated to its members a map reflecting the Kansas City, Missouri–Kansas, commercial zone as defined by a Government agency. In transmitting this map, respondent Carll V. Kretsinger, its secretary, suggested that the members likely would wish to use the commercial zone appearing there as a free delivery zone on sales to points in such area. In a letter dated December 22, 1947, this respondent reported to respondent National Association that part of his duties involved the ironing out of merchants' complaints against other merchants, and that meetings were held regularly by this constituent association.

PAR. 18. Respondent The Chatfield & Woods Co. of Pennsylvania, a dual house, was active in the fine paper activities of the National Association. Its General Manager, Mr. W. F. Doyle was a member of its Board of Directors on the fine paper side in 1946 and 1947. His successor as general manager, Mr. F. H. Chatfield, became his successor on the Board. Its Mr. A. H. Slater, Jr., was a member of its Fine Paper Governing Committee in 1948 and 1949, at the time of the issuance of the complaint herein. It subscribed to the Blue Book and in the light of the positions held by its representatives must have been thoroughly aware of its purpose and the manner in which the differentials and other pricing aids were arrived at. The President of this company, Mr. W. H. Chatfield, is also President of respondent Chatfield Paper Corporation, Cincinnati, Ohio.

Testimony of Mr. F. H. Chatfield and Mr. G. F. Liebler, Sales Manager of the Wrapping Division of this respondent, shows that it did not participate in any price fixing agreement as to wrapping paper. However, they did not testify as to its activities in the fine paper field.

The Commission is of the opinion that the Blue Book was designed for use as a pricing book, that such participation in the activities of the fine paper side of the National Association which created it and kept it current, plus subscribing to the Blue Book establishes prima facie that it was a party to a price fixing agreement as to fine paper as alleged. In the absence of evidence to the contrary, it is so held.

PAR. 19. On the basis of the record, the Commission concludes that, prior to the year 1947, the respondent paper merchants, together with respondent associations, and respondent officers, have entered into and have since carried out an unlawful planned course of action, understanding and agreement to hinder, lessen, eliminate, limit, and restrain competition in prices, practices, terms and discounts between and among said respondent merchants in the sale and distribution of fine and wrapping paper in commerce among and between the various States of the United States. Pursuant to and in furtherance of said planned common course of action, understanding, and agreement, the said respondent paper merchants, through and with the aid, assistance and guidance of respondent associations and officers and directors thereof, have done and performed the following acts and practices:

(a) Agreed upon and established uniform and identical prices, terms and discounts for both fine and wrapping paper in their respective trade areas;

(b) Classified said paper products and agreed upon uniform and identical prices, terms and discounts to be charged for paper products falling within each classification;

(c) Agreed upon and established uniform and identical additions to prices and deductions from prices to be applicable to said paper products within each classification so established;

(d) Agreed upon and established uniform and identical markups to be used in arriving at the selling prices for said paper products in their respective trade areas;

(e) Agreed upon, established and made uniform charges in certain of the respective trade areas for cutting or trimming of paper where such cutting and trimming were necessary to meet a purchaser's specification;

(f) Have held meetings at which prices, terms and conditions of sales, and trade practices and policies designed to eliminate competition in price and otherwise between respondents were discussed and acted upon;

(g) Disseminated among themselves by and through respondent Associations, at frequent intervals, current and future quotations of

prices, terms, and practices offered to the trade in the sale of said paper products.

PAR. 20. The capacity, tendency and effect of the said planned common course of action, combination, conspiracy, understanding, and agreement, here found, and the said acts and practices of respondents done and performed in the furtherance thereof and in pursuance thereto, have been substantially to lessen, restrict, restrain and suppress competition among and between said respondent paper merchants in the sale and distribution of said paper products in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, have had a dangerous tendency to hinder, restrain and prevent, and have actually hindered, restrained and prevented price competition between and among said respondent paper merchants in the sale and distribution of said paper products in said commerce in their respective trade areas; have empowered said respondent paper merchants to enhance the prices of said paper products in their respective trade areas above the prices which would prevail under a condition of natural, normal and free competition among said paper merchants; and have a dangerous tendency to create a monopoly in said paper merchants in the sale and distribution in interstate commerce of said paper products in their respective trade areas.

PAR. 21. The Commission is of the opinion that the greater weight of the evidence does not support the allegations of the complaint charging that respondents have agreed upon and used a uniform system of freight equalization. Without adequate support in the record, also, are additional charges that respondents concertedly or pursuant to a planned common course of action adopted a formal system of uniform cost accounting, that respondents agreed upon prices to be submitted to Federal, State and other governmental agencies in response to invitations to bid, that they concertedly classified members of the trade and defined customer classes to whom each classification could sell, and that they jointly established contact committees to enforce or police adherence to certain accords alleged to have been entered into. These charges of the complaint accordingly are dismissed.

PAR. 22. The Commission finds that respondent Graham Paper Company became a member of respondent National Association around 1933 but resigned therefrom late in 1937 or early in 1938, and that it does not, as charged in the complaint, hold membership in respondent Midwest Paper Merchants Group. In the opinion of the Commission, the greater weight of the evidence does not establish that

respondent Graham Paper Company has assisted or cooperated with respondent National Association through the furnishing of data for the compilation of the Blue Book or Brown Book or that it has received such publications or used them in compiling or computing its prices. The Commission, accordingly, has concluded that this proceeding should be dismissed as to respondent Graham Paper Company.

PAR. 23. Respondent Pittsburgh Paper Association became an active organization in the Fall of 1947, one year prior to the issuance of the complaint herein. It has at all times restricted its activities to wrapping paper matters. Two of its members are engaged in the sale of both wrapping paper and fine paper products, but the association has never engaged in any activity pertaining to fine paper. There is no evidence that the association engaged in any discussion or activity relating to price or which restrained competition in any way. Testimony shows that it concerned itself with other proper trade association activities.

As found by the hearing examiner, it does not appear that respondent Engel, Executive Secretary of respondent Pittsburgh Paper Association, cooperated in the activities of the respondent National Association to the same extent as those of the other local or regional associations with respect to the preparation and promulgation of the Blue Book, Brown Book and Yellow Book, and the cash discounts and cutting charges. As he stated, there is insufficient evidence in the record to support the allegations of the complaint as to respondent Engel. The Commission rejects his further conclusion that an order should be issued against the Pittsburgh Paper Association for the sole reason that it served as an instrumentality by means of which its members became members of the National Association.

PAR. 24. Respondent Morris Paper Company is a wrapping paper house only. It does not sell fine paper. It received a copy of the Brown Book from the respondent National Association of which it is a member as well as a member of respondent Pittsburgh Paper Association. The record shows that it did not use this book in the pricing of its paper products. This is shown by the testimony of its President, which evidence is supported by a comparison of the actual prices at which it sold certain of its products on certain days in 1947 and 1948 with comparable actual selling prices of certain of its competitors in the Pittsburgh area. This comparison indicates a complete lack of uniformity as to the prices of the products compared.

Other evidence shows that this respondent's President, Mr. Morris Balter, was a member of the Wrapping Paper Commodity Committee of the National Association since the Fall of 1948, near the time

of the issuance of the complaint herein. He testified that activities of this committee since he became a member have included the problem of salesmen's compensation; marking of packages and formulation of a code of ethics to improve relations with manufacturers and other matters having nothing to do with prices, markups, discounts, classification of products or the Brown Book.

In the face of this evidence any inference of participation by this respondent in an agreement to fix prices is destroyed. It is believed, therefore, that the allegations of the complaint as to the Morris Paper Company have not been sustained by the greater weight of the evidence.

PAR. 25. Respondent Anderson Paper & Twine Company has filed no answer in this proceeding. The entire record as to it consists of documents admitted into the record by a stipulation to which it was not a party. The record was closed as to this respondent upon the receipt of these documents. The Commission is of the opinion, therefore, that there is no evidence properly in the record as to this respondent and that the allegations of the complaint have not been sustained as to it. The Rules of Practice of the Commission in effect during the trial of this case and which are governing as to it, do not provide for a default and require counsel supporting the complaint to sustain the burden of proof even though no answer is filed and the matter is not contested. The allegations of the complaint, therefore, should be dismissed as to this respondent.

PAR. 26. Respondent Clarence E. Dobson is a party to this proceeding both individually and as Secretary of the respondent Southern Paper Trade Association. He filed an answer in letter form in which he stated that he had been replaced as Secretary by Miss Sara Meredith prior to the issuance of the complaint. He did not admit the allegations of the complaint nor did he consent to the admission into evidence of the documents admitted into evidence by stipulation of other respondents. As the record as to him consists entirely of these documents which have not been authenticated as to him in any way, the allegations of the complaint as to him have not been sustained on the record.

CONCLUSION

The acts and practices of said respondents as herein found, with the exception of those referred to in Paragraphs 22 through 26 of these findings, are all to the injury and prejudice of the public and constitute unfair methods of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, therefore, that respondents National Paper Trade Association of the United States, Inc.; Arthur H. Chamberlain, individually and as its Executive Secretary; W. G. Leathers, individually and as its Assistant Executive Secretary; J. H. Londergan, individually and as its Director, Statistical Research Division; The Central States Paper Trade Association; John L. Richey, individually and as Secretary of respondents The Central States Paper Trade Association, The Chicago Paper Association, Illinois State Paper Merchants Association, The Middle States Wrapping Paper Association, and Wisconsin Paper Merchants Association; Diem & Wing Paper Company; Cincinnati Cordage and Paper Company; Indiana Paper Company; Butler Paper Co., Inc.; Chatfield Paper Corporation; The Fine Paper Association of Chicago, Inc.; G. Forrest Gillett, individually and as its Secretary; Chicago Paper Company; Hobart Paper Company; Swigart Paper Company; Bradner Smith & Company; J. W. Butler Paper Company; The Chicago Paper Association; Acme Twine & Paper Company; Commercial Paper & Bag Company; Eagle Wrapping Products Company; Joseph Weil & Sons, Inc.; The District of Columbia Paper Merchants Association; William N. Schaefer, individually and as its Secretary; Charles G. Scott and Company, Inc.; Stanford Paper Company; Frank Parsons Paper Company, Inc.; Jacob N. Freedman and Joseph Freedman, individually and as copartners trading under the name of S. Freedman & Sons; Empire State Paper Association, Inc.; W. B. Dunning, individually and as its Secretary and Treasurer; The Miller Paper Company, Inc.; J. & F. B. Garrett Company; W. H. Smith Paper Corporation; Geneva Paper Company; Illinois State Paper Merchants Association; Duckett Paper Company; Rockford Wholesale Paper Company; Capital City Paper Company; The Intercity Box & Paper Company; Iowa Paper Distributors Association; Herbert F. Stoffle, individually and as its Secretary; Clinton Paper Company; Pratt Paper Company; The Peterson Paper Company; Bermingham & Prosser Company; Maryland Paper Trade Association, Inc.; Charles B. Leonard, individually and as its Secretary; Mudge Paper Company; Bradley-Reese Company; Robins Paper Company, Inc.; The Barton, Duer & Koch Paper Company; The Middle States Wrapping Paper Association; Union Paper and Twine Company; The Globe Paper Company; National Paper and Twine Company; The Central Ohio Paper Company; Midwest Paper Merchants Group; Carll V. Kretsinger, individually and as its Executive Secretary; Wertgame Paper Company; The Butler

Paper Company; Kansas Paper Company, Inc.; Weber Paper Company; New England Paper Merchants Association, Inc.; Norman E. Scott, individually and as its Executive Secretary; Cook-Vivian Company, Inc.; The Century Paper Company, Inc.; Tileston & Hollingsworth Co.; John Carter & Company, Inc.; Northwestern Paper Trade Association; Wendell O. Hawkins, individually and as its Secretary; John Leslie Paper Company; Paper Supply Company, Inc.; Anchor Paper Company; Newhouse Paper Company; Butler Paper Company; Paper Trade Association of New Jersey; David H. Rice, individually and as its Executive Secretary; Jersey Paper Company, Inc.; David Liberman and Isidore Liberman, individually and as copartners trading under the name of J. Liberman & Co.; Commercial Paper Bag Company, Inc.; H. G. Mooney Company; Paper Trade Association of Philadelphia; David S. Stockslager, individually and as its Executive Secretary; Acorn Paper & Twine Company; Eagle Paper Co.; Mather Paper Company; Quaker City Paper Co.; The Chatfield & Woods Co. of Pennsylvania; Interstate Cordage & Paper Co.,; Southern Paper Trade Association; Sara Meredith, as Secretary for said Association; The D and W Paper Company, Inc.; Columbia Paper Co., Inc.; Alco Paper Co.; E. C. Palmer & Co., Ltd.; Southeastern Paper Trade Association, Inc.; Harry M. Snyder, individually and as its Secretary; Spaugh Paper Co. of Hickory, Inc.; Dillard Paper Company; B. W. Wilson Paper Co., Inc.; Richmond Paper Company, Inc.; Southwestern Paper Merchants Association; Lewis C. Johnson, individually and as its Executive Secretary; Olmsted-Kirk Co.; Magnolia Paper Co.; Southwestern Paper Co.; Carpenter Paper Co.; Wisconsin Paper Merchants Association; Brauman Paper Company; Universal Paper Company; Sawyer Paper Company; Standard Paper Company; Fine Paper Association of Wisconsin, Inc.; Curtis W. Boyce, individually and as its Secretary; Nackie Paper Company; Oshkosh Paper Company; Moser Paper Company; The Bouer Paper Company; Metropolitan Bag & Paper Distributors Association, Inc.; Fred Free, Jr., individually and as its Secretary; Yorkville Paper Company, Inc.; A. E. MacAdam & Co., Inc.; John H. Free, Inc.; Shuttleworth Wollny Co., Inc.; S. Posner Sons, Inc.; Cosmopolitan Twine & Paper Association, Inc.; David Kasson, individually and as its President; Harlem Paper Products Corporation; Imperial Bag & Paper Co., Inc.; Daniel W. Margolin, an individual trading as Liberty Bag & Paper Company; Paper Association of New York City; Irwin Slote, individually and as its Secretary; Bonded Paper Products Co.; Graphic Paper Corp.; Capital Paper Co.; Royal Paper Corp.; Whitaker Paper Co.; and said respondents' respective officers,

representatives, agents, and employees, in or in connection with the offering for sale, sale and distribution of fine and wrapping paper or other paper products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, continuing, cooperating in or carrying out any planned common course of action, understanding, agreement, combination or conspiracy between or among any two or more of said respondents or between or among any one or more of said respondents and others not parties hereto, to do or perform any of the following acts or practices:

(a) Establishing or maintaining prices for either fine or wrapping paper or for any descriptive classes thereof, or any rates of cash discount;

(b) Establishing or maintaining markups or percentages of markups in arriving at selling prices;

(c) Establishing or maintaining differentials with respect to any individual item or class of items, different quantities, color, cutting, trimming, packaging or delivery, whether determined on a basis of method of delivery or geographical location to which delivered;

(d) Disseminating price lists or terms or conditions of sale offered to the trade to each other directly or by and through respondent associations or any other medium;

(e) Publishing or distributing any publication of national average percentage markups for any individual item or individual class of paper or paper products or any tables or charts purporting to apply any national average percentage markups to any assumed price paid by merchants for any individual item or individual class of items, or showing any average national pricing practices of merchants with respect to any individual item or individual class of items for different quantities, color, cutting, trimming, packaging or delivery;

(f) Holding or participating in any meeting, discussion or exchange of information among themselves or under the auspices of respondent National or regional associations, or any other medium or agency for the purpose or with the effect of devising or establishing any method of fixing, establishing or maintaining prices, terms or conditions of sale for fine or wrapping paper, or any other practices prohibited by the provisions of this order.

It is further ordered that nothing contained in this order shall be construed as prohibiting any respondent, acting either as principal or agent, from entering into agreements with any of its vendors or customers to buy from any such vendors or to sell to any such customers fine or wrapping paper at any price or on any terms or conditions of sale independently determined and offered and independently

accepted in any bona fide transactions, when such agreements are not for the purpose, nor have the effect, of restraining trade or competition, or from quoting prices or terms or conditions of sale for the purpose of effecting any such bona fide agreements.

It is further ordered that this complaint be, and it hereby is dismissed as to respondents Graham Paper Company, Pittsburgh Paper Association, Robert Engel, Morris Paper Company, Anderson Paper & Twine Company and Clarence E. Dobson.

It is further ordered that this complaint be, and it hereby is dismissed as to each of the respondents named in the complaint only by reference to the lists of members of the respondent trade associations attached as exhibits to the complaint, with the exception of those specifically listed in the first paragraph of this order. These dismissals are based solely on the ground that an order as to these respondents is not required in the public interest and do not pass in any way on the power or jurisdiction of the Commission to bring representative class suits under the doctrine laid down in *Chamber of Commerce of Minneapolis, et al.* v. *Federal Trade Commission*, 13 F. 2d 673, 684 (C. A. 8, 1926).

It is further ordered that each of the respondents named in the first paragraph of this order 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 Mead dissenting to the extent that he would direct that the order to cease and desist be issued also against the additional parties referred to in the recommended order to cease and desist of the hearing examiner.

Commissioners Howrey and Gwynne did not participate in the action in this matter for the reason that oral argument was heard herein prior to their appointment to the Commission.

Special Concurring Opinion

By Mason, Commissioner:

This opinion concerns questions of such diversity that it is separated into three sections.

The first deals with 143 defendants who signed waivers of trial.

The second weighs the probative value of guilt by trade association.

The third considers the question of Federal Trade Commission class suits or trials in absentia, and whether or not they offend sound judicial practice.

THE WAIVER OF TRIAL BY ONE HUNDRED FORTY-THREE DEFENDANTS

The Commission on October 5, 1948, filed its complaint against approximately one thousand wholesale paper merchants and their trade associations.[1] The charge—conspiracy to fix prices.

Of these defendants, only 146 were served with summons. According to the complaint, certain designated members of this group were sufficiently representative of everybody else belonging to the local associations that it was not necessary to summon the rest.

Efforts toward settlement of the issues without a full trial, in line with the provisions of the Administrative Procedure Act (Public Law 404, 79th Congress, Chapter 324, Second Session), were successful as to 143 defendants, including four who were not served.[2] These shall hereafter be referred to as the "waiver defendants." Six of the defendants served filed denial answers and contested this action throughout. Of these, only one is shown to have been a party to the alleged conspiracy by this record. One of the defendants served filed no answer. The remaining defendants in this proceeding were not served with summons, did not file any answers and have not consented to or participated in this proceeding in any way. The hearing examiner recommended an order against all of the defendants except two of those contesting.

The first question to be determined is the propriety of the issuance of the proposed order against the waiver defendants. On that point we observe that the law is well settled, that the case for the Government against certain conspirators does not fall for failure to name, serve, or properly prove its case against all of the parties who may be in the conspiracy. Whether the defendants who were not served with summons in this case can be held will be dealt with later.

As to those who signed substitute answers whether they were served or not, the record shows most of them withdrew answers heretofore filed denying the charges in the complaint (but without admitting guilt and solely for the purpose of the instant proceedings) and consented that the Commission could enter its findings and issue an order thereon.

The waiver defendants agreed to the entry of the documentary evidence presented by the Government. It may be that the inferences of guilt as to certain of these defendants could have been explained away if they had defended in this proceeding. However, no defense was offered. In fact, many of these waiver defendants agreed that if the Commission found from the evidence an agreement existed, they would not contend otherwise.

See footnotes set out in the appendix.

These defendants, it seems, would rather sign away than litigate their innocence. This retreat is not as ignominious as it appears, for one must bear in mind that a case more or less to a Government agency is only grist to its mill; on the other hand, when a private citizen defends against a Government charge, even when unfounded, his efforts are costly and time-consuming.

It may not be valorous, but there are cases where it is less expensive for an innocent defendant to waive a trial and consent to an order rather than contest the charge. These things do happen in antitrust litigation.

Substitute answers—waiver answers—admission answers—call them what you will—carry certain quid pro quos—from the standpoint of a prosecutor they obviate trial of a case up to the hilt, as to those who retreated.

We have no way of knowing but that the attorney in charge of the complaint, having largely disposed of the issues at the beginning of the trial insofar as the waiver defendants were concerned, devoted his major attention to those who denied the conspiratorial allegations.

It is enough to say that within the limits of our jurisdiction and the boundary of their consent, we may enter any kind of an order that comes to mind. Certainly the order suggested by the hearing examiner against all who waived trial is a model of restraint and is in strict conformity with established precedent. Insofar as those particular defendants are concerned, the order is consonant with the charges in the complaint and defendants' substitute answers. Accordingly, the recommended decision of the hearing examiner as to these defendants is approved and becomes the order of the Commission.

We come now to the center of gravity in the instant case. It has considerably more weight than the decision as to the waiver defendants. What happens to the waiver defendants may be vital to them, but the broad issues of trial in absentia and guilt by trade association involve all interested in maintaining orderly judicial procedure.

There is no blinking the cold truth, that the tenor of the times has developed two new systems of fact-finding, both deviating from our Anglo-American pattern of jurisprudence. Congressional committees use their investigatory fact-finding functions (theoretically, at least) for the purpose of guiding Congress in its legislative work.

Our Integrity Security System concerns itself only with Government employment and deals, therefore, with the privilege of working for the Government. This type of fact-finding does not affect a property right or one's personal liberty. As one of our chief security officers aptly put it:

It is not "* * * trying to punish * * * for some act * * * committed in the past * * *. We are trying to protect the Government from what may occur in the future. Since you can't prove future behavior—future acts are not susceptible to present proof—there is no proof in this system. It's not a judicial system." [3]

Neither the legislative committee system of investigation, currently holding the public eye, nor the Government Integrity Security System evolved in April 1947, deals directly with personal liberty or property rights.

On the other hand, the fact-finding of courts and their adjuncts, quasi-judicial agencies, do.

It is not the purpose of this opinion to make invidious comparisons between the three systems. Suffice to say, legislative and security fact-finding seek different ends than those of a judicial body. Nowadays when accusations may be regarded by some tribunals as in almost the same category as guilt, it behooves us to see that the judiciary reaffirms with even greater emphasis the established patterns of fair and impartial trial developed by courts over the centuries. These include the presumption of innocence, the rule against hearsay, and, not least of all, "the right to meet your accuser face to face, if you have one." [4]

This applies with even greater force to the lowest rung, but most powerful (from the businessman's standpoint), of the judicial ladder, the Federal Trade Commission. For fact-finding under the Commission's quasi-judicial function is devoid of many of the checks inherent in regular courts—the informality of trial—the relaxed rules of evidence—the lack of a jury—the final decision resting in the hands of those who formulated the original charges—all of these new short cuts to justice make it imperative that we adhere with meticulous care to the time-tested implements of fair and impartial trials by the judicial process. In fact, "the best means yet devised for the discovery of truth is a well-ordered trial in a well-ordered court room." [5]

With these compunctions in mind, let us see if the facts justify a finding of—

GUILT BY TRADE ASSOCIATION

Considering the probative value of association membership as a determinant of guilt requires at least a bowing acquaintance with the business under surveillance. When every member of a trade is encompassed in a charge of class conspiracy, there should be somewhere in the record a concise and factual description of what they do for

See footnotes set out in the appendix.

a living. Against this background, testimony as to alleged illegal acts could be evaluated with more intelligent regard as to the probability of their existence in the market structure. "It must be obvious that competition can be judged only after the market facts have been weighed." [6]

During final argument of the instant case before the Commission, in answer to a query from the bench as to the size of the industry, the reply of the prosecution indicated annual sales amounted to hundreds of thousands of dollars, or perhaps hundreds of millions of dollars, or that maybe these figures pertained to tons of paper rather than to dollars.

If we are to function, as the courts have intimated, as experts in the realm of commerce, this kind of a beginning doesn't give us much meat to feed on. The record is barren about the industry as a whole. Outside of the record perhaps we can take "quasi-judicial' notice of the fact that from the New York Sunday Times, which uses twenty-five hundred tons of paper in one edition, to Joe Blow, the job printer who uses a few ounces when he does a hundred business cards with your name and address, there is an eight billion seven hundred million dollar industry.

We can infer the distribution of fine and wrapping paper is a very important segment of the paper industry. Distributors are mostly small businessmen, and are spread over the country in little towns and big cities. The many kinds and qualities of paper, and variations in the size of their orders, make wholesaling as much a matter of service as of product, so the merchant keeps close to his market, not only geographically but personally as well.

In a trade where thousands of small items are stocked and sold on instant quotations, some machinery, like the grocer's scales or the draper's yardstick, was bound to be developed for quickly figuring prices. It would take too long and exceed the entire sales price for a paper merchant to hire a cost accountant every time he wanted to calculate the bid on a ream of White Sulphite Bond or a roll of 40-lb. Brown Kraft Wrapping Paper. So there came into being the Blue Book—the Brown Book—and the Yellow Book.

The first of these, the Blue Book, was compiled by the defendant, the National Paper Trade Association, back during the days when NRA was in effect. The National Association, through its Statistical Division, conducted annual cost and selling price surveys among its fine paper merchant members in all sections of the country and published what was known as the "Paper Merchants' Blue Book." This con-

See footnotes set out in the appendix.

tained average mark-up percentages found to be in use under the trade practices prevalent. The tables translated the cost to the member of each of the various categories. There is no doubt but that the cost analysis and suggested mark-ups were in the hands of some 1,200 merchants during NRA, but as to any later date the record is not clear.

It is interesting to note that the compilation of cost data, whether as a factor in price fixing or not, was not only essential and legal in periods of Government control, but today is considered quite de rigueur under the antitrust laws of the Federal Government as well as under many state unfair sales statutes.[7]

If the industry used colored books, so did the Government. During NRA and OPA, both depended upon these vari-hued publications to establish Federal price controls.[8]

There are thirteen charges leveled at the defendants in the instant case. These charges were all, in some form or another, part and parcel of the required activities of Federal price fixing, standardization, production, control, etc., under NRA or OPA.

For businessmen quoting prices are like square dancers—advancing, bowing and retreating—as they follow the intricate patterns called by Government.

At the signal "NRA"! or "OPA"! they take their competitor by the hand and march gravely in unison to the price song of the Federal Administrator. At a sign from the Supreme Court (*Schechter Corporation* v. *U. S.*, 295 U. S. 495, 55 S. Ct. 837) or from Congress (when price ceilings were lifted), the merchants drop hands and start fighting—or at least they are supposed to.

But some defendants are like novices at a barn dance; they do-ci-do when they should allemande left. Maybe they get confused, maybe their reflexes are conditioned all wrong from being under Government control too long, or maybe they just want to keep on holding hands with their competition like the Government taught them to do under the alphabet regimes.

At any rate, part of the time the paper wholesalers engaged in concerted or uniform action, they would have gone to jail if they hadn't, and part of the time they would go to jail if they did.

With the price fixing picture during Government controls as "background material" for the contemplation of price fixing without the blessing of Government, the evidence as to Richey, Dunning, Londergan, Leathers, Chamberlain and Whitaker, et al., gives the Commission the substantial evidence required on which to infer agreements in restraint of trade.

See footnotes set out in the appendix.

Along with these defendants go the other waiver defendants whose substitute answers place them in substantially the same category.

Here we are shown the petty machinations of a dozen over-enthusiastic trade association members. With no other link to their illegal agreements than a common membership in a trade association, we are opportuned to hack away at the entire wholesale paper trade industry exclaiming, "Everybody in the industry is a conspirator"!

Granting certain defendants fixed prices out of season, does that convict the entire wholesale paper industry under a charge of the Federal Trade Commission—at least that portion of it the Government could lay its hands on?

Like the tumbrils of the French Revolution carrying all "aristocrats" to the guillotine, the recommended decision in this case carries all who held membership in any wholesale paper trade association. Who should and who should not be found guilty was determined by a method simpler than that used by the Gileadites when they slew 42,000 Ephraimites at the River Jordan (Judges 12:6). Those who mispronounced the word "shibboleth" died for membership in the wrong association.

Nowadays class defendants are picked without using the pronunciation test of Biblical times, nor is a Madam Defarge needed to knit the names of the victims. If Mr. Dickens were writing "A Tale of Two Industries" today, he could run the Fine and the Wrapping Paper Wholesalers to earth with the method used in drawing the present complaint of the Federal Trade Commission—just proscribe all those whose names appeared in the current membership list of the 23 local paper trade associations.[9]

If the Federal Trade Commission can bind an entire industry by trying only a few, this would be the ideal case on which to establish a precedent, for these local associations were in turn associated with the national association.

Here is the connecting tissue that purportedly makes an Abilene, Texas, paper dealer blood brother conspirator with a local wholesaler in Hickory, North Carolina, and ensnares them both to a Nekoosa, Wisconsin, merchant in a joint common planned course of action with a Bensenville, Illinois, dealer. We are told that these men conspired with other wholesalers, too, from Enid, Oklahoma; Ottumwa, Iowa; Woonsocket, Rhode Island; North Adams, Massachusetts, and points north, south, east and west.

In the instant case, page after page of the recommended decision from which this appeal is taken denounces eight hundred odd unsum-

See footnotes set out in the appendix.

monded defendants as conspirators for no other reason than the following:

IN PARAGRAPH ONE (e), page 48:

"The following paper merchants are members of said respondent Central States Association and of respondent National Association:"

IN PARAGRAPH TWO (a), page 49:

"The following paper merchants, at the time of the issuance of the complaint, were members of said respondent, Fine Paper Association of Chicago, and of respondent National Association:"

IN PARAGRAPH THREE, page 50:

"The following paper merchants, at the time of the issuance of the complaint, were members of said respondent Chicago Association and of respondent National Association, except those hereinafter designated:"

IN PARAGRAPH FOUR (a), page 51:

"The following paper merchants, at the time of the issuance of of the complaint, were members of said respondent District of Columbia Association and of respondent National Association:"

IN PARAGRAPH FIVE (a), page 52:

"The following paper merchants, at the time of the issuance of of the complaint, were members of said respondent, Empire Association, and of respondent, National Association:"

IN PARAGRAPH SIX, page 54:

"The following paper merchants, at the time of the issuance of of the complaint, were members of said respondent Illinois Association, and of respondent National Association:"

IN PARAGRAPH SEVEN (a), page 55:

"The following paper merchants, at the time of the issuance of of the complaint, were members of said respondent Iowa Association and of respondent National Association, except those hereinafter indicated:"

IN PARAGRAPH EIGHT (a), page 56:

"The following paper merchants, at the time of the issuance of of the complaint, were members of said respondent Maryland Association, Inc. and of respondent National Association:"

IN PARAGRAPH NINE, page 56:

"The following paper merchants, at the time of the issuance of of the complaint, were members of said respondent, The Middle States Association, and of respondent National Association, except those hereinafter indicated:"

IN PARAGRAPH TEN, page 58:

"The following paper merchants, at the time of the issuance of of the complaint, were members of said respondent National Association, except those hereinafter indicated:"

IN PARAGRAPH ELEVEN, page 59:

"The following paper merchants, at the time of the issuance of of the complaint, were members of said respondent New England Association and of respondent National Association:"

IN PARAGRAPH TWELVE, page 62:

"The following paper merchants, at the time of the issuance of of the complaint, were members of said respondent Northwestern Association and of respondent National Association:"

IN PARAGRAPH THIRTEEN, page 63:

"The following paper merchants, at the time of the issuance of the complaint, were members of said respondent New Jersey Association and of respondent National Association:"

IN PARAGRAPH FOURTEEN, page 64:

"The following paper merchants, at the time of the issuance of the complaint, were members of said respondent Philadelphia Association and of respondent National Association:"

IN PARAGRAPH FIFTEEN, page 65:

"The following paper merchants, at the time of the issuance of the complaint, were members of said respondent Pittsburgh Association and of respondent National Association, except those hereinafter indicated:"

IN PARAGRAPH SIXTEEN, page 66:

"The following paper merchants, at the time of the issuance of the complaint, were members of said respondent Southern Association and of respondent National Association, except those hereinafter indicated:"

IN PARAGRAPH SEVENTEEN, page 67:

"The following paper merchants, at the time of the issuance of the complaint, were members of said respondent, Southeastern Association, and of respondent National Association:"

IN PARAGRAPH EIGHTEEN, page 69:

"The following paper merchants, at the time of the issuance of the complaint, were members of said respondent Southwestern Association and of respondent National Association:"

IN PARAGRAPH NINETEEN, page 71:

"The following paper merchants, at the time of the issuance of the complaint, were members of said respondent Wisconsin Association and of respondent National Association:"

IN PARAGRAPH TWENTY, page 71:

"The following paper merchants, at the time of the issuance of the complaint, were members of said respondent Fine Paper Association of Wisconsin, Inc., and of respondent National Association:"

IN PARAGRAPH TWENTY-ONE, page 72:

"The following paper merchants, at the time of the issuance of the complaint, were members of said respondent Metropolitan Association and of respondent National Association:"

IN PARAGRAPH TWENTY-TWO, page 73:

"The following paper merchants, at the time of the issuance of the complaint, were members of said respondent Cosmopolitan Association and of respondent National Association:"

IN PARAGRAPH TWENTY-THREE, page 74:

"The following paper merchants, at the time of the issuance of the complaint, were members of said respondent New York City Association and of respondent National Association:"

When the Government attempts to parlay a conspiracy suit valid against a hundred defendants into a cease and desist order against a thousand for no reason other than that they all belong to trade associations, it's time we took one look at the charge, two at the evidence, and three long looks at the procedures which defile so many on so little.

The procedure involves the combination of a conspiracy charge and a class suit with a finding of guilt by association. Each of these standing alone is well established by precedent and case law in the American judicial system.

A charge of conspiracy is an effective way to initiate remedies against joint illegal activities for an illegal end, joint legal activities for an illegal end, or joint illegal activities for a legal end. Without indictments and complaints for conspiracy the hands of those agencies of Government charged with keeping the avenues of competition free and open would be tied.

As for guilt by association—in spite of the public clamor against this phrase as conjuring up in the imaginations of the citizenry a notion that civil rights are denied, "the concept of guilt by association is neither new nor illegal." [10] In California, Idaho and Utah, any one who associates with a known thief is guilty of a crime. "The Federal Government has recently gone beyond the requirements of association to establish guilt and made a person's mere presence in an illegal establishment a crime. * * * And as recently as 1937 the courts of Virginia upheld the constitutionality of a law which not only estab-

See footnotes set out in the appendix.

lished guilt by proof of association with wrongdoers, but also founded guilt upon association with persons having a *reputation* for wrongdoing" (*underscoring* supplied).[11] Whether or not men engaged in private enterprise and their trade associations should be considered by the Federal Trade Commission in the same category with the classes above enumerated need not be averred at this time. Suffice to say the principle of guilt by association is firmly established in our legal mores. Perhaps the attempt to use it against the American businessman should give rise to more serious consideration of its dangers than when the rule has in the past been applied only against alleged whores, pimps, thieves and Communists.

As for class suits, their usefulness is so important to the adjudication of property rights that they are given special recognition in the rules of civil procedure for the district courts of the United States (Rule 23, Class Action, 75th Congress, 3d Session, H. Doc. 460).

Class suits, when used for the purpose originally intended, generally involve proceedings in rem—the assessment of improvement levies against abutting properties—the validation of bond issue liens—suits to quiet title—these are all well within the scope of American judicial practice, and the convenience of the courts and the practicalities of the situation may well be considered when dealing with them.

Granting that precedents are established for all three concepts in our judicial process, the wedding of the three together cannot help but to greatly accent (as in a consanguineal marriage) the most vicious attributes embodied in each.

Let us see what these evils are:

Conspiracy charges are the prosecutor's pet. Unless used with restraint, they encompass innocent people and innocent acts as well. For, as pointed out by Mr. Justice Jackson in the *Lutwak* case, 334 U. S. 623 (Feb. 1953):

> One of the additional leverages obtained by the prosecution through proceeding as for conspiracy instead of as for the substantive offense is that it may get into evidence against one defendant acts or omissions which color the case against all.

This brings us to the last section of this opinion dealing with—

TRIALS IN ABSENTIA

If one accepts the dubious morality of guilt by association when punishing those who consort with reputed criminals, there still arises a serious problem if we apply this presumption of guilt by trade

See footnotes set out in the appendix.

association against businessmen who are not even summoned to their own trial.

In fact the whole question of guilt by association in the instant case is so closely tied in with trials in absentia by class suit that consideration of one necessarily involves consideration of the other.

The judicial process, using the combined class conspiracy theory in conjunction with guilt by association, has in the past been used most effectively (and with great injustice) against labor trade associations. This form of tyranny reached its height shortly after the turn of the century in the infamous Danbury Hatters class conspiracy guilt by association suit. Here an old and retired hatmaker woke up one day to find a quarter of a million dollar judgment levied against his cottage. The judgment was assessed on the same theory used against most of the thousand defendants in the instant case, namely, guilt by trade association.

In the Danbury Hatters case, however, it was a labor instead of a businessmen's association that was involved. In that era the Danbury Hatters case undoubtedly did more to discourage recruitment of members to trade unions than any other attack on labor.

After the Danbury decision in 1908 there was a rash of class suits against union membership which increased in virulence in spite of the passage of the Clayton Act. Section 6 of this Act was called the Magna Charta of labor, but for the fifteen years following its passage, there were "more cases against union members * * * than during the previous twenty-four years * * *."[12] Twenty-eight prosecutions were instituted by the Federal Government. Half resulted in prison sentences. Many more were unreported. Witte estimates over 600 Federal suits in that period and twice as many in state courts.[13]

Whether these defendants were incarcerated or fined for violating judgments entered against them after a trial in absentia the record does not disclose, but many of the sanctions on which punishments were assessed were ex parte (as is the sanction sought against the unsummoned defendants here).

Some states, to meet the evil of trials in absentia, eventually passed statutes (Pennsylvania, for instance) providing ex parte orders could not remain in effect more than five days.[14]

On the other hand, under the Federal Trade Commission Act, if we find guilty those of the thousand association members who were not summoned, our cease and desist order would last forever, and if it happened that the absent defendants against whom it ran did

See footnotes set out in the appendix.

not find out about the order until sixty days after its entry, they might never be able to appeal from its command.

Trials in absentia class conspiracy suits probably reached their peak of absurdity when in *Jefferson and Indiana Coal Co.* v. *Aikens*, Com. Pleas Ct., Indiana Co., Pa., (reprinted in Senate Hearings on "Limiting Scope of Injunctions in Labor Disputes," p. 599 (1928)[15] labor association members on strike were enjoined from assembling on nearby church property and singing "Onward Christian Soldiers" and similar church hymns, as too intimidating.

With the example of the Danbury Hatters case and others before it, Congress amended the National Labor Relations Act on June 23, 1947, to provide:

> Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Styles in prosecution change. Since the creation of the Federal Trade Commission, the pendulum of class conspiracy suits as a means of discouraging association membership has swung away from labor toward business.

The class conspiracy charge in this case against over one thousand paper trade jobbers is probably the present high point in the prosecution pendulum's swing from anti-labor to anti-entrepreneur. In the past decade there have been 71 cases before the Federal Trade Commission involving membership in trade associations. The latest conspiracy suit, stigmatizing the entire membership of a trade association, was filed only this month.

Unlike those who belong to a labor association, members of a business association have no statutory protection from the $5,000 a day penalty. If they violate a cease and desist order, it wouldn't take long at that rate to amass a judgment against any one's home or business far in excess of the quarter of a million dollars levied against the old hatmaker.

The formula is simple. On the conspiracy side, prove a planned common course of illegal action by two or more members of a legal trade association. In order to avoid trying the rest of the members (and yet make them liable), serve only those two members under the allegation that they are truly representative of a class, namely, the rest of the membership in the trade association; allege that it would be manifestly impractical to serve the other members but name them anyway by appending at the end of the complaint a list of all mem-

See footnotes set out in the appendix.

bers of the association; also include all members of associations associated with that association.

The formula is not as hypothetical as it sounds for these are the steps taken in the instant case. They contain the ingredients for accomplishing by a spurious extension of our quasi-judicial fact-finding powers what has for years been the aim of many in Government, namely, to make strangers to a litigation liable for penalties under a cease and desist order based on a trial conducted against others.

Legislation giving this unparalleled and despotic power to the Federal Trade Commission had been proposed and considered in 1950 but was not introduced in Congress. Perhaps it was so extravagant that the proposal was deemed impolitic. Whether or not this be so, if the recommended decision here appealed from were to be approved (as to the unsummoned), legislation giving us this strange power would not be necessary.

However, in my opinion, it is clear that no order should issue against these defendants. They were not summoned. They did not file any answer. The entire record presented prior to its being closed as to these respondents contains only the substitute answers of other respondents and unauthenticated documents which were admitted into the record upon the consent of others. At no time did they waive, consent to or stipulate as to any right, procedure or fact. No attempt was made to establish the allegations of the complaint as to them by evidence presented in normal course. Instead, it is urged that they should be held upon admissions, and evidence stipulated into the record by others in their absence.

I reject the theory that the waiver defendants can stipulate for or waive rights of the unsummoned defendants. First, the waiver defendants did not attempt to bind the unsummoned defendants in their substitute answers. And, second, if they had tried, they obviously could not do so without authority. It is elementary that a stipulation or substitute answer only binds those who agree to it.

Recently the Commission has adopted a procedure under which a defendant is notified in the complaint served on him that, if he does not answer or contest the matter, a specified order will be issued against him by default. No such notification was given to any of these defendants. And the rules applying to this proceeding require the complaint to be proven in the absence of an admission answer, stipulation, consent or waiver. As the case against the unsummoned defendants was neither proven nor settled by agreement, in my opinion the Commission correctly dismissed the complaint as to them.

The reason given by the Commission for not issuing an order as to the unsummoned defendants in effect is that an order as to all of

these approximately nine hundred companies was not required in the public interest to terminate the illegal practices.

While the Commission has arrived at the proper conclusion, the rationale to support that conclusion does not go as far as I would go, for, in my opinion, mass conspiracy charges using the class suit theory subvert the basic concept of our forefathers which maintains that every man is entitled to his day in court.

APPENDIX

[1] The rationale of an opinion in a mass conspiracy trial involving a thousand defendants could easily be lost in a maze of corporate names, dates and places. We shall try to avoid this by relegating all listings to this appendix. [The official text names the respondents and reproduces the membership lists of the associations. These lists are omitted in this text.]

[2] Individual and Association defendants who waived further hearing and consented to the entry of a cease and desist order are as follows: [Omitted.]

[3] Statement of R. W. Scott McLeod, Chief Security Officer, Department of State, U. S. News and World Report, Feb. 12, 1954, p. 70.

[4] Excerpts from President Eisenhower's statement, Nov. 23, 1953, B'nai B'rith, Washington, D. C.:

"I was raised in a little town * * * called Abilene, Kansas. * * * Now that town had a code * * *. It was, meet anyone face to face with whom you disagree. You could not sneak up on him from behind or do any damage to him without suffering the penalty of an outraged citizenry. * * * If we are going to continue to be proud that we are Americans there must be no weakening of the code by which we have lived—by the right to meet your accuser face to face, if you have one * * *."

[5] Lloyd Paul Stryker, New York Times Magazine, May 16, 1954.

[6] "Economic Evidence in Antitrust Cases," Edward F. Howrey, Chairman, Federal Trade Commission, before American Marketing Association, June 14, 1954. "Hearing officers, and judges too for that matter, should permit industry and company history, industry and company statistics, pricing and trade practices, price levels and variations in price and other business facts to be shown by methods usually employed by practical marketing men,—methods 'resting mainly on common sense,' that is, by 'such * * * evidence as a reasonable mind might accept as adequate to support a conclusion.'"

[7] "Recently the new Federal Trade Commission, in its first order in the *Detroit Gasoline* case, directed Standard Oil Company of Indiana to adopt resale price maintenance to avoid violating the Robinson-Patman Act. This was in keeping with a growing trend toward cost-plus pricing in government regulation of industry. Cost-plus pricing has also found its way into monopoly regulations, Fair Trade acts, and Unfair Sales acts. Although thoughtful businessmen and economists deplore this pricing 'strait jacket,' * * * it is on its way to becoming the rule instead of the exception." Robert W. Austin, Harvard Business Review, May–June 1954.

[8] NRA—June 16, 1933, to April 1, 1936; OPA—April 11, 1941, to November 9, 1946. Even after OPA there were many other Government agencies created which would have the effect of confusing the businessmen, such as OTC, OPS, NPA, etc.

[9] It is obvious that there was no serious consideration given to the selection of the companies named as respondents herein. This is best shown by the fact that the complaint lists as respondents wholly owned subsidiaries and branch offices of previously name respondents. [Examples omitted.]

[10] "Guilt by Association," Carl L. Shipley, The Journal of the Bar Association of the District of Columbia, Jan. 1954.

[11] E. G., *Benson* v. *State,* 247 S. W. 510; *Lingenfelter* v. *State,* 163 S. W. 918, Ariz. Code Ann. 1939, Art. 59, Sec. 43–5901; Montana rev. code 1947, Sec. 94–35–248; Nevada Comp. Laws 1929, Sec. 10302; Deerings Calif. Penal Code, Par. 647; Idaho Code, Section 18–7101; Utah Code Annotated 1953, ch. 61, Sec. 76–61–1, cited by Shipley, supra.

[12] "The Government in Labor Disputes," Witte, p. 7.

[13] 1880–1890—28; 1890–1900—122; 1900–1910—328; 1910–1919—446; 1920–1930—921, Witte, supra, p. 84.

[14] Witte, supra, p. 89.

[15] Witte, supra, p. 98.

IN THE MATTER OF

INSTO-GAS CORPORATION

Docket 5851. Order and opinion, Sept. 24, 1954

Order reopening and remanding case to hearing examiner for the taking of additional evidence as to monopolistic position, relevant market and other applicable economic factors.

Before *Mr. Webster Ballinger*, hearing examiner.

Mr. George W. Williams and *Mr. Rufus E. Wilson* for the Commission.

Fischer, Brown, Sprague, Franklin & Ford, of Detroit, Mich., for respondent.

ORDER REMANDING CASE TO HEARING EXAMINER

This case having come on to be heard upon an appeal filed by the respondent from the initial decision of the hearing examiner, the briefs in support of and in opposition thereto, and the oral arguments of counsel; and

The Commission having duly considered the matter and being of the opinion that the record herein does not afford adequate basis for an informed determination as to whether or not the effect of respondent's practices may be to substantially lessen competition or tend to create a monopoly; and

The Commission having determined that the case should be remanded to the hearing examiner in order that these deficiencies may be supplied:

It is ordered that this case be, and it hereby is, reopened and remanded to the hearing examiner for further proceedings in conformity with the accompanying written opinion.

Commissioners Howrey and Gwynne not participating for the reason oral argument was heard prior to their appointment to the Commission.

OPINION OF THE COMMISSION

By Mason, Commissioner

This matter is before the Commission on respondent's appeal from the initial decision of the hearing examiner that respondent's contracts with its distributors and its customers under which its products are leased or sold violate Section 3 of the Clayton Act.

Respondent distributes articles of portable equipment including blow torches, hoses, plumber's furnaces and metal cylinders containing propane gas used by plumbers, electricians and others for welding and

various commercial purposes—said products being marketed in commerce under the product name Insto-Gas through wholesalers of plumbing, heating and mill supplies. In such connection, it enters into contracts with these dealers providing that the gas cylinders which are to be delivered thereunder are being leased to the dealers and shall remain the property of respondent; and the dealers agree to have them refilled only at such filling stations (bulk plants) as have contracted to sell respondent propane gas according to specifications. The dealers additionally covenant to limit deliveries of the cylinders to users who have entered into lease agreements with the respondent and to have customers execute such agreements upon delivery by the distributor. As to the users, they agree under their contracts to purchase from the respondent, or sources authorized by it, all gas needed in refilling the leased cylinders, and further agree to use only Insto-Gas appliances and equipment with said cylinders.

In addition to the existence of the tying contracts, the facts disclosed are these: respondent's aggregate volume of sales in 1950 was $800,000; the torches sold by it in that year numbered approximately 10,000; during the past 18 years it has leased approximately 80,000 of its 18-pound cylinders under 11,000 leases; it has 200 distributors and bulk plants scattered throughout 45 states; and its business is nationwide and not confined to any saturated geographical area. The record merely discloses further that there are competitors who engage in the leasing or outright sale of cylinders and in the sale of gas and appliances, and there is the suggestion that perhaps the majority of the cylinders being used are held under lease rather than through purchase.

The hearing examiner found that respondent's contracts, insofar as they relate to the use of compressed propane gas in cylinders and the sale of equipment and appliances sold by respondent, violate Section 3 of the Clayton Act.

We are aware that the courts have generally recognized a distinction (valid in our view) between tying contracts and the general run of exclusive dealing contracts, and have been more quick to declare the illegality of the former. At the same time, while we are cognizant of Justice Frankfurter's statement in the *Standard Stations* case [1] that "tying agreements serve hardly any purpose beyond the suppression of competition," we know of no case wherein "tying contracts," without more, have been declared per se illegal.

In *International Salt Co.* v. *United States*,[2] the Court, in affirming

[1] *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 69 S. Ct. 1051 (1949).
[2] *International Salt Co., Inc.* v. *United States*, 332 U. S. 392, 68 S. Ct. 12 (1947).

a summary judgment, stated that "it is unreasonable, per se, to foreclose competitors from any substantial market." The case involved contracts tying the sale of a nonpatented to a patented product, defendant was the country's largest producer of salt for industrial purposes, it owned patents on the leased machines, and it sold about $500,000 worth of salt for use in such machines. In the later *Standard Stations* case the court related those factors and, in speaking of *International Salt*, merely said that the decision therein "at least as to contracts tying the sale of a nonpatented to a patented product, rejected the necessity of demonstrating economic consequences once it has been established that the volume of business affected is not insignificant or insubstantial and that the effect of the contracts is to foreclose competitors from a substantial market."

In the *Standard Stations* case, the court had before it a situation involving requirements contracts and it was held that the qualifying cause of Section 3 was satisfied "by proof that competition has been foreclosed in a substantial share of the line of commerce affected." Defendant was the largest seller of gasoline in a saturated seven-state area; its combined sales amounted to 23% of the total taxable gallonage sold in the area; sales by company-owned service stations constituted 6.8% of the total, sales under exclusive dealing contracts with independent service stations 6.7% of the total; retail service-station sales by Standard's six leading competitors absorbed 42.5% of the total taxable gallonage—the remaining retail sales were divided between more than 70 small companies—and it was undisputed that Standard's major competitors employed similar exclusive dealing arrangements. Exclusive supply contracts with Standard had been entered into by operators of 5,937 independent stations (16% of the retail gasoline outlets in the seven-state area), which purchased from Standard in 1947, $57,646,233 worth of gasoline and $8,200,089.21 worth of other products. These are but a few of the relevant facts which the court had before it in reaching its conclusion of illegality.[3]

In the more recent Times-Picayune opinion [4] (a proceeding under the Sherman Act), the Supreme Court had occasion to summarize the law as follows:

"From the 'tying cases' a perceptible pattern of illegality emerges:

[3] In connection with the pronouncement of the "quantity" or "Share-of-commerce" test and the purpose of the competitive impact clause, the majority in the *Standard Stations* case alluded to the legislative history surrounding the addition of the qualifying language of Section 3. For an interesting discussion of the legislative history, see Lockhart and Sacks, *The Relevance of Economic Factors in Determing Whether Exclusive Arrangements Violate Section 3 of the Clayton Act.* 65 Harvard L. Rev., 913, 933–940 (1952).

[4] *Times-Picayune Publishing Co., et al.* v. *United States,* 345 U. S. 594 (1953).

When the seller enjoys a monopolistic position in the market for the 'tying' product, or if a substantial volume of commerce in the 'tied' product is restrained, a tying arrangement violates the narrower standards expressed in Section 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred."

The *Times-Picayune* decision further points out that "the essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next." But the Court significantly failed to find that the defendant, Times-Picayune, held a "dominant" position, and notice was taken of the fact that, unlike other "tying" cases where patents or copyrights supplied at least prima facie evidence of the requisite market control, any equivalent market "dominance" by the defendant would have to be based on "comparative marketing data." Such data is wholly lacking here.

To apply the foregoing tests of illegality to the record in the instant case would be an application of legal doctrine to a factual vacuum.

We are in the dark as to whether the respondent, Insto-Gas, has a monopolistic position in the market for the "tying" product (the cylinders). There is no indication of any patent monopoly; nor do we have the benefit of comparative marketing data upon which any equivalent market dominance could be based. There is nothing to indicate respondent's relative size in the industry and no information concerning the number, or competitive standing, of competitors. Our search of the record for that "essence of illegality"—the wielding of monopolistic leverage—upon which to base some determination of a foreclosure has been in vain. Foreclosure cannot be assumed; it must be demonstrated.

Nor have we been able to ascertain whether a "substantial volume" of commerce in the "tied" product (the gas and appliance) is restrained. We know, of course, that respondent's aggregate volume of sales in 1950 was $800,000, which amount was apparently derived from at least three sources, namely, the lease charges, the sales of gas and the sales of appliances. However, contrary to the hearing examiner's findings, the respondent's contracts do not confine the use of its appliances to its own cylinders; rather, the appliances are sold to the using public without restriction and irrespective of whether or not the purchaser is going to use the same with respondent's cylinders or with those of a competitor. As a consequence we cannot determine just how much of the respondent's aggregate sales of $800,000 (an absolute, noncomparative figure) results from or is connected with the tying

contract arrangements. Thus, whether a substantial volume of commerce in the "tied" product is restrained would be anybody's guess.

Additionally, respondent asserts that its volume of sales of one of the products, the gas, represents but $\frac{1}{35}$th of 1% of the volume sold nationally. Whether this contention is relevant cannot now be determined, for the record does not clearly reveal in just what line of commerce competition is allegedly restrained. Certainly it is the burden of counsel supporting the complaint to provide a reliable definition of the relevant market.[5]

The record is thus so devoid of pertinent facts that we have no choice but to disagree with the examiner. As we have recently emphasized, the Commission should carefully consider and weigh—as an expert tribunal—the applicable economic factors.[6] Conclusive presumptions of guilt should not substitute for fair evidentiary standards.[7]

Since the record at this stage is so barren, we reserve ruling on respondent's exceptions in detail. Nevertheless, it might be advisable to note at this time respondent's objections to the hearing examiner's rulings of April 2, 1952, striking certain testimony and various exhibits offered by respondent. Typical of the matters there stricken are those relating to respondent's Exhibit 6 and testimony in regard thereto indicating that the Interstate Commerce Commission has issued a regulation to the effect that gas cylinders are not to be shipped unless filled by or with the consent of the owner. Other exhibits stricken by the ruling have reference to state laws or regulations similarly relating to the refilling of cylinders and to the use of appliances requiring propane gas.

In striking such matters the hearing examiner ruled, among other things, that they had no evidentiary bearing upon matters in issue.

The stricken evidence appears to relate to conditions under which the industry's products are distributed and, in instances, used by its customers. If state laws, for example, make unrestricted refilling of tanks by unauthorized persons illegal under local police powers, it would be highly inappropriate for the Commission to refuse to consider such mandates. This does not mean that local regulations or state laws are necessarily paramount, but we cannot conceive the public interest to be served by rejecting any consideration of respondent's alleged obligations under them.

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[5] See *U. S.* v. *E. I. DuPONT De Nemours & Co.*, 118 F. Supp. 41 (1953).

[6] In the Matter of *The Maico Co., Inc.*, F. T. C. Dkt. 5822 (1953). In the Matter of *Pillsbury Mills, Inc.*, F. T. C. Dkt. 6000 (1953).

[7] Address of Hon. Edward F. Howrey before the Section of Antitrust Law, Amer. Bar Ass'n., Chicago, Illinois, August 19, 1954.

The case is remanded for further proceedings in conformity with this opinion.

* * * * * * *

Mead, Commissioner

I concurr in the order of the Commission remanding this case to the hearing examiner for the taking of additional evidence. In my opinion, the record should show more clearly whether or not a substantial volume of commerce in the "tied" product is restrained. I am also interested in any appropriate application to the case of safety laws or regulations relating to the refilling and use of gas cylinders containing propane gas.

* * * * * * *

Commissioners Howrey and Gwynne did not participate for the reason that oral argument was heard prior to their appointment to the Commission.

IN THE MATTER OF

FOSTER-MILBURN COMPANY AND STREET & FINNEY, INC.

Docket 5937. Order and opinion, Sept. 24, 1954

Order ruling on interlocutory appeals from hearing examiner's rulings—

Granting the appeal of counsel supporting the complaint from rulings (1) striking doctor's testimony as biased and (2) refusing to permit counsel supporting the complaint, on rebuttal, to present scientific witnesses to testify concerning clinical tests performed on human subjects; and

Denying remaining appeals of both counsel.

Before *Mr. J. Earl Cox*, hearing examiner.

Mr. Joseph Callaway for the Commission.

Denning & Wohlstetter, of Washington, D. C., and *Ballantine, Bushby, Palmer & Wood*, of New York City, for respondents.

ORDER RULING ON INTERLOCUTORY APPEALS

This matter came before the Commission upon the interlocutory appeal filed on April 19, 1954, by counsel supporting the complaint from various rulings made by the hearing examiner on March 25, 1954, and upon the interlocutory appeal of counsel for the respondents filed on May 19, 1954, from the hearing examiner's order of April 27, 1954, and the answers submitted in opposition to such appeals, and oral arguments of counsel.

For the reasons stated in its accompanying opinion, the Commission is of the view that the appeal of counsel supporting the complaint should be granted in part and denied in part as there noted, and that the appeal of counsel for the respondents should be denied.

It is ordered that the appeal of counsel supporting the complaint be, and it hereby is, granted in part and denied in part as noted in the accompanying opinion.

It is further ordered that the appeal of counsel for the respondents be, and it hereby is, denied.

Commissioners Howrey and Gwynne concurring in the result.

OPINION OF THE COMMISSION

By Carretta, Commissioner:

This case is before us upon interlocutory appeals separately filed by counsel supporting the complaint and counsel for respondents from various rulings of the hearing examiner and upon the answers submitted in opposition to such appeals, and the oral arguments of counsel.

These being interlocutory appeals, this case is still in the course of trial and the rulings challenged under both appeals occurred subsequent to the time when testimony and other evidence had been introduced in support of the case-in-chief, and the respondents likewise had rested after presenting their case on defense. Certain of the matters presented for our consideration under the appeals are closely related, their determination manifestly will have important bearing on the course of future hearings herein, and we have concluded that the appeals should be entertained and now ruled upon.

The complaint which instituted this proceeding alleges in effect, among other things, that respondents have represented in advertising disseminated in commerce for the purpose of inducing the purchase of Doan's Pills and that the preparation is a cure for kidney and bladder diseases and dysfunctions, and that its use will relieve various symptoms of them as designated in the advertising. Alleging that the preparation has no therapeutic value in the treatment of any disorder of the kidneys or bladder and that it will have no beneficial effect upon any symptom or condition arising from them, the complaint additionally charges that the advertisements referred to have constituted false advertisements, and that their dissemination has been in violation of the Federal Trade Commission Act. After the filing by respondents of their answer denying various allegations of the complaint and affirmatively alleging that the preparation may be helpful in treating the symptoms enumerated in case they are due to causes referred to in the answer, hearings proceeded in the case.

Under one of the rulings of March 25, 1954, to which the appeal of counsel supporting the complaint relates, the hearing examiner declined to permit counsel as part of the case on rebuttal, to present scientific witnesses who would testify in reference to clinical tests which had been made or were then being performed with Doan's Pills on human subjects. Immediately following the hearing examiner's refusal to receive the testimony on rebuttal, counsel supporting the complaint, reserving such rights as he might have to appeal from that ruling, requested that the case-in-chief be reopened for the reception of evidence to enable him to present testimony and other evidence relating to clinical tests being conducted with Doan's Pills. Although the hearing officer then indicated that this motion likewise would be denied, he reserved his decision, however, in order to permit counsel for respondents to consider the motion and to elect whether the defense would answer or submit matters for the record in reference thereto. On April 27, 1954, and after counsel supporting the complaint had appealed from the first ruling, the hearing examiner filed his order

ruling on counsel's second motion and granted the motion to reopen the case-in-chief. The appeal filed by counsel for the respondents challenges and relates solely to that order of reopening.

In denying the request of counsel supporting the complaint to submit evidence respecting the experiments as part of the case on rebuttal, the hearing examiner in effect held that rebuttal evidence should consist of none which properly could have been received as proof in chief and he ruled that the evidence referred to could and should properly have been presented during the case-in-chief. In support of his appeal, counsel supporting the complaint states that the scientific testimony presented during the course of the case-in-chief consisted primarily of expressions of opinion by qualified experts to the effect that use of the preparation will not relieve the conditions and symptoms referred to in the advertising. Counsel further asserts that the expert witnesses called by the respondents expressed opinions to the contrary and that, basing their views in instances on clinical experiments and other knowledge, they attested additionally that the relief which they believed was afforded from the preparation's use stemmed from a diuretic action or other pharmacological effects exerted by Doan's Pills. Counsel contends that a prime purpose for seeking to present testimony on rebuttal relating to the experiments is to contradict or rebut the testimony of defense witnesses respecting the method under which the pills assertedly act in affording therapeutic value. In this connection also, we note the statement appearing in the brief of counsel supporting the complaint that he learned in January 1954, which date is subsequent to that when the case on defense was closed, that it would be possible to secure the performance of clinical tests on human beings to determine whether the preparation has the pharmacological effects thus attributed.

The receipt of evidence respecting clinical experiments performed with Doan's Pills at Government installations or by scientists elsewhere would look to securing all the facts and perhaps would be of aid to an informed determination as to the merits of that preparation. Administrative agencies are not bound by the strict rules of procedure prevailing in courts of law. Moreover, questions relating to precise limits of rebuttal testimony are matters resting largely in the discretion of the court or other tribunal encharged with ultimate responsibility for conducting the proceeding and determining its merits. Appraised against the background of the factual situation here presented, it seems very clear to us, who are thus encharged, that the ruling of the hearing examiner was unduly restrictive. We accordingly have concluded that counsel's appeal from that ruling has merit

and should be granted. The same general considerations likewise apply in appraising the matters presented under the respondents' appeal. It was not error for the hearing examiner subsequently, in the exercise of his discretion, to grant the motion to reopen the case on direct. The contentions advanced in support of the respondents' appeal from that ruling are deemed to be without merit and their appeal must be denied accordingly.

Among other rulings of the hearing examiner challenged in the appeal of counsel supporting the complaint is that striking all the testimony of Dr. Bartter of the National Institutes of Health, insofar as his testimony pertained to certain experiments performed by a physician called by the respondents, and the ruling under which the witness was precluded from continuing with his testimony appraising those experiments. At the conclusion of an examination on *voir dire*, the hearing examiner stated that he deemed the witness to have been testifying to matters with which the witness agreed but which appeared in statements, largely in some instances and in others entirely, prepared by Dr. Dobbs, the Commission's chief medical officer, and the examiner rebuked counsel supporting the complaint for the manner in which the arrangements for securing Dr. Bartter's testimony were conducted by the medical officer. Stating that the circumstances under which this testimony was secured were such that they constituted a flagrant violation of traditional principles of procedure and ordinary fairmindedness, the hearing examiner additionally held that the witness must be regarded as biased and lacking in objectivity. He accordingly disqualified the witness, struck his prior testimony and declined to receive his testimony when counsel asked to recall him to testify without using notes or memoranda.

When called by counsel for the respondents, a Dr. Ezickson had testified, among other things, to a clinical study completed by him with respect to 85 patients and received in evidence were a summary and observation reports purporting to show the number of cases in which improvement of patients' subjective and objective symptoms was noted by the doctor. Submitted and identified also were the doctor's data sheets in reference thereto and hospital records likewise pertaining to those patients, these apparently comprizing altogether more than 2,500 sheets of records. The appeal brief states that, on behalf of counsel supporting the complaint, Dr. Bartter was requested to review that testimony and all related exhibits with a view to appraising such clinical study. It further appears that he and counsel supporting the complaint later conferred, and it was decided that the practical way for the doctor to testify to his opinions and expedi-

tiously identify and discuss for the record particular exhibits on which he would base his conclusions as to whether Dr. Ezickson's findings in instances contained discrepancies or had adequate support in case records, was to reduce his testimony to writing.

During his examination, the doctor testified that he received the transcript of Dr. Ezickson's testimony and the case records and other exhibits in October 1953, and went over them and formed his opinion with respect to the evidence and made notes. In January 1954, he requested Dr. Dobbs' help in reviewing the records for factual material. Dr. Dobbs likewise had prepared some notes and they conferred and discussed their respective longhand notes and Dr. Bartter's conclusions, and the latter requested that changes be made in Dr. Dobbs' notes and that they be typewritten as revised. Upon their receipt, the witness, with the records and his own notes in front of him, proceeded to revise those typewritten notes in accordance with his views. Except for the typewritten notes pertaining to the records of approximately ten patients, which the doctor upon the basis of his own study adopted as correct without changes, the notes as revised were then dictated by him to a stenographer and those groups constitute the notes which he used or proposed to use when he was on the stand.

We think it apparent from the record that the witness had fair opportunity to form his own candid scientific opinions as to the design and merit of the clinical study in question. Even prior to the time when any assistance was enlisted by him, the witness had considered the testimony and exhibits and apparently formulated conclusions in broad reference to the procedures pursued in the clinical study. Dr. Bartter testified to the effect that he confirmed the citations to the record as contained in the original typewritten notes and that the matters contained in the notes which he was using represented or were adopted as his own conclusions based on his study of the records. In rejecting the contentions of counsel supporting the complaint and in concluding in effect that the witness must be deemed not to have formed independent views of his own with respect to the tests, the hearing examiner ignored the sworn testimony in reference to the witness's own studies in preparing to testify. The fact that the doctor's professional life has been spent in close contact with experimental research, his apparent professional standing, and the position occupied by him in the service of our Government go far in dispelling mere supposition that the interpretations and opinions expressed by him and contained in the notes have stemmed from his intellectual subservience to another's views. These considerations and other matters contained in the record, we believe, create a fair pre-

sumption that the views expressed in his testimony and notes represent opinions sincerely entertained and adopted by him upon the basis of his own individual study and consideration of the tests.

Under procedures prevailing in the courts, matters in reference to bias or interest on the part of expert witnesses relate to the weight and credibility of their testimony rather than their eligibility to testify in the first instance. There, as in administrative proceedings, the right to cross-examine affords a means of testing whether the views of the witness are sincere and based on accurate facts and conform to scientific truth. In the situation presented here, we emphatically reject the hearing examiner's view that the assistance rendered to the witness was furnished in disregard of principles of fairmindedness or that its acceptance was improper. We accordingly hold that the hearing examiner erred in refusing to permit counsel to proceed with the witness' examination. Inasmuch as the rulings forbidding the use of notes and memoranda and striking his prior testimony were made under an erroneous assumption that the matters attested to could not be deemed to represent the witness' own scientific views, these rulings manifestly were improper and the appeal of counsel supporting the complaint therefrom is similarly being granted. It is our observation, moreover, that the censure which the hearing officer directed in the course of those rulings to counsel supporting the complaint and others was unwarranted.

Other matters presented under the foregoing appeal pertain to counsel's contention that the hearing examiner erred in refusing to receive Dr. Bartter's typewritten notes and memoranda in evidence and to his challenge to the ruling rejecting them under an offer of proof. These notes were indeed received but such reception was solely for the purposes of the voir dire examination. Since we have noted that the hearing examiner concluded in effect that all evidence to be adduced by the witness was incompetent but that such conclusion was patently erroneous, all the exclusionary rulings including the rejection of certain offers of proof can be regarded as lacking sound basis. On the other hand, inasmuch as an appeal was filed and the case presented on a record adequate for our review of the rulings, questions pertaining solely to the rejection by the hearing examiner of this as well as another related offer of proof now appear moot. Moreover, it is conceivable that criteria or considerations other and additional to those now appearing and originally controlling to informed decision as to the admissibility of the oral and documentary evidence offered through the witness might become relevant when the previous ruling excluding the documentary evidence is reconsidered below in the light of our opinion

here upon any reoffer of the notes. With due regard to these considerations, we have decided that granting of counsel's appeal on these aspects is not warranted.

In concluding, we deem it appropriate to interject reference to a matter outside the scope of the issues presented under the appeals. As of the time these appeals were filed, no ruling had been made by the hearing examiner with respect to a motion to dismiss made orally by respondents on November 30, 1953, more than three months prior to the time when any of the appealed from rulings occurred. The respondents contended in support of the motion, among other things, that the Commission's prior decision in *Docket No. 2711* is *res judicata* and bars decision on the merits of the issues here, and ruling was reserved by the hearing examiner. The hearing examiner should have ruled on that motion prior to or contemporaneously with the rulings which were appealed from and presented for review here.

Commissioners Howrey and Gwynne concur in the result.

IN THE MATTER OF

UNITED STATES STEEL CORPORATION ET AL.

Docket 6078. Order and opinion, Sept. 24, 1954

Order denying appeal of steel drum manufacturers from hearing examiner's adverse ruling on their request for an order authorizing an informal stipulation-agreement in settlement of the charge of unlawful combination and agreement to fix prices of steel drums; and granting in part respondents' motion for a bill of particulars.

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

Mr. Fletcher G. Cohn, *Mr. James I. Rooney*, *Mr. Paul R. Dixon*, *Mr. Everette MacIntyre* and *Mr. William A. Mulvey* for the Commission.

Mr. Thomas Lynch, of New York City, and *Mr. L. L. Lewis*, *Mr. Merrill Russell*, *Mr. John C. Bane, Jr.* and *Reed, Smith, Shaw & McClay*, of Pittsburgh, Pa., for United States Steel Corp. and United States Steel Co.

Mr. J. Theodore Ross, of Pittsburgh, Pa., for Jones & Laughlin Steel Corp. and Jones & Laughlin Steel Barrel Co.

Mayer, Froedlich, Spiess, Tierney, Brown & Platt, of Chicago, Ill., for Inland Steel Co. and Inland Steel Container Co.

Mr. Gordon W. Mallatratt, of Richmond, Calif., and *Dickler & Halbert*, of New York City, for Rheem Manufacturing Co.

Mr. Thomas F. Patton, *Mr. Harold C. Lumb* and *Mr. William J. De Lancey*, of Cleveland, Ohio, for Republic Steel Corp.

ORDER RULING ON RESPONDENTS' APPEALS AND DIRECTING COUNSEL SUPPORTING THE COMPLAINT TO FURNISH CERTAIN INFORMATION

This matter having come on for hearing upon the respondents' appeal dated October 26, 1953, from the hearing examiner's order of October 15, 1953, and the appeal additionally filed by them on November 5, 1953, from the hearing examiner's order of October 28, 1953, denying respondents' joint motion for a bill of particulars and upon the briefs and other memoranda filed in support of and in opposition to such appeals and oral arguments of counsel; and

The Commission having duly considered the appeals and having determined, for reasons stated in the accompanying opinion, that the appeal dated October 26, 1953, should be denied and that the appeal filed on November 5, 1953, should be granted in part and denied in part:

It is ordered that respondents' appeal of October 26, 1953, from the hearing examiner's order of October 15, 1953, be, and the same hereby is, denied.

It is further ordered that respondents' appeal from the hearing examiner's order of October 28, 1953, denying respondents' request for a bill of particulars be, and the same hereby is, granted in part and denied in part as noted in this order and in the accompanying opinion.

It is further ordered that counsel in support of the complaint be, and he hereby is, directed to file in this proceeding, on or before the 29th day of October, 1954, a statement disclosing the period of time to be covered by the evidence to be offered by him in the course of his case-in-chief and additionally identifying illustrative drums among a representative number of product types which he will contend have been designated or adopted by the respondents as "standard" for pricing purposes.

Commissioner Mead dissenting to the extent that he would deny both appeals filed by respondents.

OPINION OF THE COMMISSION

By Carretta, Commissioner:

Presented for our determination here are two interlocutory appeals filed by the respondents prior to the reception of evidence in this proceeding. The appeals challenge adverse rulings made by the hearing examiner on motions which were filed by the respondents.

Under the first of these interlocutory appeals, respondents urge in effect that the Commission issue an order authorizing or permitting counsel supporting the complaint to proceed to negotiate in settlement of this proceeding a stipulation agreement with respondents under which respondents will agree to limit or discontinue voluntarily such acts or practices as may be agreed upon, defined and described in that agreement. In denying respondents' similar request directed to him, the hearing examiner stated that the Commission's statement of policy as promulgated through the Federal Register of August 29, 1947, in reference to settlement of cases by trade practice conference and stipulation agreements constitutes an expression that the privilege of settling formal cases through such agreements will not be extended by the Commission to respondents charged with suppression or restraint of competition through conspiracy or monopolistic practices. In support of their appeal here, respondents contend, among other things, that it is probable that frank discussions between counsel of the issues may satisfy counsel supporting the complaint that there is no justification for a charge of conspiracy or other deliberate violation of law and that negotiation and acceptance of an agreement on respondents' part voluntarily to limit or discontinue practices defined,

described and agreed upon would reduce unnecessary delay and expense resulting from litigating this matter.

It does not appear that questions pertaining to the Commission's policy expression on settlement of cases under the trade practice conference and stipulation procedures have been presented heretofore for the Commission's consideration directly through the medium of an interlocutory appeal under Rule XX of the Commission's Rules of Practice, and the matters to which the appeal of October 26, 1953, relates, therefore, must be regarded as novel. Without passing upon the question as to whether this appeal properly lies within Rule XX of the Commission—because oral argument herein was heard—we accordingly are of the view that respondents' appeal should be considered and ruled upon by the Commission.

The complaint in this proceeding alleges that respondents, for many years last past and continuing to the time of its issuance, have acted unlawfully to suppress and prevent competition by entering into and carrying out an understanding and planned common course of action, and pursuant thereto formulated and put into effort certain practices, methods and policies under which they agreed, among other things, to fix and maintain uniform base prices, uniform price differentials, and uniform terms and conditions of sale in the offering for sale and distribution in commerce of their steel drums. The acts and practices alleged in the complaint to have been engaged in, manifestly fall within the category of matters involving suppression or restraint of competition through conspiracy or monopolistic practices and the privilege of settling formal cases of this type through stipulation agreements is foreclosed in the Commission's statement of policy referred to above.

In formulating and publishing its policies in reference to the settlement of cases under the trade practice conference and stipulation procedures, the Commission published simultaneously also an explanation of the considerations underlying their adoption and stated that the cooperative procedures afforded for the settlement of cases as noted should never be permitted as an easy escape for willful violators of the laws administered by the Commission or for avoiding or delaying the effectiveness of its corrective action. The circumstance that the explanatory statement additionally contained an assertion that consipiracies and monopolistic practices are, with few exceptions, deliberately engaged in for the purpose of restraining competition and with knowledge of their illegality and that violations of this type frequently also are criminal violations of the Sherman Act serves in no manner to suggest that, under the Commission's policy, inquiry

or negotiations might be carried on and proceedings suspended in order to appraise the motives inspiring formation and adoption of the alleged conspiracy or monopolistic practices all directed to ascertaining if an agreement voluntarily to discontinue the acts or practices could be negotiated and properly accepted in the circumstances. We are of the view that the hearing examiner correctly interpreted the Commission's here pertinent statement of policy to preclude settlement of cases through the cooperative procedures there referred to when the practices charged involve suppression or restraint of competition through conspiracy or monopolistic practices. Respondents' appeal of October 26, 1953, accordingly is deemed to be without merit.

The other or companion appeal challenges the hearing examiner's order denying respondents' joint motion for a bill of particulars. Respondents contend that the complaint inadequately informs as to the period of time to which the alleged combination or conspiracy relates and fails to define or limit properly the specific acts and practices to which the complaint is directed. They submit also that it fails to identify the agents through whom the alleged agreements were entered into or the time or times to which the evidence will relate, and these asserted omissions, respondents urge, improperly deny them the right to reasonable notice of the charges and adequate opportunity to meet such charges. Among other things, respondents additionally state in this connection that, while such information as they now possess indicates that the particular practices to which the complaint is addressed originated many years ago and were carried on during 20 years or more, any inquiry embracing this period by respondents into their corporate records and corporate records of predecessors no longer in existence would entail great expense and would be needlessly wasted should counsel supporting the complaint have in mind presenting evidence only with respect to a more recent period. one beginning, for example, in 1945.

Respondents' motion for a bill of particulars as directed to the hearing examiner was not filed until more than eight months after service of the complaint in this proceeding. During the intervening period, however, pursuant to requests on behalf of counsel for respondents, the hearing examiner on ten occasions granted extensions of time within which to file answers, the last of which extended the time therefor until October 16, 1953. Respondents' answers were submitted and filed with the Commission on the same day that counsel for respondents filed with the hearing examiner their joint motion for a bill of particulars. In circumstances thus characterized by delay in submitting the original motion and considering the fact that

the complaint in this proceeding clearly states a cause of action, the Commission perhaps might be warranted in summarily rejecting this application for leave to appeal.

We have decided, nevertheless, that this appeal should be duly considered on its merits in order to ascertain if the hearing examiner's ruling on that motion was a correct ruling. One of the charges to which challenge was directed in the motion below is subparagraph (1) of paragraph 8, which alleges that the respondents have agreed to adopt and maintain uniform "standards," or specifications, for pricing purposes and respondents in effect urged below that the failure to identify any of such standards or specifications in the charges contributes to prejudicing their preparations for the defense. Although this charge serves to state a cause of action and therefore must be regarded as valid from that standpoint, it can be concluded that the failure to identify the drums mentioned more particularly needlessly might place an undue burden on the respondents incident to investigation and preparing their defense as to this aspect of the proceeding. The probability of undue investigatory expense in such connection would be greatly reduced if counsel supporting the complaint were to furnish to respondents information identifying typical drums among a representative number of product types which he will contend have been designated or adopted through agreement as "standard" for the purpose aforementioned. Our accompanying order directs that counsel supporting the complaint furnish information in that respect and the respondents' appeal is to this extent being granted.

Turning now to consideration of other charges which allege, among other things, that respondents have agreed to fix and maintain uniform base prices, differentials, terms and conditions of sale, these matters are closely related to additional charges to the effect that the respondents have agreed to adopt, maintain and utilize a pricing formula or mathematical device there described in detail allegedly in order to calculate price revisions and to fix and maintain prices. With respect to these charges, the Commission is of the view that the complaint clearly is legally sufficient and fairly apprises respondents with respect to the acts and practices charged. The hearings of the Commission are held at intervals, a respondent is not required to proceed with his defense until after completion of the case-in-chief, and the absence of additional particulars as to these charges will not here deprive respondents of reasonable notice or adequate opportunity to meet the charges.

This conclusion, notwithstanding, the Commission is not in a position to gainsay counsel's statement that substantial expense may be incurred by respondents incident to investigating their files back 20, 30 or more years to the time when respondents state they now believe various of the practices referred to in the complaint originated. Should it come about, as respondents suggest, that counsel supporting the complaint has in mind presenting evidence only with respect to some more recent period, some of the expense incident to thus examining their records might be considered unnecessary expense. The probability of such undue expense, if any, would be obviated if counsel supporting the complaint were to furnish information as to the period of time to be covered by the evidence which will be offered by him in the course of the case-in-chief. Considerations of fairness, therefore, warrant that counsel supporting the complaint be directed likewise to furnish this information.

Nothing contained herein should be interpreted to mean that counsel in support of the complaint may not bring the evidence up to date and introduce evidence of relevant and material facts occurring subsequent to the date of the complaint.

Commissioner Mead dissents to the extent that he would deny both appeals filed by respondents.

IN THE MATTER OF

HUDSON GARMENT CO., INC., ET AL.

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

Docket 6219. Complaint, June 23, 1954—Decision, Oct. 1, 1954

Consent order requiring a New York manufacturer to cease representing falsely, by affixing markings, insignia, etc., resembling those used by the U. S. Armed Forces, that their Armed Services type jackets and outer garments were manufactured for the U. S. Armed Forces and in accordance with their specifications.

Before *Mr. James A. Purcell*, hearing examiner.
Mr. Terral A. Jordan for the Commission.
Mr. I. Arthur Rosenberg, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Hudson Garment Co., Inc., a corporation, and Samuel Zigman, Simon Ginsberg, and Pearl Zigman, individually and as officers of said corporation, hereafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Hudson Garment Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 600 Broadway, New York, New York. Respondents Samuel Zigman, Simon Ginsberg and Pearl Zigman are respectively president, treasurer and secretary of said corporate respondent. These individuals acting in cooperation with each other formulate, direct and control all of the policies, acts and practices of said corporation. The address of said individual respondents is the same as that of said corporate respondent.

PAR. 2. Respondents are now, and have been for more than one year last past, engaged in the manufacturer, sale and distribution of heavy outerwear, including Armed Services type garments, in commerce, among and between the various States of the United States and in the District of Columbia. Respondents maintain, and at all

times mentioned herein have maintained a substantial course of trade in said garments, in commerce among and between the various States of the United States.

PAR. 3. The garments manufactured, sold and distributed by respondents in the course and conduct of their business as aforesaid closely resemble the jackets and outer garments issued and furnished to members of the United States Armed Forces in color, pattern and style. Respondents also cause to be affixed to said garments certain markings, insignia, labels and tags which purport to designate the branch of service, model, contract number, specification number, stock number and directions as to the manner of use in substantially the same form, kind and manner as the markings, insignia, labels and tags prescribed and used by the United States Armed Forces on similar and like garments. Typical of the words and terms appearing on the markings, labels and tags, are as follows:

JACKET, INTERMEDIATE, FLYING

TYPE B–15

SPECIFICATION NO. 1872FS

STOCK NO. 754–28937

ORDER NO. 55–7283

ARMY AIR FORCES TYPE.

B–9

PARKA

TANKER JACKET

U. S. ARMY TYPE.

Typical of insignia used on certain of said garments is that of the Army Air Forces, consisting of a five point star with two wings enclosed in a circle, with the words "Army Air Forces" appearing immediately below.

PAR. 4. Through the use of said colors, patterns and styles and the markings, insignia, labels and tags, as described in Paragraph Three hereof, respondents have represented and implied and do represent and imply that said jackets and outer garments, manufactured, sold and distributed by them in commerce were manufactured for the United States Armed Forces and in accordance with specifications of said Armed Forces.

PAR. 5. Said representations and implications are false, misleading and deceptive. In truth and in fact, respondents' said garments

were neither manufactured for the United States Armed Forces nor in accordance with specifications of said Armed Forces.

PAR. 6. By selling and distributing to wholesalers and dealers said products manufactured as aforesaid and having affixed to them the markings, insignia, tags and labels hereinabove described, respondents furnish to such wholesalers and dealers the means and instrumentalities through and by which they may mislead and deceive the purchasing public as to the origin, kind, type, and style of their said jackets and outer garments.

PAR. 7. In the course and conduct of their business respondents are in direct and substantial competition with other corporations and firms and individuals engaged in the sale in commerce of jackets and outer garments.

PAR. 8. The sale and distribution in commerce of said garments in the color, style, design and with markings, as hereinabove alleged, has had and now has the tendency and capacity to and does mislead a substantial portion of the purchasing public into the belief that said garments were manufactured for the United States Armed Forces and in accordance with specifications of said Armed Forces. As a result thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

PAR. 9. The aforesaid acts and practices of the respondents, as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION 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 October 1, 1954, the initial decision in the instant matter of hearing examiner James A. Purcell, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JAMES A. PURCELL HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 23, 1954, issued and subsequently served its complaint upon the respondents, Hudson Garment Co., Inc., a corporation, Samuel Zigman, Simon Ginsberg, and Pearl Zigman, the three last named respondents being charged as individuals

and as officers of the corporate respondent, whose principal office and place of business is located at No. 600 Broadway, New York, New York. Respondents are engaged in the manufacture, sale and distribution of heavy outerwear, including garments of the type used in the Armed Services of the United States.

Thereafter there was filed with the Federal Trade Commission a stipulation between the parties, dated August 16, 1954, providing for entry against respondents of a consent order, which said stipulation appears of record in this formal proceeding. By the terms thereof the parties agree that the complaint and said stipulation shall constitute the entire record herein, withdrawal of the answer heretofore filed by respondents on July 12, 1954, being moved and hereby granted; that respondents admit all of the jurisdictional allegations set forth in the complaint; that the parties waive hearing before a hearing examiner or the Commission, and also the making of findings of facts and conclusions of law by the Hearing Examiner or the Commission; that respondents waive the right to file exceptions or to demand oral argument before the Commission and all further and other procedure before the Hearing Examiner or the Commission to which, but for the execution and filing of the aforesaid stipulation, the respondents might be entitled under the Federal Trade Commission Act or the rules of practice of the Commission. Said stipulation specifically waives any and all right, power or privilege to challenge or contest the validity of the order hereinafter made and further provides that the complaint forming the basis of this proceeding may be used in construing the terms of the said order, which order may be altered, modified or set aside in the manner provided by law for other orders of the Commission where such action is sought. Said stipulation was executed for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

On the basis of the foregoing, the undersigned Hearing Examiner concludes that this proceeding is in the public interest and, in conformity with the action in said stipulation contemplated and agreed upon, makes the following order:

ORDER

It is ordered that respondents Hudson Garment Co., Inc., a corporation, and Samuel Zigman, Simon Ginsberg, and Pearl Zigman, individually and as officers of said corporation, and respondents' agents, representatives and employes, directly, or through any corporate or other device, in the offering for sale, sale or distribution of wearing apparel in commerce, as "commerce" is defined in the Fed-

eral Trade Commission Act, or of any other garments, do forthwith cease and desist from representing, directly or by implication, by marking, branding, labeling, tagging, or in any other manner, contrary to fact; that such merchandise was manufactured for the Armed Forces of the United States or in accordance with specifications of said Armed Forces.

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 October 1, 1954].

IN THE MATTER OF

JOSEPH SALADOFF TRADING AS BONDED THRIFT STAMP CO. AND CROWN TRADING STAMP CO.

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

Docket 6201. Complaint, Apr. 8, 1954—Decision, Oct. 3, 1954

Consent order requiring a Philadelphia seller of a sales promotional plan consisting of the sale of trading stamps to retail merchants for distribution to their customers and the redemption of the stamps by him in the form of various articles of merchandise, to cease representing falsely that his business was bonded, that merchants purchasing his plan would be assured of increased business, etc.

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

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

Mr. Harry Arronson and *Mr. Leon Edelson*, of Philadelphia, Pa., for respondent.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission(having reason to believe that Joseph Saladoff, an individual, trading as Bonded Thrift Stamp Co. and Crown Trading Stamp Co., hereinafter referred to as the respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Joseph Saladoff is an individual, trading and doing business as Bonded Thrift Stamp Co. and Crown Trading Stamp Co. with his office and principal place of business located at 136–138 North Fifth Street in the City of Philadelphia, Pennsylvania.

PAR. 2. Respondent is now and has been for more than two years last past engaged in the sale and distribution of a sales promotion plan which consists of the sale of trading stamps to retail merchants for distribution to their customers and the redemption of the trading stamps by respondent with premiums in the form of various articles of merchandise. In connection with the sales promotion plan respondent furnishes to his customers various advertising folders, booklets and display sheets advertising and explaining the plan.

Respondent causes and has caused said stamps to be transported from his place of business in the State of Pennsylvania to purchasers thereof at their points of location in the various States of the United States other than Pennsylvania. Respondent also causes and has caused the premiums to be shipped and transported from his place of business in the State of Pennsylvania to the merchant retailers who purchase his sales promotion plan and also in many instances to the customer of said merchant retailer who has accumulated the number of trading stamps listed for said premium; both the merchant retailer and his customers are located in States of the United States other than Pennsylvania.

There is now, and has been for more than two years last past, a course of trade in said stamps and premiums by said respondent in commerce between and among the various States of the United States.

PAR. 3. In connection with and in furthering the sale of his stamps and premiums, respondent has furnished to his salesman for use in soliciting orders a sales contract or order blank in which it is stated:

Business Builder for retail stores

All premiums for filled booklets will be supplied by the company without any additional cost.

BUSINESS INCREASE GUARANTEED

PAR. 4. Through representations made in advertising, contracts, forms, circulars and form letters distributed by respondent, and through oral representations made by his salesman, respondent has represented that his business is bonded or that compliance with the sales contract is assured by a bond; that the sales promotion plan, including the trading stamps and premiums, will assure and can be depended upon to afford an increase in sales on the part of merchants subscribing to or purchasing the same; that he supplies premiums to his customers for display purposes which become their property without cost; and that he will redeem all the stamps delivered by the merchants to their customers and all such premiums will be delivered without additional cost to the merchant or the merchant's customers.

Respondent's agents have also represented to merchants that only a selected few in each trade area will be sold the trade promotion plan including the stamps and premiums.

PAR. 5. The aforesaid representations are false, misleading and deceptive. In truth and in fact, respondent is not bonded nor has any bond been obtained to assure compliance with the terms of the contract or sales agreement between respondent and his merchant customers, nor to assure delivery of the premiums to the customers of the merchant. The use of said promotional plan will not increase the sales

of the merchant customers in many instances. Respondent has in many instances attempted to collect for the premiums supplied to the merchant customer for display purposes or attempted to recover the merchandise. In many instances respondent has failed to deliver the premiums offered for the redemption of the stamps and in other instances has demanded a fee for delivery of the premiums. Respondent does not sell to selected customers but, on the contrary, offers to sell and sells his sales plan to any merchant who will purchase same without regard to geographic location or whether other merchants in the community have purchased the plan.

PAR. 6. Through the use of the word "Bonded" in his trade name, respondent has further falsely represented that he is bonded or under bond to assure compliance with the terms of his sales agreement and to assure delivery of the premiums for which his trading stamps are to be redeemed.

PAR. 7. The use by respondent of the false, misleading and deceptive statements and representations with respect to his trading stamps and promotion plans has had and now has the capacity and tendency to mislead purchasers of said stamps and promotional plans into the erroneous and mistaken belief that such statements and representations are and were true and to induce the purchase of said stamps and promotional plans and to induce members of the public to patronize the dealers who purchase said stamps and promotional plans because of such erroneous and mistaken belief.

PAR. 8. The acts and practices of respondent, as hereinabove set forth, are all to the 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.

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 October 3, 1954, the initial decision in the instant matter of hearing examiner James A. Purcell, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JAMES A. PURCELL HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on April 8, 1954, issued and subsequently served its complaint upon the respondent, Joseph Saladoff, an individual trading as Bonded Thrift Stamp Co., and Crown Trad-

ing Stamp Co., whose office and principal place of business is located at Nos. 136–138 North Fifth Street, Philadelphia, Pennsylvania. Respondent is engaged in the sale and distribution of sales promotional plans involving the use of trading stamps, which plans and stamps he sells to retail merchants for their use in promoting sales and, on the basis of the stamps distributed by the retail merchants to customers, awards premiums in the form of various articles of merchandise.

Threafter there was filed with the Federal Trade Commission a stipulation between the parties, dated August 2, 1954, providing for entry against respondent of a consent order, which said stipulation appears of record in this formal proceeding. By the terms thereof the parties agree that the complaint and said stipulation shall constitute the entire record herein, withdrawal of the answer heretofore filed by respondent on May 17, 1954, being moved and hereby granted; that respondent admits all of the jurisdictional allegations set forth in the complaint; that the parties waive hearing before a hearing examiner or the Commission as also the making of findings of fact and conclusions of law by the hearing examiner or by the Commission; that respondent waives the right to file exceptions or to demand oral argument before the Commission as also all further and other procedure before the hearing examiner or the Commission to which, but for the execution and filing of the aforesaid stipulation, the respondent might be entitled under the Federal Trade Commission Act or the rules of practice of the Commission. Said stipulation specifically waives any and all right, power or privilege to challenge or contest the validity of the order hereinafter made and further provides that the complaint forming the basis of this proceeding may be used in construing the terms of the said order which order may be altered, modified or set aside in the manner provided by law for other orders of the Commission where such action is sought.

On the basis of the foregoing, the undersigned Hearing Examiner concludes that this proceeding is in the public interest and, in conformity with the action in said stipulation contemplated and agreed upon, makes the following order:

ORDER

It is ordered that the respondent Joseph Saladoff, an individual now trading as Bonded Thrift Stamp Co., Crown Trading Stamp Co., or under any other name or names, and his agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of

sales promotional plans, trading stamps or premiums, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That his business is bonded, or that any bond or other assurance has been given to provide compliance with his sales agreement.

(b) That merchants subscribing to or purchasing respondent's sales promotion plan, including trading stamps and premiums, will be assured of increased business.

(c) That premiums which are to become the property of the merchant customer subscribing to or purchasing respondent's plan, will be supplied to his merchant customers for display or other purposes, unless such premiums are in fact so furnished and supplied on such basis, and no attempt is or will be made to collect for or to recover said premiums.

(d) That premiums will be delivered by respondent and without additional cost or charge to the merchant, or the merchant's customers, who send in respondent's stamps for redemption, unless respondent in all instances delivers all premiums, and without imposing or attempting to collect a charge or fee therefor; or misrepresenting in any other manner the terms or conditions under which premiums are to be delivered or supplied by respondent in connection with the redemption of stamps purchased from respondent.

(e) That the sale of respondent's plan or stamps will be restricted to only a few or to a limited number of selected merchants in each trade area, unless such sales thereof are so limited.

2. Using the word "Bonded," or any word or words of similar import or meaning, as a part of a trade name under which respondent does business.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered that the respondent herein shall within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist [as required by said declaratory decision and order of October 3, 1954].

IN THE MATTER OF

EDWARD L. MILLEN COMPANY

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

Docket 6193. Complaint, Mar. 12, 1954—Decision, Oct. 5, 1954

Order requiring a Brookline, Mass., seller of insecticides designated "Cedar Wall" and "Cedar Wall with DDT" to cease advertising falsely that "Cedar Wall" contained DDT, that the two products repelled moths and carpet beetles and prevented damage to clothes and fabrics and that "Cedar Wall" was fully guaranteed.

Before *Mr. Loren H. Laughlin*, hearing examiner.
Mr. Edward F. Downs for the Commission.
Mr. Ezekiel Wolf, of Boston, Mass., for respondent.

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 October 5, 1954, the initial decision in the instant matter of hearing examiner Loren H. Laughlin, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (hereinafter referred to as the Commission) on March 12, 1954, issued its complaint herein under the Federal Trade Commission Act and thereafter duly served said complaint upon the above-named and styled respondent. This complaint alleges in substance that the respondent for more than one year last past has been engaged in the business of selling and distributing certain products in commerce and has sent certain false and misleading advertising to his dealers for display and distribution to the purchasing public in which respondent claimed concerning his products, designated as "Cedar Wall" and "Cedar Wall With DDT," that when such products were applied to closet walls or to clothes, as the case might be, they would repel moths and other insects and would prevent insect damage to clothes and other fabrics. It is further alleged that during this period respondent has made representations that his said products were either fully or unconditionally guaranteed by him. The foregoing alleged acts, practices and representations

of the respondent, subsequently particularized in the Findings of Fact herein, if true, were and are unfair methods of competition and unfair and deceptive acts and practices in commerce and constitute violations of Section 5 (a) of the Federal Trade Commission Act, as amended, 52 Stat. 111–112; 15 U. S. C. A., Sec. 45 (a).[1] Use of the words "guarantee" and "guaranteed" in advertising, without clear and unequivocal disclosure of the actual security afforded to the buyer has been repeatedly prohibited by the Commission and such rulings have been sustained by the courts. The numerous cases are digested in C. C. H. Trade Regulation Reports, 10th Ed., Par. 5099.30.

On August 9, 1954, the respondent in due course filed his answer, denominated as his "Admission," which admits all the material allegations of the complaint and further, without any reservation, waives all intervening procedures in further proceedings as to the said facts alleged in the complaint.

The undersigned Hearing Examiner on August 15, 1954, was duly designated by the Commission to hear this proceeding and perform other duties herein according to law, in the place and stead of Frank Hier, the Hearing Examiner theretofore appointed by the Commission for such purposes.

Upon the whole record the Hearing Examiner finds that the respondent has been fully afforded due process of law in all particulars and that by his said answer the respondent has elected not to contest the facts but to submit this matter for decision upon the pleadings by waiving hearing and all other intervening procedures, as fully provided for in Rule VIII of the current Rules of Practice of the Commission, effective August 3, 1951, of which respondent had due legal notice as well as specific notice in the complaint itself of the effect of his answer prior to the filing thereof.[2]

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[1] Misrepresentation of the effectiveness of insecticides has been repeatedly found to be unlawful and ordered discontinued by the Commission. The cases are digested in C. C. H. Trade Regulation Reports, 10th Ed., Par. 5081.358. See *Gulf Oil Corporation* v. *F. T. C.*, (C. C. A. 5, 1945), 150 F. 2d 106, 1944–1945 Trade Cases, Par. 57, 382, affirming 38 F. T. C. 242 (1944).

[2] Rule VIII (a) insofar as pertinent here provides:

"If respondent desires to waive hearing on the allegations of fact set forth in the complaint and not to contest the facts, the answer may consist of a statement that respondent admits all material allegations of fact charged in the complaint to be true. Such answer will constitute a waiver of any hearing as to the facts alleged in the complaint and findings as to the facts and conclusions based upon such answer shall be made and order entered disposing of the matter without any intervening procedure. The respondent may, however, reserve in such answer the right to submit proposed findings and conclusions of fact or law * * * and the right to appeal * * *."

And Rule VIII (c) provides:

"Admission in the answer * * * of all the material allegations of fact contained in the complaint shall constitute a waiver of hearing. Upon such admission the * * * (hearing) examiner and the Commission shall be deemed authorized, without further notice to

Therefore the undersigned Hearing Examiner now finds that this proceeding is substantially in the public interest, and upon the whole record, including the material facts alleged in the complaint, all of which are admitted in the answer, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Respondent Edward L. Millen is an individual doing business as Edward L. Millen Company with his office and principal place of business located at Brookline, Massachusetts.

2. Respondent is now and for more than one year last past has been engaged in the business of offering for sale, selling and distributing a product designated "Cedar-Wall" and a product designated "Cedar Wall With DDT." The formulas and directions for use of these products are as follows:

Formulas:

Cedar Wall—Active: Cedar Wood Oil ---------- 3½%
Inert: Genuine Ground Red Cedar Wood, Cement and Plastic Binders ---------- 96½%

Cedar Wall with DDT
Active: Cedar Wood Oil ---------- 3½%
Dichloro Diphenyl Trichlorethane ---------- 2%
Inert: Genuine Ground Red Cedar Wood, Cement and Plastic Binders ---------- 94½%

Directions:

Cedar Wall: (for brush application) to a 5 lb. bag add 3 to 3½ qts. of water in a clean pail. To a 10 lb. bag add 6 to 7 qts. of water in a clean pail. Stir to uniform consistency of heavy whipped cream. Allow to stand for ten minutes before applying. For application with a trowel use less water and mix to trowel consistency. APPLICATION—Clean closet thoroughly and spread old newspapers on the floor. Use a 2½ to 3 inch flat paint brush. Scoop up a quantity of Cedar-Wall on the side of the brush and daub on to surface to the thickness of a penny (about 1/16 inch). Don't apply any thinner coat and not too thick in the corners.

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respondent, to find the facts, to draw conclusions therefrom, and to enter an appropriate order." (Parenthetical word after omission accords to present official title.)

The Commission's earlier rule to like effect was sustained in *Hill, et al.*, v. *F. T. C.*, (C. C. A. 5, 1941), 124 F. 2d 104, 106, wherein it was held that an order of the Commission based upon pleaded and admitted facts was valid without a hearing and the presentation of evidence. The Court said that even without the Commission's rule:
"* * * it is fundamental that judicial admissions are proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them. A fact admitted by answer is no longer a fact in issue."

Cedar-coat the entire inside of closet but not the floor, doors or wood trim. Clean up floor and wood trim with a wet rag or sponge. Brush and pail can be cleaned easily with water.

Cedar-Wall with DDT: Same as above but add: Closet walls should be lightly sprayed once a year with 5% DDT solution. Clothes should be sprayed with an approved insecticide spray, being careful to treat all seams and folds of garments before storage.

Respondent causes his products when sold to be transported from within the Commonwealth of Massachusetts to purchasers thereof, located in various other States of the United States and maintains and at all times mentioned herein has maintained, a course of trade in said products in commerce among and between the various States of the United States. His volume of trade in such commerce has been and is substantial.

3. Respondent is now, and at all times hereinafter mentioned has been, in substantial competition with other individuals and with corporations, partnerships and firms engaged in the sale in commerce of insecticides.

4. In the course and conduct of his business and for the purpose of inducing the purchase of his said products in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent in circulars, pamphlets and banners, sent by him to dealers for display and distribution to the purchasing public, has made certain claims with respect to his said products. Among and typical, but not all inclusive, of such claims are the following:

CEDAR WALL your closet with a Brush!
Repels Moths—Contains DDT.
CEDAR WALL with DDT repels and resists *moths* and carpet beetles. It is *moth-repellant* and will prevent *moth* damage to clothes and fabrics. It has been laboratory tested.
Just Brush On Moth-Repellant CEDAR WALL.
Fragrant enduring—contains DDT.
CEDAR WALL with DDT repels MOTHS. When applied to walls CEDAR WALL prevents MOTH damage.
Its FULLY GUARANTEED.

5. Through the use of the statements and representations hereinabove set forth, and others similar thereto not specifically set out herein, respondent has represented, directly or by implication, as follows:

(a) That the product designated "CEDAR WALL" contains DDT.

(b) That the products designated "CEDAR WALL" and "CEDAR WALL with DDT" repel moths and prevent damage by moths.

(c) That "CEDAR WALL with DDT" repels carpet beetles, resists moths and carpet beetles and prevents damage to clothes and fabrics by moths.

(d) That "CEDAR WALL" is fully or unconditionally guaranteed.

6. The aforesaid statements and representations used and disseminated by respondent as hereinabove set forth, are false, misleading and deceptive. In truth and in fact:

(a) Respondent's product designated "CEDAR WALL" does not contain DDT.

(b) Respondent's products designated "CEDAR WALL" and "CEDAR WALL with DDT" will not repel moths or prevent damage by moths.

(c) "CEDAR WALL with DDT" will not repel carpet beetles, resist moths or carpet beetles nor will it prevent damage to clothes or fabrics by moths.

(d) The "guarantee" furnished by respondent does not in any manner relate to the effectiveness of "CEDAR WALL" as an insecticide. The guarantee furnished by respondent is only against cracking when penetrated by a nail or screw.

7. The use by respondent of the foregoing false, misleading and deceptive statements and representations, and others similar thereto, has the tendency and capacity to mislead a substantial portion of the purchasing public into erroneous and mistaken belief that such statements and representations are true, and to induce a substantial portion of the purchasing public, because of such mistaken and erroneous belief, to purchase respondent's said products. As a direct result of the practices of respondent, as aforesaid, substantial trade in commerce is and has been diverted to respondent from his said competitors and injury has been and is done to competition in commerce between and among the various States of the United States.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondent herein.

2. The aforesaid acts and practices of respondent, as hereinbefore found, are all to the prejudice and injury of the public and of the competitors of respondent 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 Edward L. Millen, an individual doing business as Edward L. Millen Company, or doing business under any other name, his representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of the products designated "CEDAR WALL" and "CEDAR WALL with DDT" or any other product or products of substantially similar composition or possessing substantially similar properties, whether sold under these names or under any other name or names, forthwith cease and desist from representing directly or by implication:

(1) That the product designated "CEDAR WALL" contains DDT.

(2) That said products repel moths or prevent damage by moths.

(3) That the product designated "CEDAR WALL with DDT" repels carpet beetles, resists moths or carpet beetles or prevents damage to clothes or fabrics by moths.

(4) That "CEDAR WALL" is fully guaranteed unless such guarantee is unconditional, or that said product is guaranteed in any way unless the terms and conditions of the actual guarantee are disclosed in immediate conjunction therewith.

ORDER TO FILE REPORT OF COMPLIANCE

It is ordered that the respondent herein shall within sixty (60) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order to cease and desist [as required by said declaratory decision and order of October 5, 1954].

IN THE MATTER OF

FRED SCHAMBACH

MODIFIED CEASE AND DESIST ORDER

Docket 5405. Order, Oct. 11, 1954

Order modifying, in accordance with orders of CA–DC, subparagraph "1" of the Commission's order of September 30, 1952,[1] so that it forbid Schambach to sell or distribute in commerce, lottery devices "which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme".

Before *Mr. James A. Purcell*, hearing examiner.
Mr. J. W. Brookfield, Jr. for the Commission.
Nash & Donnelly, of Washington, D. C., for respondent.

ORDER MODIFYING ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, testimony and other evidence, and the recommended decision of the hearing examiner; and the Commission having made its findings as to the facts, concluded that respondent had violated the provisions of the Federal Trade Commission Act, and on September 30, 1952, issued an order to cease and desist against said respondent and his agents, representatives and employees; and

Respondent thereafter having filed in the United States Court of Appeals for the District of Columbia Circuit his petition to review and set aside said order to cease and desist; and that Court having considered the cause, on September 15, 1953, and October 9, 1953, and entered orders modifying said Commission order and affirming and enforcing the Commission's order as so modified; and

The Commission being of the opinion that subparagraph number "1" of its order and the preamble, insofar as applicable thereto, should be modified so as to accord with the judgment of the United States Court of Appeals for the District of Columbia Circuit, the same is hereby modified to read as follows:

It is ordered that respondent, Fred Schambach, his agents, representatives and employees, directly or through any corporate or any other device, do forthwith cease and desist from:

[1] The original order had prohibited Schambach from supplying to others push cards or other lottery devices "which * * * are to be used, or which, due to their design, are suitable for use in the sale or distribution of * * * merchandise to the public." 49 F. T. C. 248, 255.

Selling or distributing in commerce, as "commerce" is defined in the Federal Trade Commission Act, push cards, punchboards, or other lottery devices which are designed or intended to be used in the sale or distribution of merchandise to the public by means of a game of chance, gift enterprise or lottery scheme.

It is further ordered that respondent Fred Schambach, an individual, shall, within thirty (30) days after service upon him of this order, file with the Commission a report in writing setting forth in detail the manner and form in which he has complied with the order of September 30, 1952, as modified herein.

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IN THE MATTER OF

I. SPIEWAK & SONS, INC., ET AL.

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

Docket 6220. Complaint, June 24, 1954—Decision, Oct. 19, 1954

Consent order requiring manufacturers of Armed Service type jackets, in New York City to cease representing falsely, by use of colors and styles and of affixed markings, insignia, labels, etc., that said outer garments were manufactured for the U. S. Armed Forces and in accordance with the Armed Forces specifications.

Before *Mr. John Lewis*, hearing examiner.
Mr. Terral A. Jordan for the Commission.
Chambers & Chambers, of New York City, for respondents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that I. Spiewak & Sons, Inc., a corporation, and Philip Spiewak, Gerald Spiewak, and Robert Spiewak, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent I. Spiewak & Sons, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its office and principal place of business located at 1186 Broadway, New York, New York. Respondents Philip Spiewak, Gerald Spiewak and Robert Spiewak are respectively President, Vice President and Treasurer of said corporate respondent. These individuals acting in cooperation with each other formulate, direct and control all of the policies, acts and practices of said corporation. The address of said individual respondents is the same as that of corporate respondent.

PAR. 2. Respondents are now, and have been for more than one year last past, engaged in the manufacture, sale and distribution of heavy outerwear, including imitation Armed Service type jackets, in commerce, among and between the various States of the United States

and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained a substantial course of trade in said garments, in commerce among and between the various States of the United States.

PAR. 3. The garments manufactured, sold and distributed by respondents in the course and conduct of their business as aforesaid closely resemble the jackets and outer garments issued and furnished to members of the United States Armed Forces in color, pattern and style. Respondents also cause to be affixed to said garments certain markings, insignia, labels and tags which purport to designate the branch of service, model, contract number, specification number, stock number and directions as to the manner of use in substantially the same form, kind and manner as the markings, insignia, labels and tags prescribed and used by the United States Armed Forces on similar and like garments. Typical of the words and terms appearing on the markings, labels and tags, are as follows:

TYPE N-1
Contract No. 1SS
Mgr 212630
Foul Weather Jacket

Jacket, Field, M-1943

This Jacket increases greatly the warmth of clothing worn under it in cold and temperate climates because it is *windproof.*

USE: Sweat will chill you; therefore, when you start to get hot, open collar and loosen cuffs and waist. If that is not enough, remove clothing worn underneath.

Waist Drawstring

Pull drawstring up and loop each end to keep proper adjustment; in warm weather or when overheated, tie drawstring across body and open the unbuttoned jacket.

Specification #1SS 3098.

Typical of insignia used on certain of said garments is that of the Air Forces, consisting of a five point star with two wings enclosed in a circle, with the words "Air Forces" appearing immediately above.

PAR. 4. Through the use of said colors, patterns and styles and the markings, insignia, labels and tags, as described in Paragraph 3 hereof, respondents have represented and implied and do represent and imply that said jackets and outer garments, manufactured, sold and distributed by them in commerce were manufactured for the United States Armed Forces and in accordance with specifications of said Armed Forces.

PAR. 5. Said representations and implications are false, misleading and deceptive. In truth and in fact, respondents' said garments

were neither manufactured for the United States Armed Forces nor in accordance with specifications of said Armed Forces.

PAR. 6. By selling and distributing to wholesalers and dealers said products manufactured as aforesaid and having affixed to them the markings, insignia, tags and labels hereinabove described, respondents furnish to such wholesalers and dealers the means and instrumentalities through and by which they may mislead and deceive the purchasing public as to the origin, kind, type, and style of their said jackets and outer garments.

PAR. 7. In the course and conduct of their business respondents are in direct and substantial competition with other corporations and firms and individuals engaged in the sale in commerce of jackets and outer garments.

PAR. 8. The sale and distribution in commerce of said garments in the color, style, design and with markings, as hereinabove alleged, has had and now has the tendency and capacity to and does mislead a substantial portion of the purchasing public into the belief that said garments were manufactured for the United States Armed Forces and in accordance with specifications of said Armed Forces. As a result thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has been done to competition in commerce.

PAR. 9. The aforesaid acts and practices of the respondents, as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION 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 October 19, 1954, the initial decision in the instant matter of hearing examiner John Lewis, as set out as follows, became on that date the decision of the Commission.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on June 24, 1954, issued and subsequently served its complaint upon the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce in vio-

lation of the provisions of said Act. Thereafter, respondents appeared by counsel and entered into a stipulation for consent order, dated August 11, 1954. Said stipulation provides that the answer heretofore filed by respondents is withdrawn and expressly waives a hearing before a hearing examiner or the Commission, the making of findings of fact or conclusions of law by the hearing examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the hearing examiner or the Commission to which respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission. Respondents consent to the entry of an order to cease and desist in the form provided for in said stipulation which shall have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon, and waive any and all right, power or privilege to challenge or contest the validity of said order. Said stipulation further provides that the signing thereof is for settlement purposes only and does not constitute an admission of violation by respondents, except that respondents admit all the jurisdictional allegations of the complaint.

The said stipulation having been submitted to the above-named hearing examiner, theretofore duly designated by the Commission, for his consideration in accordance with Rule V of the Commission's Rules of Practice, and it appearing that said stipulation provides for an appropriate disposition of this proceeding, the same is hereby accepted and ordered filed as part of the record herein by the hearing examiner who, after considering the complaint and said stipulation, finds that this proceeding is in the interest of the public and makes the following:

JURISDICTIONAL FINDINGS

PARAGRAPH 1. Respondent I. Spiewak & Sons, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 1186 Broadway, New York, New York. Respondent Philip Spiewak, Gerald Spiewak, and Robert Spiewak are president, vice president, and treasurer, respectively of said corporate respondent. The address of said individual respondent is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and have been for more than one year last past, engaged in the manufacture, sale and distribution of heavy outerwear garments, including various armed service type jackets, in commerce, among and between the various States of the United States and in the District of Columbia. Respondents main-

tain, and at all times mentioned herein have maintained, a substantial course of trade in said garments, in commerce among and between the various States of the United States.

ORDER

It is ordered that respondents I. Spiewak & Sons, Inc., a corporation, and Philip Spiewak, Gerald Spiewak, and Robert Spiewak, individually and as officers of said corporate respondent, and respondents' agents, representatives and employees, directly or through any corporate or other device, in the offering for sale, sale or distribution of wearing apparel in commerce, as "commerce" is defined in the Federal Trade Commission Act, or of any other garments, do forthwith cease and desist from representing, directly or by implication, by marking, branding, labeling, tagging, or in any other manner contrary to fact, that such merchandise was manufactured for the Armed Forces of the United States or in accordance with specifications of said Armed Forces.

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 October 19, 1954].

IN THE MATTER OF

ARGUS CAMERAS, INC.

Docket 6199. Complaint, Mar. 26, 1954—Decision, Oct. 20, 1954

Dismissal—on the ground that respondent voluntarily discontinued all the practices involved, that resumption thereof was unlikely, and that everything that could be accomplished by a desist order had already been accomplished—of complaint charging a manufacturer of photographic equipment at Ann Arbor, Mich., with violation of Sec. 2 (a) of the Clayton Act as amended through its practice of pricing its products on an annual-volume discount basis, and violation of Sec. 2 (d) of the same Act through granting two of its customers an extra 3% discount from list price on all purchases made from their mail order business as compensation for advertising the products in their nationally-distributed mail order catalogs.

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

Mr. Peter J. Dias, and Mr. Rice E. Schrimsher for the Commission.

Rogers, Hoge & Hills, of New York City, for respondent.

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

This matter coming on for the Commission's consideration of the question whether or not the respondent's showing of complete abandonment of the practices alleged in the complaint to have been unlawful warrants dismissal of said complaint without prejudice, which question was certified to the Commission by the hearing examiner under the provisions of Rule XIV (9) of the Commission's Rules of Practice; and

The Commission having considered the record thus far made, including the respondent's motion for dismissal and supporting material, and the answer in opposition to said motion filed by counsel in support of the complaint; and

The Commission having determined that said question should be answered in the affirmative and having set forth its reasons therefor in the accompanying written opinion:

It is ordered that the complaint in this proceeding be, and it hereby is, dismissed, without prejudice, however, to the right of the Commission to issue a new complaint or to take such further or other action against the respondent at any time in the future as may be warranted by the then existing circumstances.

Commissioner Mead dissenting.

OPINION OF THE COMMISSION

By Gwynne, Commissioner:

Complaint charges violation of Sections 2 (a) and (d) of the amended Clayton Act. Prior to the taking of testimony, respondent filed a motion supported by affidavits requesting the hearing examiner to dismiss the complaint or, in the alternative, to certify to the Commission for its determination the following question: Should the proceedings herein be terminated and the complaint herein be dismissed for lack of public interest? Grounds for its motion are that the respondent has fully and voluntarily abandoned the practices complained of and will not resume them. The motion was supported by two affidavits by W. J. Scholten, a vice president and director of respondent, who was responsible for its selling policies. On May 24, 1954, the hearing examiner certified the matter to the Commission.

The respondent is a manufacturer of photographic equipment which it sells to retailers. The complaint charges respondent in Count I with violation of Section 2 (a) of the Clayton Act in its practice of pricing on an annual volume discount basis as follows:

	Percent
Purchases less than $600 per year	33⅓
Purchases from $600 to $99,999	40
Annual purchases of $100,000	40 plus 7

Count II charges that respondent gave an extra 3% discount to two customers for advertising purposes which allowance was not made available to other customers.

Following the service of the complaint, respondent took steps to modify its practices and took additional steps when attention was called to the fact that the new pricing policy did not eliminate all the charges made in the complaint. It now appears that respondent has discontinued all the illegal practices charged in the complaint. The affidavits of Mr. Scholten are to the effect that the abandonment of such discounts has been made by respondent without intention of resuming them or any similar arbitrary discounts.

It is well settled that a discontinuance of the practices which the Commission found to constitute a violation of the law does not render the controversy moot. (*FTC* v. *Goodyear Tire & Rubber Company* (1938) 304 U. S. 257.) The fact that a respondent has discontinued an illegal practice even prior to the issuance of a complaint does not prevent the Commission from issuing a cease and desist order. "In such cases, the Commission must exercise its discretion in view of all the circumstances." (*Guarantee Veterinary Company* v. *FTC* (1922)

285 Fed. 853.) In *Eugene Dietzgen Company* v. *FTC* (1944) 142 F. 2d 321, the court said:

> The propriety of the order to cease and desist, and the inclusion of a respondent therein, must depend on all the facts which include the attitude of respondent towards the proceedings, the sincerity of its practices and professions of desire to respect the law in the future and all other facts. Ordinarily the Commission should enter no order where none is necessary. This practice should include cases where the unfair practice has been discontinued.
>
> On the other hand, parties who refused to discontinue the practice until proceedings are begun against them and proof of their wrongdoing obtained, occupy no position where they can demand a dismissal. The order to desist deals with the future, and we think it is somewhat a matter of sound discretion to be exercised wisely by the Commission—when it comes to entering its order.
>
> The object of the proceeding is to *stop* the unfair practice. If the practice has been surely stopped and by the act of the party offending, the object of the proceedings having been attained, no order is necessary, nor should one be entered. If, however, the action of the wrongdoer does not insure a cessation of the practice in the future, the order to desist is appropriate. We are not satisfied that the Commission abused that discretion in the instant case.

In exercising its discretion, the Commission should examine not only the question of a discontinuance of all the illegal practices (as distinguished, for example, from the giving up only of certain specific acts (see *Hershey Chocolate Company* v. *FTC* (1941) 121 F. 2d 968), but it should also consider the likelihood of the practices being resumed in the future. Promises of a respondent as to its future course of action should be weighed in the light of attending circumstances. For example, in *Goshen Manufacturing Company* v. *Myers Manufacturing Company*, 242 U. S. 202, a suit based on infringement of a patent, it appeared that defendant had sold his factory before the suit was filed with no present intention of resuming manufacturing. Nevertheless, he was still attacking the validity of the patent so an injunction was held proper. In *Sears, Roebuck and Company* v. *FTC* (1919) 258 Fed. 307, respondent had discontinued the illegal practices before complaint issued and in its answer alleged it had no intention of resuming them. Nevertheless, it contended that its acts were not illegal because the law was unconstitutional. A cease and desist order was held proper. In *Perma-Maid Company* v. *FTC* (1941) 121 F. 2d 282, the record failed to show that the alleged attempts made by respondent to terminate the illegal practices were successful or were likely to be so in the future. Issuance of an order was therefore upheld. In *U. S.* v. *W. T. Grant Company* (1953) 345 U. S. 629, the court declined to grant an injunction to prevent future violation of Section 8 of the Clayton Act where defendants advised

the court that "the interlocks no longer existed and disclaimed any intention to revive them." The court said, at page 633;

"The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance, and, in some cases, the character of the past violations."

In the matter of *Wildroot Company, Inc.*, (1953) Docket No. 5928, it appeared that the respondent had subscribed to the Trade Practice Conference Rules for the Cosmetic and Toilet Preparations Industry, which Rules adequately covered the practices complained of. There was also in the record a declaration under oath of respondent's vice president and general manager that the respondent had no intention of resuming the practices. The complaint was dismissed without prejudice.

As bearing upon the good faith of the respondent in the instant case and the likelihood of the resumption of the practices complained of, the record shows as follows.

At various times during 1947 and 1948, respondent was contacted by representatives of the Commission by telegram, letter and in person for information in regard to respondent's fair trade contracts and its discount practices. The requested information was furnished and said representatives were allowed unrestricted access to respondent's books. In 1949, respondent received a letter from the Commission, the material part of which follows:

"The Commission has reviewed the preliminary investigation made pursuant to an application for complaint alleging violation of Section 5 of the Federal Trade Commission Act through the alleged use of full line forcing and tie-in sales practices in connection with the sale of cameras and photographic equipment by Argus, Inc., proposed respondent in the above-numbered application.

"From the facts as disclosed by the preliminary investigation, the Commission does not contemplate at this time further proceedings in this matter. You are advised, however, that the Commission may, at any time, take such further action as the public interest may require."

In a similar manner in 1952, respondent was again contacted and information secured as to its discount structure and particularly as to its transactions with two customers.

A copy of the complaint was mailed April 1, 1954. On April 15, respondent wrote customers that certain discounting practices were being discontinued in order to comply with the direction of the Commission. Respondent says its intention was to abandon all the practices complained of by the Commission. At the hearing, when respondent's attention was called to the fact that all the practices complained of had not been abandoned, respondent agreed to give these up also and filed a second affidavit to that effect.

The record indicates that the respondent has at all times been cooperative; that prior to the service of the complaint, respondent was not specifically advised that its practices were correct nor was it told that they were irregular; that the course of dealing over the years was such as to justify respondent in the belief, prior to the issuance of the complaint, that no challenge was being made to its practices.

Dismissal of a complaint in cases of this general character is not the usual procedure. It should not be done unless there is a clear showing of unusual circumstances which in the interest of justice require it. Those circumstances exist in this case. Respondent has shown its good faith by both word and deed. That fact has an important bearing on the likelihood of the practices complained of not being resumed in the future.

We conclude (1) that respondent has voluntarily discontinued all the practices involved in the complaint, (2) that a resumption of these practices is not likely, and (3) that everything that could be accomplished by a cease and desist order has already been accomplished.

It is therefore ordered that the complaint be dismissed without prejudice.

Commissioner Mead dissents.