IN THE MATTER OF

LESTER B. PATTERSON ET AL. DOING BUSINESS AS LESLIE PATTON

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

Docket 6876. Complaint, Aug. 23, 1957—Decision, Dec. 10, 1957

Consent order requiring sellers in Chicago to cease advertising falsely in magazines and otherwise that persons completing their correspondence course could make $50 a day or $15,000 to $20,000 a year buying and selling scrap gold; that it was "to be found wherever you go," "waiting for you to pick it up"; and that the U.S. Government paid $35 an ounce for the gold contained in "old junk jewelry."

Mr. Kent P. Kratz supporting the complaint.
Mr. John A. Nash, of Chicago, Ill., for respondents.

INITIAL DECISION OF JOHN LEWIS, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on August 23, 1957, charging them with the use of unfair and deceptive acts and practices in commerce, in violation of the Federal Trade Commission Act, by falsely representing the advantages to be derived from taking respondents' correspondence course on the subject of buying and selling scrap gold, including the earnings which may be expected by persons taking such course, and the availability and price of such scrap. After being served with said complaint, respondents appeared by counsel and entered into an agreement dated October 16, 1957, containing a consent order to cease and desist purporting to dispose of all this proceeding as to all parties. Said agreement, which has been signed by all respondents, by counsel for said respondents, and by counsel supporting the complaint, and approved by the director and assistant director of the Commission's Bureau of Litigation, has been submitted to the above-named hearing examiner for his consideration, in accordance with section 3.25 of the Commission's rules of practice for adjudicative proceedings.

Respondents, pursuant to the aforesaid agreement, have admitted all the jurisdictional facts alleged in the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. Said agreement further provides that respondents waive any further procedural steps before the hearing examiner and the Commission, the making of find-

ings of fact or conclusions of law and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has been agreed that the order to cease and desist issued in accordance with said agreement shall have the same force and effect as if entered after a full hearing and that the complaint may be used in construing the terms of said order. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, and that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing consent order, and it appearing that the order provided for in said agreement covers all the allegations of the complaint and provides for an appropriate disposition of this proceeding as to all parties, said agreement is hereby accepted and is ordered filed upon this decision's becoming the decision of the Commission pursuant to sections 3.21 and 3.25 of the Commission's rules of practice for adjudicative proceedings, and the hearing examiner, accordingly, makes the following jurisdictional findings and order:

1. Respondents Lester B. Patterson and Edith F. Patterson are copartners trading under the name of Leslie Patton with their office and principal place of business located at 335 W. Madison Street, Chicago, Ill.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against said respondents under the Federal Trade Commission Act, and this proceeding is in the interest of the public.

ORDER

It is ordered, That respondents Lester B. Patterson and Edith F. Patterson, individually or as copartners, trading as Leslie Patton, or trading under any other name, their 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 a course of instruction in buying and selling scrap gold, do forthwith cease and desist from representing, directly or by implication, that:

1. Persons completing said course of instruction and engaging in the buying and selling of scrap gold can make $50 a day or $12,000

to $20,000 a year or any other amount in excess of the amount that is customarily and usually earned by such persons.

2. The United States Government pays $35 per ounce, or any other amount for scrap gold that is in excess of the net amount actually paid after all deductions.

3. Scrap gold is readily available or that it can be obtained readily or with little effort.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's rules of practice, the initial decision of the hearing examiner shall, on the 10th day of December 1957, become the decision of the Commission; and, accordingly:

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.

Decision

IN THE MATTER OF

TEITELBAUM FURS ET AL.

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

Docket 6850. Complaint, July 25, 1957—Decision, Dec. 13, 1957

Consent order requiring a furrier in Beverly Hills, Calif., to cease violating the Fur Products Labeling Act by attaching fictitious price tags to fur products, by advertising in newspapers which failed to disclose that certain products contained artificially colored fur and represented prices falsely as reduced from regular prices which were actually fictitious, and by failing in other respects to comply with the advertising, invoicing, and labeling requirements.

Mr. John J. McNally for the Commission:

Leland & Plattner, by *Mr. Haase Kalik*, of Los Angeles, Calif., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents with violation of the Federal Trade Commisssion Act and of the Fur Products Labeling Act and the rules and regulations promulgated thereunder, by misbranding and by falsely and deceptively advertising and invoicing their fur products.

After the issuance of the complaint, respondents, their counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the director and the assistant director of the Commission's Bureau of Litigation, and thereafter transmitted to the hearing examiner for consideration.

The agreement identifies respondent Teitelbaum Furs as a California corporation, with its office and principal place of business located at 414 North Rodeo Drive, Beverly Hills, Calif., and individual respondents Albert Teitelbaum and Francis K. Somper as president and treasurer, and as vice president, respectively, of the corporate respondent, stating that these individual respondents formulate, direct and control the acts, practices, and policies of the corporate respondent and have the same office and principal place of business as the corporate respondent.

The agreement provides, among other things, that respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had

been duly made in accordance with such allegations; that the record on which the initial decision and the decision of the Commisssion shall be based shall consist solely of the complaint and this agreement; that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the complaint may be used in construing the terms of the order agreed upon, which may be altered, modified or set aside in the manner provided for other orders; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint; and that the order set forth in the agreement and hereinafter included in this decision shall have the same force and effect as if entered after a full hearing.

Respondents waive any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with the agreement.

The order agreed upon fully disposes of all the issues raised in the complaint, and adequately prohibits the acts and practices charged therein as being in violation of the Federal Trade Commission Act, the Fur Products Labeling Act and the rules and regulations promulgated thereunder. Accordingly, the hearing examiner finds this proceeding to be in the public interest and accepts the agreement containing consent order to cease and desist as part of the record upon which this decision is based. Therefore,

It is ordered, That Teitelbaum Furs, a corporation, and its officers, and Albert Teitelbaum and Francis K. Somper, individually and as officers of said corporation, and their representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale, in commerce, or the transportation or distribution in commerce, of fur products, or in connection with the sale, advertising, offering for sale, transportation, or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Setting forth on labels attached thereto fictitious prices or any misrepresentation as to the value of such fur products, either directly or by implication;

2. Failing to affix labels to fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(e) The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale, or transported or distributed it in commerce;

(f) The name of the country of origin of any imported furs used in the fur product;

3. Setting forth on labels attached to fur products:

(a) Information required under §4(2) of the Fur Products Labeling Act and the rules and regulations thereunder in abbreviated form or in handwriting;

(b) Information required under §4(2) of the Fur Products Labeling Act and the rules and regulations thereunder mingled with nonrequired information;

B. Falsely or deceptively invoicing fur products by:

1. Failure to furnish invoices to purchasers of fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(e) The name and address of the person issuing such invoice;

(f) The name of the country of origin of any imported fur contained in a fur product;

2. Setting forth information required under §5(b)(1) of the Fur Products Labeling Act and the rules and regulations thereunder in abbreviated form;

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

1. Fails to disclose that the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is the fact;

2. Represents, directly or by implication, that the regular or usual price of any fur product is any amount which is in excess of the price at which the respondents have usually and customarily sold such products in the recent regular course of their business;

3. Makes use of comparative prices or percentage savings claims unless such compared prices or percentage savings are based upon current market values or unless a bona fide price at a designated time is stated;

4. Makes pricing claims or representations of the types referred to in paragraphs 2 and 3 above, unless there are maintained by respondents full and adequate records disclosing the facts upon which such claims or representations are based, as required by rule 44(e) of the rules and regulations.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's rules of practice, the initial decision of the hearing examiner shall, on the 13th day of December 1957, become the decision of the Commission; and, accordingly:

It is ordered, That respondents Teitelbaum Furs, a corporation, and Albert Teitelbaum and Francis K. Somper, individually and as officers of said corporation, 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.

Decision

IN THE MATTER OF

GLENN W. BRAUN AND CLYDE WITT TRADING AS RENNEL PRODUCTS

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

Docket 6691. Complaint, Dec. 13, 1956—Decision, Dec. 18, 1957

Order requiring sellers in Toledo, Ohio, to cease representing falsely in advertisements in newspapers—prepared mainly from solicited testimonial letters, writers of which were given free bottles of the product—that their preparation "Rennel Concentrate," essentially a laxative, constituted an effective treatment for obesity and would greatly reduce weight.

Mr. John W. Brookfield, Jr., supporting the complaint.

Boggs, Boggs & Boggs by *Mr. Ralph S. Boggs* of Toledo, Ohio, for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

Formal complaint, issued December 13, 1956, charged respondents with disseminating and causing the dissemination through the United States mails and in commerce of false advertisements for a drug preparation called Rennel Concentrate. The allegations of the complaint in effect charge violation of section 12(a)(1) of the Federal Trade Commission Act which is, by section 12(b), made an unfair or deceptive act or practice within the meaning of section 5. After service of the complaint, answer was filed by the respondents.

Hearings were held pursuant to notice and agreement of counsel in Toledo, Ohio, and Ann Arbor, Mich. Respondents were represented by counsel who participated in the hearings and who were afforded full opportunity to be heard, to introduce evidence pertinent to the issues and examine and cross-examine witnesses. Proposed findings as to the facts, conclusions, and orders were submitted by both sides.

The facts found, the conclusions reached and the order entered herein are based upon the entire record and hearing the testimony. All findings as to the facts, conclusions and orders proposed by all parties hereto not adopted and concluded in this initial decision are specifically rejected.

FINDINGS AS TO THE FACTS AND CONCLUSIONS

Respondents Glenn W. Braun and Clyde Witt are copartners trading in the name of Rennel Products and are located in that business at 417 Main Street, Toledo, Ohio.

Respondents are now, and have been for more than 1 year prior to the issuance of the complaint, engaged in the business of selling and distributing a preparation called "Rennel Concentrate" which is sold and distributed in labeled 4-ounce bottles.

The qualitative formula and the directions for use of said Rennel Concentrate are as follows:

Fl.	Sassafras Bark	¼%
Fl.	Oregon Graperoot	¼%
Fl.	Senna Leaves	¼%
Fl.	Prickly Ash Bark	¼%
FE.	Cascara Sagrada	7%
	Magnesium Sulphate	18%
	Saccharine	9/10%
	Sodium Benzoate	1/10%
	Alcohol	1%
	Water	72%

Follow these simple directions for making 1 pint of liquid medicine. Empty contents of this bottle into a clean pint bottle. Add enough unsweetened grapefruit juice to fill bottle. Or use the juice of two lemons instead and add water to fill pint bottle. Shake well and use as directed under "Directions for taking."

IMPORTANT—Do not take until diluted as per mixing directions above. Cut down on starchy foods, such as potatoes, white bread, fatty foods, sweets, etc. Eat more fruit, leafy vegetables and fruit juices. Caution, use only as directed.

Average Directions for Taking after mixing as per Directions on Left Side Panel—Adults: Take two tablespoonsful before breakfast and two tablespoonsful at bedtime. As this preparation contains laxative as well as other ingredients, increase or decrease dosage according to bowel action. Some people need only one tablespoonful twice a day. NO medicine containing a laxative should be taken when severe abdominal pain, nausea, vomiting or other symptoms of appendicitis are present.

The gross volume of business done by respondents in said preparation averaged $70,000 per year for each of the years 1954 and 1955. There is no proof that any sales of Rennel Concentrate were made without the State of Ohio.

During the period of time respondents have been in this business they have caused advertisements for said preparation to be placed from time to time in from 81 to 85 daily newspapers published in the State of Ohio, including the Toledo Blade. Copies of advertisements placed in the Toledo Blade on October 6, 1954; January 10, 1955; February 7, 1955; March 7, 1955; April 22, 1955; May 4, 1955; July

11, 1955; and August 1, 1955, were received in evidence, and are typical of respondents' advertising of Rennel Concentrate. Such or similar advertising was published in the 81 to 85 daily newspapers on an average of two or three times a week, according to their circulation. The newspapers having a larger circulation were used more frequently.

The Toledo Blade, during the period of time of publication of these advertisements, had a daily circulation as follows:

Total circulation	191, 405
Mail circulation	8, 515
Out of the State circulation	11, 323

The daily circulation of various other newspapers in which respondents' advertisements were published were also given in the record. The circulation of the Toledo Blade is merely used as an illustration.

The advertisements so published were prepared by respondents from testimonial letters written to respondents by users of the preparation. These testimonial letters were solicited with the understanding that the writer of the testimonial would be given six free bottles of Rennel Concentrate if his or her letter was used in advertising. Such advertisements were placed in the various newspapers at respondents' direction by the Miller Advertising Co. of Toledo, Ohio.

Typical of the representations contained in said advertisements are as follows:

I have been taking Rennel for just a short time but have found so much improvement in my health. I have already lost 25 pounds and feel more ambitious * * *. (Com. Ex. 1)

I have been taking Rennel for just a short time * * * I have already lost 25 pounds and feel more ambitious * * *. With Rennel Concentrate I didn't have to starve myself or go on a diet. * * * (Com. Ex. 6)

I have lost 75 pounds reducing with Rennel Concentrate. I did weigh 240 pounds. * * * I did not starve myself at any time and could eat anything I wanted. (Com. Ex. 7)

On the above state of facts the finding is made that respondents have disseminated and caused the dissemination by United States mails and in commerce of advertisements for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of Rennel Concentrate, which is a drug within the meaning of section 12(a)(1) of the Federal Trade Commission Act. Through the use of said newspaper advertisements respondents have represented directly and by implication that Rennel Concentrate constitutes a competent and effective treatment for obesity and will greatly reduce weight.

It was agreed between counsel on the record that the product involved in this proceeding and its directions for use are the same as the

product involved in a companion case, Rennel Sales, et al., Docket No. 6692. Also counsel for respondents in both proceedings being the same it was agreed on the record that the direct and cross-examination of the expert medical witnesses to be offered in support of the allegations of the complaint, would be along the same line and one hearing for receiving such testimony would suffice. Accordingly, the hearing examiner directed on the record that there be only one hearing held to receive such testimony and that copy of the proceedings at that hearing go into the official record and become a part thereof in docket No. 6692 and in this proceeding.

At such hearing, held by agreement of the parties and order of the hearing examiner in Ann Arbor, Mich., on April 25, 1957, two medical experts appeared and testified. They were Dr. Jerome W. Conn and Dr. Henry H. Swain. Their qualifications as experts are in the record. They testified generally on direct examination that obesity is overweight, but if the degree of overweight is less than 20 percent above the average weight it is not usually called obesity; that they had each seen the formula and directions for use of the product in question; that the effect of the preparation when taken in accordance with directions would be that of a mild laxative; that a laxative is not a competent or effective treatment for obesity or overweight and will not reduce obesity or overweight; that the ingredients of Rennel Concentrate taken singly or in combination will not reduce a person's obesity or overweight; that Rennel Concentrate will not reduce a person's obesity or overweight.

Neither doctor had ever taken Rennel Concentrate or prescribed it for any patients nor performed any experiments with this preparation. Both doctors admitted that the effect of a laxative may be to cause a runny stool, in which event a person's weight is temporarily reduced by the weight of water or liquid so removed from the body, but that upon loss of any significant amount of body fluid the person would become thirsty and rapidly replace the weight loss so caused by an equal or approximately equal intake of fluid. Both such weight loss and the reversal would happen in a matter of hours. Reduction of obesity or overweight to be of any significance means not a loss of body fluids, but a loss of fatty tissues which have been built up in the body over a period of time by a greater intake of calories in food than the body has used up in the expenditure of energy. Such excess of calories is deposited in the body as fat. The only way to reduce the fatty tissues in the body is to reverse the process and cut down the intake of calories to a point where the calories used by the body in expenditure of energy over a period of time is less than the intake. When this happens the

store of fat in the tissues is used up by the body to replace the deficiency in intake of calories. This does not mean that the reduction of fatty tissues will be permanent. Fat will again be stored in the body and one's weight will increase again any time the intake of calories over a period of time exceeds those used by the body in the expenditure of energy. There are certain drugs that are recognized as assisting in cutting down the ratio between the intake of calories and those used by the body, but Rennel Concentrate does not contain any of them.

The testimony in opposition to that of the medical experts mentioned consisted of five users of Rennel Concentrate who testified to losing from 14 to 54 pounds over varying periods of time while taking Rennel Concentrate according to directions. Such weight losses, they testified, were maintained by them for months after stopping the use of the preparation. None of them had kept any records. There was no medical testimony to the effect that the weight loss by them should be attributed to the use of Rennel Concentrate. The testimony of users as to the beneficial results derived by them from the use of a medicinal preparation is of little value and expert testimony is to be preferred over that of lay witnesses.[1] Indeed, the qualifications and background of the experts who testified in support of the allegations of the complaint, their knowledge of the subject, their frank answers and explanations, and their general demeanor on the stand make their testimony preponderate overwhelmingly on the point that Rennel Concentrate is not a competent or effective treatment for obesity or overweight.

The testimonials used in respondents' advertising refer to loss of weight of 75 pounds and other amounts so large that they could not possibly be the result of loss of liquids by the body. Also the testimonials refer to continuing loss of weight over a number of months while taking Rennel Concentrate. This also is proof of the fact that the weight loss referred to in the advertising was a loss of fatty tissue rather than loss of liquids which would be replaced within a few hours.

It is therefore found that the advertising was false advertising within the meaning of section 12(a)(1) of the Federal Trade Commission Act.

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

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[1] *Elliott* v. *Frisk*, 58 F. 2d 820, 825; *Failey* v. *Heininger*, 105 F. 2d 79, 84; *Kay* v. *Federal Trade Commission*, 35 F. 2d 160.

ORDER

It is ordered, That respondents Glenn W. Braun and Clyde Witt, individuals and copartners trading as Rennel Products, or under any other name, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the preparation designated as Rennel Concentrate or of any other preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same name or names, or any other name, do forthwith cease and desist from, directly or indirectly:

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

(a) That said preparation constitutes a competent or effective treatment for obesity.

(b) That said preparation will reduce the weight of the user.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having come on to be heard by the Commission upon its review of the hearing examiner's initial decision filed on October 2, 1957, and the Commission having determined that said initial decision is adequate and appropriate in all respects to dispose of this proceeding:

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

It is further ordered, That the respondents, Glenn W. Braun and Clyde Witt, 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 contained in said initial decision.

IN THE MATTER OF

CHARLES J. BRAUN AND ROSE MARIE WITT TRADING AS RENNEL SALES

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

Docket 6692. Complaint, Dec. 13, 1956—Decision, Dec. 18, 1957

Order requiring sellers in Detroit, Mich., to cease representing falsely in advertisements in newspapers—prepared mainly from solicited testimonial letters, writers of which were given free bottles of the product—that their preparation "Rennel Concentrate," essentially a laxative, constituted an effective treatment for obesity and would greatly reduce weight.

Mr. John W. Brookfield, Jr., supporting the complaint.

Boggs, Boggs & Boggs by *Mr. Ralph S. Boggs* of Toledo, Ohio, for respondents.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

Formal complaint, issued December 13, 1956, charged respondents with disseminating and causing the dissemination through the United States mails and in commerce of false advertisements for a drug preparation called Rennel Concentrate. The allegations of the complaint in effect charge violation of section 12(a)(1) of the Federal Trade Commission Act which is, by section 12(b), made an unfair or deceptive act or practice within the meaning of section 5. After service of the complaint, answer was filed by respondents.

Hearings were held pursuant to notice and agreement of counsel in Toledo, Ohio, Detroit and Ann Arbor, Mich., at which respondent Charles J. Braun was present and both respondents were represented by counsel, who participated in the hearings and who was afforded full opportunity to be heard, to introduce evidence pertinent to the issues, and to examine and cross-examine witnesses. Proposed findings as to the facts, conclusions and orders were submitted by all parties.

The facts found, the conclusions reached and the order entered herein are based upon the entire record and hearing the testimony. All findings as to the facts, conclusions and orders proposed by all parties hereto not adopted and included in this initial decision are specifically rejected.

FINDINGS AS TO THE FACTS AND CONCLUSIONS

Respondents Charles J. Braun and Rose Marie Witt are copartners trading in the name of Rennel Sales and located in that business at 2440 Fenkel Street, Detroit, Mich.

Respondents are now, and have been for more than 1 year prior to the issuance of the complaint, engaged in the business of selling and distributing a preparation called "Rennel Concentrate" (compounded and bottled by them from ingredients purchased from drug supply houses) which is sold and distributed by respondents in labeled 4-ounce bottles.

The qualitative formula and the directions for its use as shown on the label thereof and its quantitative formula are as follows:

Fl.	Sassafras bark	¼%
Fl.	Oregon Graperoot	¼%
Fl.	Senna Leaves	¼%
Fl.	Prickly Ash Bark	¼%
FE.	Cascara Sagrada	7%
	Magnesium Sulphate	18%
	Saccharine	9/10%
	Sodium Benzoate	1/10%
	Alcohol	1%
	Water	72%

Follow these simple directions for making one pint of liquid medicine. Empty contents of this bottle into a clean pint bottle. Add enough unsweetened grapefruit juice to fill bottle. Or, use the juice of two lemons instead and add water to fill pint bottle. Shake well and use as directed under "Directions for taking."

IMPORTANT—Do not take until diluted as per mixing directions above. Cut down on starchy foods, such as potatoes, white bread, fatty foods, sweets, etc. Eat more fruit, leafy vegetables and fruit juices. Caution, use only as directed.

Average Directions for Taking after mixing as per Directions on Left Side Panel—Adults: Take two tablespoonsful before breakfast and two tablespoonsful at bedtime. As this preparation contains laxative as well as other ingredients, increase or decrease dosage according to bowel action. Some people need only one tablespoonful twice a day. NO medicine containing a laxative should be taken when severe abdominal pain, nausea, vomiting or other symptoms of appendicitis are present.

The gross volume of business done by respondents in said preparation averaged $47,500 annually for the years 1954 and 1955. There is no proof that any sales of Rennel Concentrate were made without the State of Michigan.

During the period of time respondents have been in this business, they have placed or caused advertisements of Rennel Concentrate to be placed from time to time in 42 daily newspapers, including the Detroit News and Detroit Times, and three weekly newspapers published in the State of Michigan. The copy for the advertisements so placed or caused to be placed in the newspapers is prepared by the respondent Charles J. Braun using excerpts from testimonial letters written to respondents by users of the preparation. Those who write the testimonials are given a few bottles of the preparation in return for their letters if their names are used in the advertisements.

Typical of the testimonials contained in respondents' said advertisements are the following:

"I started taking Rennel Concentrate three and one-half months ago weighing 220 pounds. Up to now I have lost 45 pounds and feel a lot better. I eat as as much as I did before I started taking Rennel. Not only have I lost weight but I also lost 4 inches at the waist. I know Rennel is doing me a lot of good. All this has been done with just a few bottles of Rennel and I will continue to take it until I reach my correct weight," so writes Joe Diguard, Box 141. (Com. Ex. 14)

"My doctor wants me to weigh 145 pounds and I think I will make it soon" writes Mrs. Mary Allen 5553 French Road, Detroit 13, Michigan. "I would like to tell you how much I like Rennel Concentrate, because with it I have lost 25 pounds in three months. My weight has gone from 197 to 172 and I am still losing weight regularly, several pounds a week. I am telling all my friends about Rennel since it is the only thing that helps me."

Thousands have found this amazing simple home recipe the safe economical no diet way to reduce * * *. (Com. Ex. 17)

The placing, scheduling and billing of the newspaper advertising copy prepared by respondent Charles J. Braun has been handled by the Miller Advertising Co. of Toledo, Ohio. The advertising company has, at the direction of respondents, arranged the placing and scheduling of these ads in the newspapers in Michigan having a relatively large circulation on an average of three times a week and less often in newspapers having a relatively small circulation. Particular reference is made to the circulation of two Detroit, Mich., papers in which respondents' advertising appeared.

The Detroit News, a daily newspaper of general circulation published in the city of Detroit, Mich., during a period respondents' said advertising appeared therein, from April 1, 1954, to March 31, 1955, had a total average daily circulation of 532,659, including 844 copies sent to subscribers through the United States mails and 9,166 copies sent to out of the State subscribers.

The Detroit Times, a daily newspaper of general circulation published in the city of Detroit, Mich., during a period of time respondents' said advertising appeared therein, from April 1, 1954, to March 31, 1955, had total average daily circulation of 592,178 copies including 1,672 copies sent to subscribers through the United States mails and 13,638 copies sent to out of the State subscribers.

The circulation of each of these newspapers for the 12 months' period following the period mentioned was approximately the same as the circulation given, and during that period of time respondents' said advertising was carried.

On the above state of facts, the finding is made that respondents have disseminated and caused the dissemination by United States mails and in commerce of advertisements for the purpose of inducing

and which were likely to induce, directly or indirectly, the purchase of Rennel Concentrate, which is a drug within the intent and meaning of section 12 (a)(1) of the Federal Trade Commission Act. Through the use of said newspaper advertisements respondents have represented, directly and by implication, that Rennel Concentrate constitutes a competent and effective treatment for obesity and will greatly reduce weight.

It was agreed between counsel on the record that the product involved in this proceeding and its directions for use are the same as the product involved in a companion case, Rennel Products, et al., docket No. 6691. Also counsel for respondents in both proceedings being the same it was agreed on the record that the direct and cross-examination of the expert medical witnesses to be offered in support of the allegations of the complaint, would be along the same line and one hearing for receiving such testimony would suffice. Accordingly, the hearing examiner directed on the record that there be only one hearing held to receive such testimony and that copy of the proceedings at that hearing go into the official record and become a part thereof in docket No. 6691 and in this proceeding.

At such hearing, held by agreement of the parties and order of the hearing examiner in Ann Arbor, Mich., on April 25, 1957, two medical experts appeared and testified. They were Dr. Jerome W. Conn and Dr. Henry H. Swain. Their qualifications as experts are in the record. They testified generally on direct examination that obesity is overweight, but if the degree of overweight is less than 20 percent above the average weight it is not usually called obesity; that they had each seen the formula and directions for use of the product in question; that the effect of the preparation when taken in accordance with directions would be that of a mild laxative; that a laxative is not a competent or effective treatment for obesity or overweight and will not reduce obesity or overweight; that the ingredients of Rennel Concentrate taken singly or in combination will not reduce a person's obesity or overweight; that Rennel Concentrate will not reduce a person's obesity or overweight.

Neither doctor had ever taken Rennel Concentrate or prescribed it for any patients nor performed any experiments with this preparation. Both doctors admitted that the effect of a laxative may be to cause a runny stool, in which event a person's weight is temporarily reduced by the weight of water or liquid so removed from the body, but that upon loss of any significant amount of body fluid the person would become thirsty and rapidly replace the weight loss so caused by an equal or approximately equal intake of fluid. Both

such weight loss and the reversal would happen in a matter of hours. Reduction of obesity or overweight to be of any significance means not a loss of body fluids, but a loss of fatty tissues which have been built up in the body over a period of time by a greater intake of calories in food than the body has used up in the expenditure of energy. Such excess of calories is deposited in the body as fat. The only way to reduce the fatty tissues in the body is to reverse the process and cut down the intake of calories to a point where the calories used by the body in expenditure of energy over a period of time is less than the intake. When this happens the store of fat in the tissues is used up by the body to replace the deficiency in intake of calories. This does not mean that the reduction of fatty tissues will be permanent. Fat will again be stored in the body and one's weight will increase again any time the intake of calories over a period of time exceeds those used by the body in the expenditure of energy. There are certain drugs that are recognized as assisting in cutting down the ratio between the intake of calories and those used by the body, but Rennel Concentrate does not contain any of them.

The testimony in opposition to that of the medical experts mentioned consisted of six users of Rennel Concentrate who testified to losing from 23 pounds to 82 pounds over varying periods of time while taking Rennel Concentrate according to directions. Such weight losses, they testified, were maintained by them for months after stopping the use of the preparation. None of them had kept any records. There was no medical testimony to the effect that the weight loss by them should be attributed to the use of Rennel Concentrate. The testimony of users as to the beneficial results derived by them from the use of a medicinal preparation is of little value and expert testimony is to be preferred over that of lay witnesses.[1] Indeed, the qualifications and background of the experts who testified in support of the allegations of the complaint, their knowledge of the subject, their frank answers and explanations, and their general demeanor on the stand make their testimony preponderate overwhelmingly on the point that Rennel Concentrate is not a competent or effective treatment for obesity or overweight.

The testimonials used in respondents' advertising refer to loss of weight of 45 pounds and other amounts so large that they could not possibly be the result of loss of liquids by the body. Also the testimonials refer to continuing loss of weight over a number of months while taking Rennel Concentrate. This also is proof of the fact that the weight loss referred to in the advertising was a loss of fatty tissue

[1] *Elliott* v. *Frisk*, 58 F. 2d 820, 825; *Failey* v. *Heininger*, 105 F. 2d 79, 84; *Kay* v. *F.T.C.*, 35 F. 2d 160.

rather than loss of liquids which would be replaced within a few hours.

It is therefore found that the advertising was false advertising within the meaning of section 12(a)(1) of the Federal Trade Commission Act.

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

ORDER

It is ordered, That respondents Charles J. Braun and Rose Marie Witt, individuals and copartners trading as Rennel Sales, or under any other name, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the preparation designated as Rennel Concentrate or of any other preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same name or names, or any other name, do forthwith cease and desist from, directly or indirectly:

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

(a) That said preparation constitutes a competent or effective treatment for obesity.

(b) That said preparation will reduce the weight of the user.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having come on to be heard by the Commission upon its review of the hearing examiner's initial decision filed on October 2, 1957, and the Commission having determined that said initial decision is adequate and appropriate in all respects to dispose of this proceeding:

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

It is further ordered, That the respondents, Charles J. Braun and Rose Marie Witt, 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 contained in said initial decision.

IN THE MATTER OF

ARNOLD VOGL ET AL. DOING BUSINESS AS RIVIERA PACKING CO. ET AL.

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

Docket 6752. Complaint, Mar. 27, 1957—Decision, Dec. 18, 1957

Consent order requiring canners of sardines, with principal office at Eastport and plants at Eastport and Milbridge, Maine—customarily selling through brokers who received commissions of up to 5 percent of the market price—to cease making illegal brokerage payments to customers in violation of section 2(c) of the Robinson-Patman Act by selling canned sardines directly to purchasers at prices as much as 5 percent below the market price, and by permitting brokers to make sales at 5 percent below market price and paying them less than the usual fee, with the result that the buyer received part of the brokerage.

Mr. Lewis F. Depro for the Commission.
Regosin & Edwards, of New York City, for respondents.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of section 2(c) of the Clayton Act (U.S.C. Title 15, sec. 13) as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondents Arnold Vogl, Edith Vogl, and Erna Fisher, sometimes hereinafter referred to as individual respondents, are individuals and copartners doing business under the firm name and style of Riviera Packing Co. with their principal office and place of business located at Eastport, Maine.

Respondent Milbridge Canning Corp., sometimes hereinafter referred to as corporate respondent, is a corporation organized and existing under the laws of the State of New York, with its plant and place of business located at Milbridge, Maine, and its principal office located at Eastport, Maine.

The individual respondents are and have been officers and sole stockholders of the corporate respondent.

PAR. 2. The partnership business of the individual respondents consists of the processing, canning, and packing of sardines and the sale and distribution thereof. The plant where the processing, can-

ning, and packing has been and is now performed is located in the city of Eastport, in the State of Maine.

The corporate respondent has been and is now engaged in the processing, canning, and packing of sardines at its plant located in the city of Milbridge, in the State of Maine. The sardines packed by said corporate respondent are sold through the office of Riviera Packing Co. in Eastport, Maine, although shipped from the corporate respondent's plant at Milbridge, Maine.

PAR. 3. All of the individual respondents have cooperated and acted together in formulating the policies and directing the business carried on under the names of Riviera Packing Co. and Milbridge Canning Corp. Respondent Arnold Vogl is now and has been president of the corporate respondent and has acted in the capacity of a general manager, actively engaged in the formulation of the policies and the direction of the business of both the partnership and the corporate respondent.

PAR. 4. Respondents, in the course and conduct of their said business, are engaged in commerce, as "commerce" is defined in the Clayton Act, in that they sell and distribute sardines to purchasers thereof located in States other than the State of Maine where shipment originates and cause such product to be shipped and transported from their plants in the State of Maine to destinations in other States throughout the United States. There is now and has been a constant course and flow of trade and commerce in such sardines across State lines between respondents in the State of Maine and purchasers located in other States and, therefore, respondents are subject to the jurisdiction of the Federal Trade Commission.

PAR. 5. Respondents pack sardines in two types of cans, one known as a keyless can and the other having a key attached. The keyless cans consist of three sizes, namely, ¼ pound, ¾ pound and 1 pound cans, while the cans having keys attached are of the ¼ pound capacity.

Respondents sell sardines packed in both types of cans in the aforementioned commerce to buyers through brokers and, in some instances, directly to buyers.

On sales through brokers respondents pay or allow a brokerage fee for services rendered and sales are generally made on the basis of FOB Maine, meaning FOB Eastport.

Respondents allow a brokerage fee of 3 percent from the list market price for the sale of sardines in keyless cans and 5 percent in cans with keys. That is, on sales made by respondents' brokers at list or market price, a brokerage fee equal to 3 percent of the purchase price is paid

by respondents on sardines packed in keyless cans, and a brokerage fee of 5 percent of the purchase price is paid by respondents on sardines packed in cans with keys.

PAR. 6. The business of the corporate respondent actually is that of the individual respondents because of their ownership of its entire capital stock and their control over its operations. Also respondent Arnold Vogl, who is the operating head of the corporate respondent, likewise manages and directs the activities of the partnership business, carried on under the firm name of Riviera Packing Co.

During the year 1954 the corporate respondent packed sardines under its name and also that of the partnership business. The sales personnel and the location of the sales office of the corporate respondent are the same as for the partnership business.

The corporate respondent is engaged in making direct sales of sardines to buyers without the intervention of a broker and such sales have been made at prices lower than list or market price and, at times, at prices equal to 5 percent less than such list or market price.

PAR. 7. Since early in 1954 respondents have authorized their brokers to sell their sardines at either list or market price, or at a discount of 5 percent from such price and, since such time, sales of respondents' sardines have been made by their brokers at the full list or market price, and also at a discount of 5 percent off such list or market price.

In connection with those sales by respondents' brokers at 5 percent off list or market price, respondents pay such brokers, in some instances, amounts which are less than the brokerage fees aforementioned of 3 percent or 5 percent of the purchase price, on sardines in cans without and with keys, respectively. Such lesser amounts paid to their brokers usually are equal to 10 cents per case of sardines sold, but in some instances brokerage fees based upon rates other than 10 cents per case have been paid or allowed.

PAR. 8. On those sales made through brokers, respondents, in granting to some buyers a discount of 5 percent from list or market price, have allowed and granted discounts in lieu of brokerage in varying amounts equal to the difference between the usual brokerage fees of 3 percent or 5 percent and the 10 cents per case, or such other rate of brokerage as has been granted or paid to the broker as hereinbefore alleged.

On those sales made directly by the respondents, either in the name of the corporate respondent or in the name of the partnership, to buyers at list or market prices less 5-percent discount, they have thereby granted and allowed such buyers a discount in that amount in lieu of brokerage.

PAR. 9. The discounts which respondents have granted or allowed since early in 1954 in lieu of brokerage to certain of their buyers who purchased respondents' sardines in commerce, as hereinbefore alleged and described, at list or market price less the discount of 5 percent, are substantial in amount.

PAR. 10. The aforesaid acts of the respondents are in violation of the provisions of section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondents on March 27, 1957, charging them with having violated section 2(c) of the Clayton Act, as amended by the Robinson-Patman Act. Respondents appeared by counsel and entered into an agreement, dated October 7, 1957, containing a consent order to cease and desist, disposing of all the issues in this proceeding without hearing, which agreement has been duly approved by the director and the assistant director of the Bureau of Litigation. Said agreement has been submitted to the undersigned, heretofore duly designated to act as hearing examiner herein, for his consideration in accordance with section 3.25 of the rules of practice of the Commission.

Respondents, pursuant to the aforesaid agreement, have admitted all of the jurisdictional allegations of the complaint and agreed that the record may be taken as if findings of jurisdictional facts had been made duly in accordance with such allegations. Said agreement further provides that respondents waive all further procedural steps before the hearing examiner or the Commission, including the making of findings of fact or conclusions of law and the right to challenge or contest the validity of the order to cease and desist entered in accordance with such agreement. It has also been agreed that the record herein shall consist solely of the complaint and said agreement, that the agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission, that said agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint, that said order to cease and desist shall have the same force and effect as if entered after a full hearing and may be altered, modified or set aside in the manner provided for other orders, and that the complaint may be used in construing the terms of the order.

This proceeding having now come on for final consideration on the complaint and the aforesaid agreement containing the consent order,

and it appearing that the order and agreement cover all of the allegations of the complaint and provide for appropriate disposition of this proceeding, the agreement is hereby accepted and ordered filed upon this decision and said agreement becoming part of the Commission's decision pursuant to sections 3.21 and 3.25 of the rules of practice, and the hearing examiner accordingly makes the following findings, for jurisdictional purposes, and order:

1. Respondents Arnold Vogl, Edith Vogl, and Erna Fisher are individuals trading as copartners under the firm name and style of Riviera Packing Co., with their office and principal place of business located in the city of Eastport, State of Maine. Respondent Milbridge Canning Corp. is a corporation existing and doing business under and by virtue of the laws of the State of New York, with its plant and place of business located in the city of Milbridge, State of Maine, and its principal office is also located in the city of Eastport, State of Maine.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents hereinabove named. The complaint states a cause of action against said respondents under the Clayton Act, as amended by the Robinson-Patman Act. This proceeding is in the public interest.

ORDER

It is ordered, That respondents Arnold Vogl, Edith Vogl, and Erna Fisher, individually and as copartners doing business under the name of Riviera Packing Co., or under any other name, and as officers and sole stockholders of Milbridge Canning Corp., and respondent Milbridge Canning Corp., a corporation, and its officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the sale and distribution of sardines or other food products in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

1. Paying, granting, or allowing, directly or indirectly, to any buyer or to anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, an allowance or discount in lieu of brokerage, or any part or percentage thereof, by selling sardines or other food products to any such buyer at prices reflecting a reduction from the prices at which sales of such products are currently being effected by respondents to other buyers, where such reduction in price is accompanied by a reduction in the regular rate of commission, brokerage, or other compensation currently being paid by respondents to their brokers; or

2. Selling sardines or other food products direct to some buyers, without using brokers, at prices reflecting a reduction from the prices at which sales of such products are currently being effected by respondents to other buyers, where such reduction reflects or is in lieu of the full brokerage normally paid, or any part or percentage thereof; or

3. In any other manner, paying, granting, or allowing, directly or indirectly, to any buyer or anyone acting for or in behalf of or who is subject to the direct or indirect control of such buyer, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any sale of sardines or other food products to such buyer for his own account.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's rules of practice, the initial decision of the hearing examiner shall, on the 18th day of December 1957, become the decision of the Commission; and, accordingly:

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.

IN THE MATTER OF

HENRY FETTNER DOING BUSINESS AS FETTNER FUR CO.

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

Docket 6828. Complaint, July 8, 1957—Decision, Dec. 18, 1957

Consent order requiring a furrier in Cincinnati, Ohio, to cease violating the Fur Products Labeling Act by removing from fur products the labels required to be affixed thereto, and by affixing to certain products labels stating falsely that they were composed of backs; by setting forth on invoices the names of animals other than those producing certain furs; by advertising which failed to disclose the names of animals producing certain furs, and that furs were artificially colored or composed of paws, waste fur, etc.; which misrepresented prices, and stated falsely that "all comparative prices have been registered with the Federal Trade Commission"; and by failing in other respects to comply with the labeling, invoicing, and advertising requirements of the law.

Mr. Michael J. Vitale and *Mr. Thomas A. Ziebarth* for the Commission.

Goodman & Goodman by Sol Goodman of Cincinnati, Ohio, for respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondent with violation of the Fur Products Labeling Act, and the rules and regulations promulgated thereunder, and the Federal Trade Commission Act, in connection with the advertising and sale of his fur products. An agreement has now been entered into by respondent and counsel supporting the complaint which provides, among other things, that respondent admits all of the jurisdictional allegations in the complaint; that the record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and agreement; that the inclusion of findings of fact and conclusions of law in the decision disposing of this matter is waived, together with any further procedural steps before the hearing examiner and the Commission; that the order hereinafter set forth may be entered in disposition of the proceeding, such order to have the same force and effect as if entered after a full hearing, respondent specifically waiving any and all rights to challenge or contest the validity of such order; that the order may be altered, modified, or set aside in the manner

provided for other orders of the Commission; that the complaint may be used in construing the terms of the order; and that the agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order and being of the opinion that they provide an adequate basis for an appropriate disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent Henry Fettner is an individual trading and doing business as Fettner Fur Co. with his office and principal place of business located at 23 W. 7th Street, Cincinnati, Ohio.

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

ORDER

It is ordered, That respondent, Henry Fettner, an individual, trading and doing business as Fettner Fur Co., or under any other name, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product, or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped or received in commerce, as "commerce," "fur," and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Removing or mutilating, or causing or participating in the removal or mutilation of, prior to the time any fur product is sold and delivered to the ultimate consumer, any label required by the Fur Products Labeling Act, and the rules and regulations thereunder, to be affixed to such fur product except as provided in section 3(e) of said act.

B. Misbranding fur products by:

1. Failing to affix labels to fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed or otherwise artificially colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(e) The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce;

(f) The name of the country of origin of any imported furs used in the fur product.

2. Failing to affix labels to fur products which comply with the minimum size requirements as set forth in rule 27 of the rules and regulations.

3. Mingling nonrequired information with information which is required under section 4(2) of the Fur Products Labeling Act on labels;

4. Setting forth information which is required under section 4(2) of the Fur Products Labeling Act on labels in handwriting or by the use of pencils;

5. Falsely or deceptively identifying fur products as being composed in whole or in substantial part of backs or otherwise falsely or deceptively identifying the portion of the pelt of which the product is composed.

C. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur products as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

(b) That the fur product contains or is composed of used fur, when such is the fact;

(c) That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is the fact;

(e) The name and address of the person issuing such invoices;

(f) The name of the country of origin of any imported furs contained in the fur product.

2. Setting forth on invoices the name of any animal or animals other than that which produced the fur;

3. Setting forth on invoices information required under section 5(b)(1) of the Fur Products Labeling Act and the rules and regulations thereunder in an abbreviated form.

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

1. Fails to disclose:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur products as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

(b) That fur products contain or are composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(c) That fur products are composed in whole or in substantial part of paws, tails, bellies or waste fur, when such is the fact;

2. Uses the name of, or in any way implies or represents that the Federal Trade Commission or any other governmental agency has in any way approved of or sanctioned any advertising or other practice;

3. Represents that fur products are sold at wholesale prices, at cost or below cost, unless such is the fact;

4. Represents the prices of fur products as having been reduced from regular or usual prices when the so-called regular or usual prices are in fact fictitious in that they are greater than the prices which said merchandise is usually sold in the recent, regular course of business;

5. Uses comparative prices which are not based on current market values or which fail to give a designated time of a bona fide compared price.

E. Making use of price reductions, comparative prices and percentage savings claims in advertising unless there are maintained by respondent full and adequate records disclosing the facts upon which such claims and representations are based.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's rules of practice, the initial decision of the hearing examiner shall, on the 18th day of December 1957, become the decision of the Commission; and, accordingly:

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.

Decision

IN THE MATTER OF

INSTO-GAS CORP.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 3 OF THE CLAYTON ACT

Docket 5851. Complaint, Feb. 21, 1951—Decision, Dec. 19, 1957

Order dismissing for lack of proof, charges that one of the largest operators in the industry concerned, with principal office in Detroit, Mich., violated section 3 of the Clayton Act by tying the lease or sale of propane gas cylinders to the use of propane gas and equipment or appliances sold by it.

Mr. Rufus E. Wilson and *Mr. Arthur Edgeworth* supporting the complaint.

Fischer, Sprague, Franklin & Ford of Detroit, Mich., by *Mr. Richard Ford*, for respondent.

INITIAL DECISION BY JOSEPH CALLAWAY, HEARING EXAMINER

On February 21, 1951, the Commission issued its complaint charging respondent with the violation of section 3 of the Clayton Act in connection with its business of leasing or selling cylinders for containing compressed propane gas, selling propane gas for use in filling and refilling said cylinders and selling a line of equipment for use with said cylinders. The complaint further alleged that respondent was among the largest owners, lessors, or vendors of cylinders in the United States for containing compressed propane gas and vendors of such equipment as are used in connection therewith. The violation of section 3 was alleged to consist of tying the lease or sale of the cylinders to the use of propane gas and equipment or appliances sold by respondent.

Respondent's answer admitted the jurisdictional allegations of the complaint and the alleged conditions attached to the leasing of its cylinders, denied the allegations in regard to cylinder sales or appliance sales and also denied the other material allegations of the complaint. Further answering, respondent set up certain affirmative defenses which will be dealt with in the findings of fact.

Hearings were held before Hearing Examiner Webster Ballinger at which evidence in support of and in opposition to the allegations of the complaint was adduced. Upon completion of the hearings and after proposed findings of fact, conclusions of law and orders and the reasons therefor had been filed by both sides, the hearing examiner, on May 12, 1952, issued his initial decision including an order to cease and desist from the practices complained of.

On September 24, 1954, the Commission sustained the appeal of respondent from the hearing examiner's initial decision and ordered the case reopened and remanded to the hearing examiner for further proceedings in conformity with the Commission's written opinion. The Commission, among other things, decided that the record did 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 create a monopoly.

During the proceedings before Hearing Examiner Ballinger, he had, on motion of counsel supporting the complaint, over objection of respondent, striken from the record certain testimony and exhibits offered in support of respondent's affirmative defense set up in the answer. Exception by respondent to this action was included in the appeal to the Commission. While not passing upon the evidentiary value of the stricken testimony and exhibits, the Commission, in its written opinion, indicated that this evidence should be considered.

Subsequent to the remand by the Commission, Hearing Examiner Ballinger was retired from Government service and Hearing Examiner Cox was, on October 21, 1954, appointed to serve in his stead.

On June 19, 1956, no additional evidence having been received, the undersigned was appointed as hearing examiner herein to replace Hearing Examiner Cox. Delay in proceeding since the remand was occasioned by representations of counsel supporting the complaint that difficulties were being encountered in obtaining the desired information and data.

On March 4, 1957, hearing was held before the undersigned to take testimony and evidence in accordance with the Commission's remand. In lieu of testimony a stipulation of counsel was offered and received. This stipulation among other things included certain additional exhibits offered by each side, which it was agreed might be received in evidence subject to the objection of the opposite side; a re-offer by respondent of the exhibits and testimony heretofore mentioned as stricken by Hearing Examiner Ballinger; an objection by counsel supporting the complaint to these exhibits and testimony being received; an agreement that upon acceptance of the stipulation and action by the hearing examiner upon the re-offer of respondent's exhibits and testimony, the record might be closed so far as proof was concerned.

The record was closed as to proof on March 4, 1957, but subsequently reopened on March 18, 1957 by order of the hearing examiner. Respondent's re-offered exhibits and testimony previously stricken by Hearing Examiner Ballinger were received in evidence. They were as follows: Respondent's exhibits 6 to 46 inclusive; 49 to 58 inclusive; 60

to 64 inclusive and the witnesses Evans, White, Thomas, Reymer, Bogue, and Cedarberg (cross-examination). The record was then again closed as to proof.

Both sides were given the opportunity to and subsequently did file new or supplementary proposed findings, conclusions and the reasons therefor. The matter is now before the hearing examiner for a new initial decision. After carefully reviewing the entire record including that which was before Hearing Examiner Ballinger, the Commission's Opinion issued in connection with the order of remand, and that which has been placed in the record since then, the hearing examiner makes the following findings as to the facts, conclusion drawn therefrom and order. All proposed findings and conclusions by both sides not found or concluded are hereby specifically rejected.

FINDINGS AS TO THE FACTS

PARAGRAPH 1. Respondent Insto-Gas Corp. is a corporation organized and existing under and by virtue of the laws of the State of Michigan with its office and principal place of business located at 998 E. Woodbridge Avenue, Detroit, Mich. It is not domesticated or licensed to do business in any other State and does not hold any type of license or permit in any other State.

PAR. 2. Respondent is now and for many years last past has been engaged in the business of leasing cylinders used as containers for compressed propane gas, the sale of propane gas for use in filling or refilling said cylinders and the sale of equipment as appliances (gas burning torches, soldering irons, plumber's furnaces, etc.). The cylinders are leased and the gas and equipment are sold under the name "Insto-Gas." The word "Insto" is a registered trademark of respondent's and the combination "Insto-Gas" is added to the name of each product to identify it as respondent's. These products are used by plumbers, electricians, and other craftsmen for welding and other commercial purposes wherever portable heat is required.

PAR. 3. In the course and conduct of its business respondent causes its propane gas cylinders when leased and its propane gas appliances and equipment when sold to be transported from its place of business in Detroit, Mich., or other places of origin to the lessees and vendees of such products in various other States of the United States and in the District of Columbia. Respondent maintains now and has maintained for a number of years last past a substantial course of trade in said products between and among various States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its said business respondent is now and for several years last past has been in competition in commerce with corporations, firms, partnerships, and individuals engaged in like commerce in leasing or selling similar type cylinders for containing propane gas, the sale of propane gas for use in filling or refilling the same and in the sale of equipment or appliances described in paragraph 2 hereof for use with such cylinders.

PAR. 5. Respondent's cylinders are manufactured for it by another concern and like those of its competitors conform in construction with specifications established by the Interstate Commerce Commission, but in one respect are unlike other competitive cylinders in that some of them are designed to hold only 5 pounds of compressed gas and the others are designed to hold only 18 pounds of compressed gas. No competitive cylinders are designed to hold only 18 pounds of compressed gas and it is this size cylinder that constitutes the great majority of those leased by respondent. Another size cylinder sold or leased by respondent's competitors in substantial volume is a cylinder designed to hold 20 pounds of compressed gas. Other propane gas cylinders have capacities ranging from 25 to 100 pounds.

PAR. 6. The gas respondent sells under the trade name "Insto-Gas," is known as propane gas. It is a liquefied petroleum gas that has been commercially purified and is available to the public in commercial quantities in all sections of the United States under many different trade names.

PAR. 7. Propane gas is a dangerous substance. It is inflammable and explosive when mixed with air in certain proportions and is under great pressure as ordinarily transported, stored, and used. When used with such appliances as are sold by respondent it must be contained in specially constructed cylinders.

PAR. 8. The Interstate Commerce Commission by regulation prohibits the transportation of propane in cylinders having been filled or refilled otherwise than by the owner's consent. A number of States have by statute and regulation prohibited the refilling of cylinders with propane other than by the owner or with his consent.

PAR. 9. In Detroit respondent has its new cylinders filled with "Insto-Gas." Then it ships them to its authorized distributors in other States of the United States, who are usually also dealers in paint, plumbing, heating, and mill supplies. By the use of three forms of contracts respondent leases its cylinders on condition that they can be refilled only with propane gas purchased either direct or through any of the respondent's distributors or authorized dealers. Prior to 1952 the leases also provided that the lessee use only "Insto-Gas"

equipment and appliances with "Insto-Gas" cylinders. That provision of the lease has been discontinued.

PAR. 10. The first form of contract is with authorized distributors, of which there are between 150 and 200, located in every State of the Union except the States of Arizona, Nevada, and New Mexico. This contract provides in part as follows:

(7) CYLINDER LEASES: Aforesaid lease charge on any cylinder shall constitute the entire lease charge for such time as the distributor wishes to keep said cylinder, as a container for Insto-Gas. The distributor agrees that all Insto-Gas cylinders leased to him under this agreement, shall remain the property of the company at all times. The distributor agrees to have the company cylinders refilled only at such filling stations as shall be authorized in writing by the company.

(8) The distributor agrees to have the company's cylinder lease agreements (on forms supplied by the company) signed in triplicate by every customer to whom the distributor delivers the company's products, and to send said signed cylinder lease agreements to the company within a reasonable time. The distributor further agrees to deliver Insto-Gas cylinders only to customers having a cylinder lease agreement with the company.

The second form of contract is the cylinder lease agreement referred to in the first form. Prior to 1952 that form provided in part as follows:

(3) The lessee agrees that all INSTO-GAS cylinders leased to him, under this agreement, shall remain the property of the company at all times. The lessee agrees to purchase from the company, either direct or through any of the company's distributors or authorized dealers, all the gas used by the lessee in the operation of INSTO-GAS cylinders, and to use only INSTO-GAS equipment and appliances with INSTO-GAS cylinders. The customer agrees that he will not use INSTO-GAS as a motor fuel.

Since 1952, the comparable provision in this form has been changed to read as follows:

(3) The lessee agrees that all Insto-Gas cylinders leased to him under this agreement shall remain the property of the company at all times. The lessee agrees to purchase from the company, either direct or through any of the company's distributors or authorized dealers, gas used by the lessee in the operation of Insto-Gas cylinders. The customer agrees that he will not use Insto-Gas as a motor fuel.

The third form of contract is with the filling stations referred to in the first form who maintain bulk refilling stations numbering approximately 200. In this contract respondent is the buyer and the bulk filling station is the seller. It reads in part as follows:

Seller agrees to sell to buyer and buyer agrees to purchase from seller, buyer's liquefied petroleum gas requirements for use in resale in buyer's cylinders only from seller's bulk plants * * *.

VIII Cylinders

It is understood and agreed that seller will not be obligated to fill any cylinders presented by buyer for filling which cylinders are not owned or leased by buyer.

Seller will not be obligated to fill any cylinders not approved by the Interstate Commerce Commission for the transportation of this commodity. Buyer may arrange for the seller to make repairs to buyer's cylinders and valves on a basis of actual cost of parts and labor. It is further understood and agreed that any fuel losses resulting from faulty conditions of buyer's cylinders or valves are for the buyer's account.

PAR. 11. As a matter of actual practice, when a gas cylinder leased from respondent becomes empty, the lessee of the cylinder takes it back to the authorized distributor of respondent from whom he obtained the full cylinder or another such authorized distributor and gets another full cylinder in its place, paying only for the gas. When respondent's authorized distributor accumulates a number of empty cylinders he takes or sends them to the nearest bulk refilling station with which respondent has a contract. There the valves on the cylinders are tested for leaks and the retest dates of the cylinders themselves shown on each cylinder are examined. If the valves do not leak and the time is not past the retest date of the cylinders, they are refilled and returned to respondent's distributor for leasing or further exchange with other lessees. The bulk refilling station then bills respondent for the propane gas put in the cylinders and respondent in turn bills its distributor.

PAR. 12. Of course respondent makes a profit on the gas by charging its distributor a higher price than the bulk refilling station charges respondent for it. Respondent's distributor makes a profit on the gas by charging the lessee a higher price than respondent charges the distributor for it.

PAR. 13. Competitive bulk stations for filling or refilling cylinders with compressed propane gas operate in the various localities in which respondent maintains contract bulk refilling stations, whose prices for propane gas in some localities may be lower than the prices the lessees have to pay for the gas in the manner they have to acquire it under the terms of their lease. In at least one instance the price of the competitive station was $1.60 while that charged the lessees by the distributor of respondent was $3.50 for refilling an 18-pound cylinder. These competitive bulk filling stations can and do refill any cylinders in accordance with the specifications for refilling such cylinders when brought to them for refilling by the owner of such cylinder.

PAR. 14. Prior to the remand of this proceeding the evidence showed that respondent had more than 200 authorized distributors, some of whom were located in every state of the Union except the States of Arizona, Nevada, and New Mexico. It also had 150 to 200 contract bulk refilling stations at locations where they would be available to the authorized distributors. From the time respondent

started its business in 1936 up until October 1951 it had leased approximately 80,000 18-pound propane gas cylinders, which were embraced in approximately 11,000 lease agreements entered into by respondent with its customers. The gross aggregate of respondent's annual sales in 1950 amounted to $800,000. Prior thereto the annual average was between $600,000 and $700,000. The record presently shows that the number of 18-pound cylinders leased by respondent during the years 1954, 1955, and 1956 was as follows:

PAR. 15.

1954	*1955*	[1]*1956*
10,934	12,658	9,954

The record also now shows the sales of propane gas by all suppliers in the United States including respondent to be as follows:

	Total U.S. sales in pounds [1]	Respondent's sales, in pounds	Respondent's share of market
1949	5,950,242,160	2,424,026	0.00040
1950	8,218,396,240	3,277,081	.00039
1951	10,255,669,600	3,393,639	.00033
1952	10,657,642,800	3,427,675	.00032
1953	12,009,778,800	3,468,512	.00029
1954	12,585,642,880	3,505,731	.00028
1955	13,824,321,040	3,815,332	.00027

[1] From Bureau of Mines Report No. MMS-2531 (7/27/56). Gallons converted into pounds by multiplying by 4.24 (weight of one gallon at 60° C.)

PAR. 16. A table showing respondent's yearly gross receipts from sale and lease of its products for the years 1947 through 1956, broken down into the various categories of cylinders, propane gas and equipment has been prepared by each counsel from exhibit "A" and "I" to the stipulation. There are only minor differences. The table prepared by respondent's counsel reads as follows:

	Cylinders	Gas	Tools	Total
1949	$132,872 (21%)	$300,152 (47%)	$202,070 (32%)	$635,094
1950	204,591 (24%)	374,514 (43%)	291,354 (33%)	870,459
1951	180,468 (22%)	387,777 (47%)	248,414 (31%)	816,659
1952	159,476 (20%)	376,058 (47%)	260,497 (33%)	796,031
1953	169,605 (21%)	332,210 (41%)	308,020 (38%)	809,835
1954	221,746 (23%)	349,318 (37%)	381,710 (40%)	952,774
1955	263,836 (24%)	377,261 (33%)	479,964 (43%)	1,121,061
1956	226,127 (21%)	356,311 (33%)	504,893 (46%)	1,087,331

The value of this table is that it separates respondent's gross income for each year into the various categories. Such figures were not shown in the record prior to the remand.

PAR. 17. The stipulation among other things also includes the following:

A list showing the number of cylinders leased by respondent for each of the years 1949 through 1954 in certain areas and also the total pounds of propane gas purchased by respondent in each such area and the names of competing gas merchandisers in each such area.

Exhibit "D" to the stipulation attempts to compare the cylinders leased throughout the country by respondent during 1949 and 1950 with the number of 18- and 20-pound cylinders manufactured in those years. Only 9 of 14 known manufacturers inquired of answered and the exhibit states that no information is available as to the actual number of cylinders produced by all manufacturers. The value as evidence these tables and others made a part of the stipulation will be considered.

PAR. 18. According to proposed findings submitted, the stipulation and the exhibits thereto the issues have now been limited to two questions:

(1) Whether the effect of the restrictive terms of respondent's leases to the users of its cylinders, thereby preventing the lessees from purchasing refills of propane gas from respondent's competitors, may be to substantially lessen competition or tend to create a monopoly in the sale of propane gas.

(2) Whether the protection of respondent's trade mark and/or the protection of the public in the use of propane gas, an inflammable and explosive substance, the shipping in commerce and the use of which is the subject of regulation by the Interstate Commerce Commission and the laws of many States, justify the restrictions contained in respondent's leases to the users of respondent's cylinders.

PAR. 19. This action was brought under Section 3 of the Clayton Act, the pertinent portion of which reads as follows:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, * * * for use, consumption or resale within the United States * * * or the District of Columbia * * * on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors, of the lessor or seller, where the effect of such lease, sale or contract for sale, or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly.

PAR. 20. In considering the first question listed above, it cannot be doubted that respondent's competitors in the sale of propane gas are effectively cut off from competing for the sale of propane gas to refill respondent's cylinders under lease to the users thereof. Competition in the sale of propane gas has been lessened to that extent. Is this sufficient to violate the act?

PAR. 21. Counsel supporting the complaint contends that it is. They argue that the dollar figures in the sale of propane gas each year by respondent to its 18-pound cylinder users represents a substantial share of the relevant market which is composed of 18- and 20-pound cylinders. We know, from the last table shown above, the dollar value of the propane gas sold by respondent each year under consideration. We also know that respondent only sells in 18-pound and 5-pound cylinders and that a great majority of respondent's leased cylinders are of 18-pound capacity. This is on a national basis. There is no reliable figure on a national basis for the dollar value or amount in pounds of gas sold by respondent's competitors in 20-pound cylinders. Exhibit "B" to the stipulation shows that there are 153 producers of liquefied petroleum gases. Information was requested from each of these as to the propane gas (in pounds and dollar volume) sold in 18- and 20-pound containers in 1949 and 1950. Only 7 out of the 153 reported sales by pounds and dollar volume. A table showing the reports made by these seven is not reliable even for their sales when the footnotes are considered. The only figure of any significance, comparing respondent's annual sales of propane gas with the sale of propane gas by others, is exhibit "C" to the stipulation. This shows that for the year 1949 respondent sold 2,425,026 pounds of propane while the total U.S. sales in pounds was 5,950,242,160, or respondent sold four-tenths of 1 percent of the total sold. Similar figures and percentages are given for other years. Of course this includes all sales in bulk and all sales in all sizes of cylinders.

PAR. 22. Exhibit "B" to the stipulation shows an effort to obtain the sales of respondent in 18-pound cylinders and sales of competitors in 20-pound cylinders for the years 1949 and 1950 in different marketing areas. Due to the fact that the records of many of respondent's competitors in the sale of propane gas were not kept on the basis of rated capacity of the cylinders filled but only in pounds of gas sold, the information obtained was of slight value. In the marketing areas of Cleveland, Ohio, Detroit, Mich., Chicago, Ill., and Pittsburgh, Pa., only 2 out of 20 answering the inquiry reported any record of sales in 20-pound cylinders. Thus, we are without any responsible guide or even any informed estimate in comparing either

nationally or in any particular marketing area, the volume of respondent's sales in 18-pound cylinders in 1949 or 1950, or any other year with sales by respondent's competitors in 20-pound cylinders.

PAR. 23 Counsel supporting the complaint argue in effect that competition is substantially lessened when it is shown that respondent's sales in 18-pound cylinders were in a substantial amount without any comparison with sales by competitors, or any information as to respondent's comparative standing in the industry. It is contended that the decision by the District Judge in the Standard Stations case [1] was to that effect and that the Supreme Court in that case [2] recognized the correctness of that standard of proof. It is further contended that this position is strengthened by the fact that in the Richfield Oil Corp. case the same standard of proof was applied by the District Judge [3] and the case affirmed by the Supreme Court [4] on the basis that the issues were substantially the same as in the Standard Stations case.[5]

PAR. 24. In the Standard Stations case the Supreme Court found, in addition to the other things mentioned, that the defendant, Standard Oil Co., was a major competitor in the field at the time the system of exclusive dealing contracts were inaugurated and had remained so, being the largest seller of gasoline in the area. In the *Richfield Oil Corp.* case [6] the district judge found that the agreements affected a substantial number of outlets and a substantial number of products whether considered comparatively or not. This is a finding that the agreement did affect a substantial number of outlets and a substantial number of products when considered comparatively. It is true that no evidence is mentioned in the opinion justifying this portion of the finding. However, it was a specific finding and there must have been evidence in the record justifying it or it would not have been made. In the *International Salt* case [7] also cited by counsel in support of their position, the Court said that it was established by pleadings or admissions that the International Salt Co. was the country's largest producer of salt for industrial use. The contracts in that case were in regard to the industrial use of salt, and required the lessees of the Salt Co's. patented machines to use in them only salt bought from the lessor.

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[1] *U.S. v. Standard Oil of California, et al*, 78 F. Supp. 850.
[2] *Standard Oil of California, et al v. U.S.* 337, U.S. 293.
[3] *U.S. v. Richfield Oil Corp.*, 99 F. Supp. 280.
[4] *Richfield Oil Co. v. U.S.* 343, U.S. 922.
[5] See footnote 2, *Supra.*
[6] See footnote 3, *supra.*
[7] *International Salt Co., Inc., v. U.S.* 332, U.S. 392.

PAR. 25. In the *Dictograph Products* case [8] the Court of Appeals for the Second Circuit stated in part:

Where the alleged violator dominated or was a leader in the industry, proof of such fact was, at an early stage, determined to be sufficient predicate from which to conclude that the use of exclusive-dealing contracts was violative of section 3 and other factors appear to have been largely ignored (citing cases). More recently, the Supreme Court extended the rule to business organizations enjoying a powerful, though clearly not dominant position in the trade and doing a substantial share of the industry's business by means of these contractual provisions.[9]

PAR. 26. The Supreme Court recognized in the *Standard Stations* case that section 3 was not intended to reach every remote lessening of competition. It then went on to say later in the opinion that the cases do indicate that some sort of showing must be made as to the actual or probable economic consequences of the agreement and that Standard's requirements contracts, affecting a gross business of $58 million, comprising 6.7 percent of the total in the area, goes far towards supporting the inference that competition has been or probably will be substantially lessened.[10] This inference was undoubtedly further supported by the fact, previously mentioned, that Standard was a major competitor in the field, being the largest seller of gasoline in the area. Here there is no such showing, nor is there any showing from which a similar inference can be made, only the fact that respondent's receipts from the sale of propane gas in 1949 were $300,152 and in 1950 were $291,354 and that the great majority of such sales were in 18-pound cylinders. These figures could be sufficient to cause a substantial lessening of competition between respondent and its competitors for the business of refilling cylinders of 18- and 20-pound capacity, but there is nothing in the record from which such inference can be drawn. In some lines of business these figures might put respondent in a dominant position in the industry. In other lines of business they probably would not cause even a remote lessening of competition. The burden is on counsel supporting the complaint to

[8] *Dictograph Products Inc.*, v. *F.T.C.*, 217 F. 2d 821.

[9] In *Anchor Serum Co.*, v. *F.T.C.*, 217 F. 2d 867 the record showed actual effect upon competition. In the matter of *Revlon Products*, docket No. 6519, respondent was the largest seller of lipstick and actual effect on competition is shown. In *Beltone Hearing Aid*, docket No. 5825, the record showed respondent to be one of the largest manufacturers, ranking fourth in the industry. In docket No. 5698, *Harley-Davidson Motor Co.* was the largest domestic manufacturer of motorcycles. In docket 5882, *Outboard, Marine & Manufacturing Co.*, respondent's comparative position in the industry is shown to range between 54 percent and 32 percent of the total sales.

[10] Other later cases cited containing language which it is contended imply a different standard of proof, do not involve section 3. See *Transamerica Corp.* v. *Board of Governors*, Federal Reserve System 206 F. 2d 170; *Times-Picayune Publishing Co., et al* v. *U.S.* 345 U.S. 594; *U.S.* v. *E. I. du Pont de Nemours*, decided June 3, 1957 by Supreme Court.

produce evidence showing or from which a logical inference can be drawn that respondent's leasing practices may be to substantially lessen competition or tend to create a monopoly. That burden has not been fulfilled and it is so found.

PAR. 27. It is believed to be incumbent on the hearing examiner to pass on all the issues raised by the pleadings, the proposed finding and conclusions, in view of the remand. In support of its affirmative defense, respondent claims that regardless of the effect of its practices on competition the facts in this case bring it within the rule announced in the *Sinclair Refining Co.* case.[11] In short, this contention is that respondent's leasing practices are not in violation of section 3, regardless of their effect on competition, because the leases to the users do not undertake to limit the lessees' right to use propane gas furnished by competitors but only prevent the lessees from using competitors' gas in respondent's cylinders. The hearing examiner is unable to distinguish the holding in the *Sinclair* case from decisions in later cases on the same point which reject the principle contended for by respondent.[12] Hence this contention of respondent is rejected here.

PAR. 28. Respondent's other contentions come under the second issue in this case mentioned in paragraph 18. These contentions are in effect that it has a right to prevent its trade-marked cylinders from being used as containers for propane gas sold by others, that, its leasing practices are necessary to protect the public in the use of a dangerous substance, propane gas, and help prevent the public from violating Interstate Commerce Commission regulations and various state statutes and regulations designed for protection of the public.

PAR. 29. The cases cited in support of the position that respondent has the right to prevent its trade marked cylinders from being used for propane gas sold by others are contained in the proposed findings submitted to Hearing Examiner Ballinger and in respondent's appeal to the Commission. These cases generally support the principle that the user of a competitor's container for the sale of a competing product, where the purpose or the effect of such use enables the producer or retailer to pass off the user's product as the product of the seller originally using the container, is unfair competition. Respondent's contention might be applicable if its agreements with its distributors were under attack. Respondent's distributors obtain the cylinders by lease with the agreement that the cylinders will be refilled only at such

[11] *Sinclair Refining Co.* v. U.S. 261 U.S. 463.

[12] These cases are reviewed in *Judson L. Thompson Manufacturing Co.*, v. *F.T.C.* 150 F. 2d 952 where contention similar to that made by respondent herein was rejected.

filling stations as shall be authorized by respondent. These distributors have the cylinders refilled for leasing to users and for exchange for cylinders brought in by lessees who are the actual users of the cylinders and the gas. If the distributors had respondent's cylinders refilled with the gas of a competitor and then leased them to users or exchanged them for empty cylinders brought in by the lessee-user they could pass off the gas of a competitor for that of respondent. But these agreements with their distributors by respondent are not in issue. It is the lease agreements with the users of respondent's cylinders that are attacked in the complaint. If the lessee-user had the right to have the cylinders refilled for his own use wherever he chose there could be no palming off of the gas of a competitor for that of respondent's because the lessee-user would know whose gas went into the cylinder. Respondent's restrictions in the lease with the lessor-user cannot be defended on the grounds of protecting respondent from unfair competition. Also the trademark law provides that the holder of a registered trademark may not use it to violate the antitrust laws of the United States.[13]

PAR. 30. The restrictions in the lease with the lessor-user cannot be defended in this case on the grounds that such restrictions are necessary to protect the public in the use of a dangerous substance or help prevent the public from violating Interstate Commerce Commission regulations or various State statutes designed for the protection of the public. No cases are cited in support of respondent's position on this, nor has the hearing examiner's attention been called to any statute or regulation imposing such duty on respondent. Furthermore, the only provisions of such statutes and regulations on which respondent seems to rely is the Interstate Commerce Commission regulation which prohibits the transportation in commerce of propane gas in cylinders having been filled or refilled otherwise than by the owner or with the owner's consent, and the various state statutes prohibiting the refilling of cylinders otherwise than by the owner or his consent. It is the retention of title to the cylinders by respondent without giving the lessee the right to have them refilled where he chooses that prevents the lessee-user from having the cylinders refilled by respondent's competitors, rather than any statute or regulation. The record shows that some competitors of respondent sell their cylinders instead of leasing them. The record also shows that respondent's competitors in the sale of propane gas can and do refill cylinders of all kinds in accordance with directions contained thereon when permitted by the owners.

[13] Section 1115, Title 15, U.S.C.A.

The record further shows that in actual practice respondent has no way of knowing who has which cylinder at any given time.

CONCLUSION OF LAW

The record now, as at the time of remand, does not afford an adequate basis for an informed determination as to whether the effect of respondent's practices may be to substantially lessen competition or tend to create a monopoly. It appearing that such information is unavailable, the proceeding should be dismissed.

ORDER

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

OPINION OF THE COMMISSION

By Tait, Commissioner:

On September 24, 1954, the Commission remanded this case to the Hearing Examiner for further proceedings since the evidence of record was not adequate to resolve the questions raised on appeal.

Pursuant to such remand, additional evidence, including testimony and exhibits previously stricken, was received and considered by the hearing examiner. On June 28, 1957, an initial decision was filed wherein the hearing examiner, in a well considered opinion, ordered dismissal of the complaint. The matter is now before us on cross-appeals from this initial decision.

Basically, the issues presented here are the same as those which existed at the time the Commission rendered its opinion upon remand. It is our view that the trial record now established will not support a conclusion that respondent has violated the provisions of section 3 of the Clayton Act as alleged in the complaint. Accordingly, the complaint should be dismissed.

An appropriate order will be entered adopting the initial decision as the decision of the Commission.

ORDER ADOPTING INITIAL DECISION DISMISSING COMPLAINT

This matter having come on to be heard by the Commission upon the cross-appeals of counsel supporting the complaint and respondent from the hearing examiner's initial decision dismissing the complaint, and the briefs and oral argument with respect to said appeals, and the Commission having determined, for the reasons appearing in the accompanying opinion, that an order should be entered adopting the initial decision as the decision of the Commission:

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

IN THE MATTER OF

A. HARRIS & CO.

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

Docket 6862. Complaint, Aug. 14, 1957—Decision, Dec. 19, 1957

Consent order requiring a furrier in Dallas, Tex., to cease violating the Fur Products Labeling Act by failing to comply with the labeling and invoicing requirements and by misrepresenting prices in advertising and otherwise failing to observe the advertising requirements.

Harry E. Middleton, Jr., Esq., for the Commission.

Thomas, Knight, Wright & Simmons, by *Sol Goodell*, Esq., of Dallas, Tex., for respondent.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

The complaint in this proceeding charges that A. Harris & Co., a corporation, hereinafter called respondent, has violated the provisions of the Federal Trade Commission Act, the Fur Products Labeling Act of 1951 and the rules and regulations promulgated under the last-named act by misbranding and falsely and deceptively invoicing and advertising fur products.

After issuance and service of the complaint, the respondent, its counsel and counsel supporting the complaint entered into an agreement for a consent order. The agreement has been approved by the director and assistant director of the Bureau of Litigation. The order disposes of the matters complained about.

The pertinent provisions of said agreement are as follows: Respondent admits all jurisdictional facts; the complaint may be used in construing the terms of the order; the order shall have the same force and effect as if entered after a full hearing and the said agreement shall not become a part of the official record of the proceeding unless and until it becomes a part of the decision of the Commission; respondent waives the requirement that the decision must contain a statement of findings of fact and conclusion of law; respondent waives further procedural steps before the hearing examiner and the Commission, and the order may be altered, modified, or set aside in the manner provided by statute for other orders; respondent waives any right to challenge or contest the validity of the order entered in accordance with the agreement; and the signing of said agreement is

for settlement purposes only and does not constitute an admission by respondent that it has violated the law as alleged in the complaint.

The hearing examiner having considered the agreement and proposed order and being of the opinion that the acceptance thereof will be in the public interest, hereby accepts such agreement, makes the following jurisdictional findings, and issues the following order:

JURISDICTIONAL FINDINGS

1. Respondent A. Harris & Co. is a corporation existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 1501 Main Street, Dallas, Tex.

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

ORDER

It is ordered, That respondent A. Harris & Co., a corporation and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale, in commerce, or the transportation or distribution in commerce, of fur products, or in connection with the sale, advertising, offering for sale, transportation, or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Failing to affix labels to fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations.

(b) That the fur product contains or is composed of used fur, when such is the fact.

(c) That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact.

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact.

(e) The name or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce.

(f) The name of the country of origin of any imported furs used in the fur product.

2. Setting forth on labels affixed to fur products:

(a) Information required under section 4(2) of the Fur Products Labeling Act and the rules and regulations thereunder in abbreviated form.

(b) Information required under section 4(2) of the Fur Products Labeling Act and the rules and regulations thereunder mingled with nonrequired information.

3. Failing to show separately on labels affixed to fur products composed of two or more sections containing different animal furs the information required under section 4(2) of the Fur Products Labeling Act and the rules and regulations thereunder with respect to the fur comprising each section.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices to purchasers of fur products showing:

(a) The name or names of the animal or animals producing the fur or furs contained in the fur product as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations.

(b) That the fur product contains or is composed of used fur, when such is the fact.

(c) That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact.

(d) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact.

(e) The name and address of the person issuing such invoice.

(f) The name of the country of origin of any imported fur contained in a fur product.

(g) The item number or mark assigned to a fur product.

2. Abbreviating on invoices information required under section 5(b)(1) of the Fur Products Labeling Act and the rules and regulations thereunder.

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

1. Represents directly or by implication: (a) That the regular or usual price of any fur product is any amount which is in excess of the price at which the respondent has usually and customarily sold such products in the recent regular course of its business.

2. Makes use of comparative prices or percentage savings claims unless such compared prices or percentage savings claims are based

upon the current market value of the fur product or unless a bona fide price at a designated time is stated.

3. Makes pricing claims and representations of the types referred to in subparagraphs 1(a) and 2, unless there are maintained by respondent full and adequate records disclosing the facts upon which such claims or representations are based as required by rule 44(e) of the rules and regulations.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's rules of practice, the initial decision of the hearing examiner shall, on the 19th day of December 1957, become the decision of the Commission; and, accordingly:

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

Decision

IN THE MATTER OF

SAMUEL GLASS TRADING AS SAMUEL GLASS

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

Docket 6874. Complaint, Aug. 23, 1957—Decision, Dec. 20, 1957

Consent order requiring a furrier in Philadelphia, Pa., to cease violating the Fur Products Labeling Act by failing to comply with its labeling and invoicing requirements.

Mr. S. F. House for the Commission.

Fox, Rothschild, O'Brien & Frankel, by *Mr. Nathan L. Posner*, of Philadelphia, Pa., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, the Federal Trade Commission on August 23, 1957, issued and subsequently served its complaint in this proceeding against respondent Samuel Glass, an individual trading as Samuel Glass, with his office and principal place of business located at 128 S. 11th Street, Philadelphia, Pa.

On October 24, 1957, there was submitted to the undersigned hearing examiner an agreement between respondent and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. By such agreement, respondent waives any further procedural steps before the hearing examiner and the Commission; the making of findings of fact and conclusions of law; and waives all of the rights he may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement. Such agreement further provides that it disposes of all of this proceeding as to all parties; that the record on which this initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the latter shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the agreement is for settlement purposes only and does not constitute an admission by respondent that he has violated the law as alleged in the complaint; and that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondent, and, when so

entered, it shall have the same force and effect as if entered after a full hearing, and may be altered, modified or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

The hearing examiner, having considered the agreement and proposed order, and being of the opinion that they provide and appropriate basis for settlement and disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued.

1. Respondent Samuel Glass is an individual trading as Samuel Glass, with his office and principal place of business located at 128 S. 11th Street, in the city of Philadelphia, Pa.

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

ORDER

It is ordered, That the respondent Samuel Glass, an individual trading as Samuel Glass, or trading under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce or the sale, advertising, offering for sale, transportation or distribution of fur products in commerce, or in connection with the sale, advertising, offering for sale, transportation or distribution of fur products which have been made in whole or in part of fur which has been shipped and received in commerce, as "commerce", "fur" and "fur products" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

1. Misbranding fur products by:

(a) Failing to affix labels to fur products showing:

(1) The name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

(2) That the fur product contains or is composed of used fur, when such is the fact;

(3) That the fur product contains or is composed of bleached, dyed, or other wise artificially colored fur, when such is the fact;

(4) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(5) The name, or other identification issued and registered by the Commission, of one or more persons who manufactured such fur product for introduction into commerce, introduced it into commerce, sold

it in commerce, advertised or offered it for sale in commerce, or transported or distributed it in commerce;

(6) The name of the country of origin of any imported furs used in the fur product.

(b) Failing to show on labels attached to fur products the item numbers or marks assigned to fur products as required by rule 40 of the rules and regulations.

(c) Setting forth on labels affixed to fur products:

(1) Information required under section 4(2) of the Fur Products Labeling Act and the rules and regulations thereunder in abbreviated form;

(2) Information required under section 4(2) of the Fur Products Labeling Act and the rules and regulations thereunder which is intermingled with nonrequired information.

2. Falsely or deceptively invoicing fur products by:

(a) Failing to furnish invoices to purchasers of fur products showing:

(1) The name or names of the animal or animals producing the fur or furs contained in the fur product, as set forth in the Fur Products Name Guide and as prescribed under the rules and regulations;

(2) That the fur product contains or is composed of used fur, when such is the fact;

(3) That the fur product contains or is composed of bleached, dyed, or otherwise artificially colored fur, when such is the fact;

(4) That the fur product is composed in whole or in substantial part of paws, tails, bellies, or waste fur, when such is the fact;

(5) The name and address of the person issuing such invoices;

(6) The name of the country of origin of any imported furs contained in a fur product.

(b) Failing to show on invoices furnished purchasers the item numbers or marks assigned to fur products as required by rule 40 of the rules and regulations.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's rules of practice, the initial decision of the hearing examiner shall, on the 20th day of December 1957, become the decision of the Commission; and, accordingly:

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.

IN THE MATTER OF

PEPSI COLA CO.

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

Docket 6593. Complaint, July 19, 1956—Decision, Dec. 21, 1957

Order dismissing without prejudice complaint charging a seller of carbonated beverages, with principal office in New York City, with violating section 2(d) of the Clayton Act by making payments to broadcasting companies for the benefit of certain customers—consisting of broadcasting time furnished the favored customers for their own advertising purposes—as compensation for promotional services in connection with the sale of respondent's products, while failing to make such payments available to its other customers.

Mr. J. Wallace Adair, *Mr. William R. Tincher* and *Mr. Eugene Kaplan*, for the Commission.

Appell, Austin & Gay, by *Mr. Cyrus Austin*, and *Kaye, Scholer, Fierman & Hays*, by *Mr. Milton Handler*, all of New York, N.Y., for respondent.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

THE COMPLAINT

The complaint in this proceeding charges the respondent with having paid money to three of the major broadcasting companies for the benefit of certain chain-store customers, thereby providing broadcasting time through such broadcasting companies to respondent's favored customers for their own advertising purposes. The payments thus made by respondent are alleged to have been made as compensation or in consideration for services or facilities furnished it by these favored customers in connection with the offering for sale and sale of respondent's products. It is further alleged that the benefits so furnished to some of respondent's customers were not made available to respondent's other customers on proportionally equal terms, in violation of the provision of subsection (d) of § 2 of the Clayton Act, as amended.

The complaint then describes in some detail the sales-promotion plans through which respondent favored certain of its customers.

THE ANSWER

Respondent in its answer admits that it is a corporation organized and doing business under the laws of the State of Delaware, with its principal office and place of business located at 3 W. 57th Street, New

York 19, N.Y. Respondent denies, however, that it has been engaged, as alleged in paragraph 2 of the complaint, in the business of selling and distributing its products, including carbonated beverages, in commerce to competing independent grocers and grocery chain-stores located throughout the United States. Moreover, respondent avers that it manufactures and sells concentrates and syrups used in making carbonated beverages in commerce, but that it does not sell or distribute any of its products either to independent grocers or to grocery chain-stores.

MOTION TO DISMISS COMPLAINT

On October 28, 1957, counsel supporting the complaint submitted a motion to dismiss the complaint herein. In this motion they state that this proceeding is one of nine cases in which complaints have been issued against respondents for their use of certain discriminatory merchandising plans alleged to be in violation of § 2(d) of the Robinson-Patman Act. They further state that in seven of those proceedings, the hearing examiner has already issued initial decisions containing orders to cease and desist. In addition, they state that the respondents in these cases constitute 9 of approximately 100 similar grocery-product advertisers who have adopted and utilized similar allegedly illegal merchandising plans.

Counsel aver that six of the above cases were presented to the hearing examiner for determination on the basis of agreed stipulations of facts common to all. The stipulations in those proceedings presented a detailed analysis of the various merchandising plans used and the method by which they were effectuated. In contrast, counsel assert that the instant proceeding involves distinct problems requiring separate consideration as to both law and fact.

Counsel supporting the complaint set forth that in September 1957, respondent presented to them information showing that the respondent corporation was not a party to any of the promotional contracts with broadcasting companies as alleged in the complaint herein. They state that this information shows, rather, that the contracts referred to were executed between the Metropolitan Bottling Co. a subsidiary of the respondent, and certain broadcasting companies. Counsel quote an official of the respondent as stating that this subsidiary, the Metropolitan Bottling co., operates as an independent company, and that respondent has not participated in any way in any of this subsidiary's acts and practices of the type here involved. This information further indicates that the Metropolitan Bottling Co. does not sell its products to grocery outlets as alleged in the complaint,

but distributes its products by selling them to independent distributors, who, in turn, sell to such grocery outlets.

Counsel supporting the complaint state that they have no evidence available to contradict respondent's statements. They conclude that the complaint should be dismissed

* * * without prejudice to the right of the Commission to undertake such further investigation or to institute such further proceeding as facts and circumstances may warrant.

Since respondent has never conceded commerce in this matter, and it has been impossible to negotiate a stipulation as to the other cases, continued prosecution of this matter would necessitate the expensive and time-consuming presentation of factual proof regarding all issues.

Since the legality of the adoption and use of these merchandising plans is already being tested in the above-referred-to cases, counsel supporting the complaint consider this separate and continued prosecution of this matter an unnecessary expenditure in determining the legality of the alleged practice and in the protection of the public interest. It is reasonable to assume that if the Commission upholds the examiner's initial decision that the use of these plans by the respondent advertisers is illegal: (1) the numerous other grocery product advertisers will be deterred from the further use of these plans; (2) the necessity of issuing complaints against such other advertisers will be obviated; and (3) these plans will not then be available for use by this respondent.

THE ISSUE RESOLVED

We cannot subscribe to all the reasons presented by counsel supporting the complaint for the dismissal of this proceeding. Counsel's motion, however, does contain one good and valid reason why the complaint herein should be dismissed. As previously stated, counsel have submitted in such motion a statement of facts which they admit they have no available proof to contravene. That statement shows that the respondent was not a party to any of the contracts with any of the broadcasting companies, as alleged in the complaint; that the respondent's subsidiary, Metropolitan Bottling Co., operates as an independent company in whose acts and practices respondent did not participate; and that the Metropolitan Bottling Co. does not sell its products to grocery outlets as alleged in the complaint, but rather distributes them by selling to independent distributors who, in turn, sell to such grocery outlets. The admission by counsel supporting the complaint that they have no evidence to disprove these facts indicates that they cannot prove the allegations of the complaint against the respondent, and that, accordingly, the prosecution of this proceeding is unwarranted. It follows, therefore, that the motion to dismiss the complaint should be granted. Since, however, the dismissal is based upon a confessed lack of potential proof rather than

a failure of proof upon a trial of the issues, the dismissal should be without prejudice to the public interest. Accordingly,

It is ordered, That the complaint herein be, and the same hereby is, dismissed without prejudice to the right of the Commission to take such further action against the respondent herein as facts and circumstances may warrant.

DECISION OF THE COMMISSION

Pursuant to section 3.21 of the Commission's rules of practice, the initial decision of the hearing examiner shall, on the 21st day of December 1957, become the decision of the Commission.

IN THE MATTER OF

HARLEY BELT CO., INC., ET AL.

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

Docket 6861. Complaint, Aug. 13, 1957—Decision, Dec. 21, 1957

Consent order requiring a manufacturer in New York City to cease preticketing ladies', men's, and boys' belts with ficticious and exaggerated prices, thereby placing in the hands of retailers means of misleading the purchasing public as to the usual retail price.

Mr. Harry E. Middleton, Jr. for the Commission.
Mr. Louis N. Porter, of New York, N.Y., for respondents.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 13, 1957, issued and subsequently served its complaint in this proceeding against respondents Harley Belt Co., Inc., a corporation existing and doing business under and by virtue of the laws of the State of New York, Harry Liebovitz and Louis B. Fox, individually and as officers of the corporate respondent. The office and principal place of business of said respondents is at 102 Wooster Street, New York, N.Y.

On November 1, 1957, there was submitted to the undersigned hearing examiner an agreement between respondents and counsel supporting the complaint providing for the entry of a consent order. By the terms of said agreement, respondents admit all the jurisdictional facts alleged in the complaint and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. By such agreement, respondents waive any further procedural steps before the hearing examiner and the Commission; waive the making of findings of fact and conclusions of law; and waive all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement. Such agreement further provides that it disposes of all of this proceeding as to all parties; that the record on which this initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the latter shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the agreement is for settlement purposes only and does not constitute an admission by

respondents that they have violated the law as alleged in the complaint; and that the following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents, and, when so entered, it shall have the same force and effect as if entered after a full hearing, and may be altered, modified, or set aside in the manner provided for other orders; and that the complaint may be used in construing the terms of the order.

The hearing examiner having considered the agreement and proposed order, and being of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued.

1. Respondent Harley Belt Co., Inc, is a corporation 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 102 Wooster Street, New York, N.Y. Respondents Harry Liebovitz and Louis B. Fox, are officers of the corporate respondent and have their office and principal place of business at the same address as the corporate respondent.

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

ORDER

It is ordered, That respondents Harley Belt Co., Inc., a corporation, and its officers, and Harry Liebovitz and Louis B. Fox, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of belts or other products, do forthwith cease and desist from:

1. Representing, by preticketing or in any other manner, that certain amounts are the usual and regular retail prices for their products, when such amounts are in excess of the prices at which their products are usually and regularly sold at retail.

2. Putting into operation any plan whereby retailers or others may misrepresent the regular and usual retail price of their products.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to section 3.21 of the Commission's rules of practice, the initial decision of the hearing examiner shall, on the 21st day of

December 1957, become the decision of the Commission; and, accordingly:

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.

IN THE MATTER OF

CROWN ZELLERBACH CORP.

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

Docket 6180. Complaint, Feb. 15, 1954—Decision, Dec. 26, 1957

Order requiring the nation's second largest producer of paper and paper products with headquarters in San Francisco, to divest itself of, and restore as a competitive entity in the paper trade, a major competitor it acquired in 1953 through exchange of common stock, in violation of section 7 of the Clayton Act as amended;

Providing that no property to be divested be sold to anyone who at the time of divestiture was a stockholder or otherwise connected with respondent or its affiliates;

Requiring it to refrain from cutting, removing, or selling any timber or forest residuals from lands acquired in the aforesaid acquisition; and

Requiring it to submit within 60 days a plan for compliance with the order, specifying the time in which it could reasonably carry out the divestiture, whereupon the Commission would fix the date by which compliance must be effected.

Mr. L. E. Creel, Jr., *Mr. Dwight L. Carhart*, *Mr. J. Wallace Adair*, and *William N. Early*, for the Commission.

Mr. Philip S. Ehrlich, *Mr. R. J. Hecht*, and *Mr. Philip S. Ehrlich, Jr.*, of San Francisco, Calif.; and *Sullivan & Cromwell*, by *Mr. Arthur H. Dean*, *Mr. Howard T. Milman*, *Mr. Marvin Schwartz*, and *Mr. Jerome Gotkin*, of New York, N.Y., for respondent.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is based upon a complaint charging the respondent Crown Zellerbach Corp., a corporation, with violation of section 7 of the Clayton Act, as amended, and approved December 29, 1950, by reason of its acquisition of St. Helens Pulp & Paper Co., a corporation. This proceeding is now before the undersigned hearing examiner for final consideration on the complaint, answer thereto, testimony and other evidence, and proposed findings as to the facts and conclusions, together with briefs and reply briefs presented by counsel. The hearing examiner has given consideration to the proposed findings as to the facts and conclusions submitted by both parties and briefs in support thereof, and all findings of fact and conclusions of law proposed by the parties respectively, not hereinafter specifically found or concluded are herewith rejected, and the hearing examiner, having considered the record herein and being now fully advised in the premises, makes the

following findings as to the facts and conclusions drawn therefrom and order:

I. CROWN ZELLERBACH CORPORATION

1. Respondent Crown Zellerbach Corp. (hereinafter referred to as Crown) is a corporation organized under and by virtue of the laws of the State of Nevada with its principal office and place of business located at 343 Sansome Street, San Francisco, Calif.

2. Crown Zellerbach Corp. was incorporated under the name Zellerbach Corp. on August 28, 1924. At that time it was engaged in the paper business as a wholesale paper merchant. In 1928 it merged with Crown Willamette Paper Co. and became Crown Zellerbach Corp. At the time of this merger, Crown Willamette was engaged in the manufacture of coarse papers and newsprint with mills at Camas, Wash.; West Linn and Lebanon, Oreg.; and Floriston, Calif.; and controlled the Pacific Mills, Ltd., in British Columbia.

3. Respondent, directly or through its subsidiaries, is engaged principally in the production and in the sale and distribution of pulp, paper, and paper products in interstate commerce, and is one of the largest manufactures of pulp and paper in the world, ranking second in the production of paper and paper products in the United States. Respondent is a fully integrated producer of pulp, paper, and paper products in the United States and through Canadian subsidiaries is an integrated producer of pulp, paper, paper products, plywood, lumber, and lumber products in Canada. In its operations in the United States, respondent owns and controls timber reserves and conducts logging operations; produces its own pulp requirements; manufactures paper of various kinds; converts paper into paper products and sells paper and paper products to converters, jobbers, and others.

4. Respondent produces unbleached and bleached groundwood, sulphite and sulphate (kraft) pulp. A small amount of this pulp is sold to other paper and paperboard manufacturers, but the major portion is manufactured into paper by the company.

5. The papers manufactured by respondent consist of the following major grades: newsprint, groundwood papers, gloss book paper, towel paper, machine glazed and machine finish wrapping papers, butcher papers, gumming papers, waxing papers, bag papers, multiwall sack papers, envelope papers, other converting papers, other kraft papers, napkins, toilet and facial tissues, and specialty paperboard. Some of these products are sold in finished form for consumer uses, others to manufacturers and converters for further fabrication, and the balance is converted by the company into various products for consumer use.

6. Respondent owns and operates a number of mills for the produc-

tion of paper. All of these mills have one or more pulp mills as part of their plant facilities except the new mill at Antioch, Calif., which will use pulp shipped from Canada and the mill at Los Angeles, Calif., which uses pulp shipped from respondent's Camas mill. These mills are as follows:

CAMAS, WASH. This mill has fourteen paper machines which produce fine paper and substantially all grades of trade coarse paper. Paper capacity: 710 tons per day.

WEST LINN, OREG. This mill has ten paper machines producing principally newsprint and gloss book paper, groundwood specialties, sulphite wrapping papers and toweling. Paper capacity: 620 tons per day.

PORT ANGELES, WASH. This mill has three paper machines making newsprint. Paper capacity: 445 tons per day.

LEBANON, OREG. This mill has two paper machines producing wrapping paper specialties. Paper capacity: 55 tons per day.

PORT TOWNSEND, WASH. This mill has two paper machines, one of which produces kraft board and the other of which produces kraft bag and wrapping paper. Paper capacity: 335 tons per day.

ANTIOCH, CALIF. Scheduled to begin production in September 1956. This mill will have daily capacity to produce 310 tons per day.

LOS ANGELES, CALIF. In November 1955, respondent began producing sanitary tissues on an unique paper machine in its Los Angeles converting plant. Capacity is 20 tons per day. Pulp is converted to packaged consumer products in a single-line operation.

7. Respondent has facilities for converting part of its paper production into such paper products as bags, multiwall shipping sacks, toilet paper, towels, napkins, facial tissue, waxed papers, gummed paper tape and asphalt laminated paper. At West Linn, Oreg., and Camas and Port Townsend, Wash., converting operations are integrated with paper production. Respondent has additional converting facilities at Harlingen, Tex.; San Leandro, Calif.; Los Angeles, Calif.; and North Portland, Oreg.

8. In addition to its paper mills in the West, respondent has a small paper mill and converting plant at Carthage, N.Y. It also acquired through its merger with Gaylord Container Corp. on November 30, 1955, mills at Bogalusa, La., Baltimore, Ohio, and Dresden, Ohio, and several converting plants outside the West.

9. As of April 30, 1952, respondent owned approximately 500,000 acres of high-quality forest growth sites in Oregon and Washington. These forests, of different ages, are distributed among the best growing forest lands in the Pacific Northwest. Of the total forest lands owned,

approximately 175,000 acres are mature or old growth forests, carrying an estimated volume of 6,500 million board feet; approximately 51,000 acres are so-called second growth forest ranging from 60 to 100 years old and carrying an estimated merchantable stand of 3 billion board feet; and approximately 36,000 acres 40- to 60-year old forests of presently premerchantable size. With the exception of approximately 10,000 acres, all of the remaining acreage is fully stocked with young premerchantable size timber ranging in age from 5 to 40 years. In addition to the above timberlands owned in fee, respondent has cutting rights of satisfactory duration on approximately 20,000 acres of mature old growth forestlands carrying an estimated volume of 500 million board feet.

10. Respondent has extensive holdings in Canada. Through its subsidiaries, respondent owns in fee or controls in various forms of tenure approximately 920,000 acres of timberlands in British Columbia. Respondent owns 99 percent of Crown Zellerbach Canada Ltd., formerly Pacific Mills, Ltd., which is a fully integrated mill producing pulp, paper, and paper products which are sold in Canada and in the export markets. In 1953, respondent acquired the Canadian Western Lumber Co., Ltd., one of the largest producers of lumber in the British Commonwealth. This company is a 97 percent owned subsidiary of the respondent. The timber holdings of Canadian Western as of March 23, 1953, consisted of an estimated 3,500 million board feet of high quality sawmill and pulp timber. It also holds approximately 500 million board feet of timber located in the interior of British Columbia not readily accessible because of excess transportation costs. Canadian Western and Crown Zellerbach Canada Ltd. jointly own the Elk Falls Co., Ltd., which company owns and operates a newsprint mill with capacity of 240 tons per day and a designated ultimate capacity of 320 tons per day. In addition, Crown Zellerbach Canada Ltd., has four wholly owned subsidiaries, each of which are Canadian corporations: Hudson Paper Co., Ltd.; Canadian Boxes, Ltd.; Northern Pulpwood Ltd.; and Badwater Towing Company Ltd.

11. Respondent also owns a one-third interest in the Elk River Timber Co., Ltd., with operations on Vancouver Island, British Columbia, and a 50-percent interest in the Owikeno Lake Timber Co. Ltd., a nonoperating company owning timber surrounding Owikeno Lake, British Columbia. The Elk River Timber Co., Ltd., is operating on a combination of timberlands owned in fee and long-term cutting rights. It is estimated that the latter company has an operating life expectancy of from 15 to 20 years at an annual production rate of approximately 40 million board feet per year. The Owikeno Lake

Timber Co., Ltd., owns timber carrying an estimated volume of 600 million board feet.

12. The Zellerbach Paper Co. is a wholly-owned jobber subsidiary of the respondent which distributes fine papers, newsprint, trade coarse papers and a great variety of merchandise of the type sold in variety stores, such as school supplies, stationery, picnic supplies, notions, bobby pins and electric appliances, in California, Oregon, Washington, Arizona, Nevada, Idaho, Utah, and Montana. Zellerbach Paper Co.'s 1953 purchases of paper from respondent accounted for the following percentages of respondent's Western sales: wrapping paper, 27.8 percent; converting papers, 3.9 percent; bags, 16.4 percent; miscellaneous consumer products, 3.9 percent.

13. Prior to January 17, 1956, respondent held a substantial stock interest in Fibreboard Products, Inc., a corporation engaged with its subsidiaries principally in the manufacture and sale of boxboard, pulpboard, fiber shipping cases, boxes and cartons, paper milk bottles, oyster and ice cream pails, paper tubes and cans, fiber wallboard, egg case fillers and other paper products, and glass containers. On January 17, 1956, respondent sold its interest in Fibreboard Products, Inc., for $37,800,000, which had consisted of 40 percent preferred shares, 44 percent class A common, and 50 percent class B common (voting). Respondent's investment in Fibreboard had cost approximately $5,200,000. The redemption of Fibreboard shares produced a capital gain of approximately $24,500,000, after Federal capital gains tax.

14. On November 30, 1955, the Gaylord Container Corp. was merged into respondent by an exchange of stock and became a division of the respondent. Gaylord has produced sulphate and bleached sulphate pulp and semichemical pulp. It has manufactured and sold various types of corrugated and solid fiber shipping boxes, packing and shipping materials, container liners, bag paper, bleached and unbleached specialties, laminated asphalt waterproof paper, bags, etc. Gaylord's paper and paperboard mills were located at Bogalusa, La., and at Baltimore and Dresden, Ohio; converting plants were located at Bogalusa, La.; Dallas and Houston, Tex.; St. Louis, Mo.; Milwaukee, Wis.; Baltimore, Ohio; Beaver Falls, Pa.; Jersey City, N.J.; Greenville, S.C.; Atlanta, Ga.; and Tampa and Miami, Fla. In 1952, Gaylord's net sales were $85,798,000 and its total net assets at the end of the year, $60,042,000. The acquisition of Gaylord added 480,000 acres of intensively managed forest lands to respondent's timber holdings. None of this timber, however, was located in the Western States.

15. The total assets of respondent and its subsidiaries prior to the acquisition of St. Helens were $243 million. Consolidated sales were $253 million. These figures, however, include substantial sales and assets in Canada and the sales and assets of Zellerbach Paper Co.

16. Sales of respondent and its subsidiaries in the year ended December 31, 1955, were $414 million, which includes the substantial sales of respondent's Canadian subsidiaries, the sales of Zellerbach Paper Co., and the sales of the new Gaylord division. The magnitude of the sales of Zellerbach Paper Co. is indicated by its sales in the fiscal year ended April 30, 1955, of approximately $90 million. The sales of the Gaylord division were $87 million. The sales of respondent's Canadian subsidiaries are not separately given, but they accounted for 22 percent of respondent's consolidated net income after taxes.

17. On December 31, 1955, respondent's total assets were $418 million. This figure reflects the $69 million increase in assets resulting from the merger with Gaylord Container Corp. on November 30, 1955.

18. In the fiscal year ending April 30, 1953, respondent produced paper and board as follows: 395,383 tons of newsprint and other printing papers; 332,343 tons of wrapping papers; 115,976 tons of tissues and sanitary papers; and 50,682 tons of paperboard. Over the five-year period ending April 30, 1952, respondent's mills have expanded their output by more than a quarter million tons, or approximately 37 percent. During the 15-year period ending April 30, 1952, its production has increased nearly 80 percent.

19. During the 11-year period from May 1, 1942, to April 30, 1953, respondent's net sales increased from $84,656,362 to $252,765,012, and its net income increased from $7,543,287 to $21,889,705.

II. ST. HELENS PULP & PAPER CO.

20. St. Helens Pulp & Paper Co. (hereinafter referred to as St. Helens) a corporation organized in 1924, was, prior to June 5, 1953, doing business under and by virtue of the laws of the State of Oregon (commercial operations began January 1, 1927), with its principal office and place of business located at St. Helens, Oreg.

21. St. Helens was engaged primarily in the manufacture and in the sale and distribution in interstate commerce of bleached and unbleached kraft papers, including machine finished and machine glazed papers, wrapping papers, butcher papers, gumming papers, waxing papers, multiwall waxing papers, envelope papers, and converted items such as bags and towels.

22. St. Helens was a fully integrated mill as it owned and controlled timber reserves, conducted some logging operations, produced most of

its own pulp requirements, manufactured kraft paper of various grades, converted some of its paper into paper products, and sold paper and paper products to converters, jobbers and others, principally in the 11 Western States, through its sales agency, the Graham Paper Co. of St. Louis, Mo. Since its inception, St. Helens had a contract with Graham Paper Co., paper merchants of St. Louis, Mo., pursuant to which Graham sold St. Helens' entire output as St. Helens' sole and exclusive selling agent.

23. St. Helens owned approximately 117,000 acres of timberland containing an estimated stand of 520 million board feet of timber in Oregon and Washington. On March 17, 1953, the retail value of St. Helens' timberland was estimated to be $8 million. In addition, it owned cutting rights on timberlands with an estimated stand of 30 million board feet and had the first right of refusal at the current market price on the log production of a logging company which owns an estimated 200 million board feet of pulp-type timber near the timber holdings of St. Helens.

24. The St. Helens mill had a capacity for manufacturing paper of approximately 180 tons per day, or approximately 60,000 tons per year, prior to an expansion program which was inaugurated around 1948. The St. Helens mill has operated at near capacity for several years, and its production of paper and paper products for the past five calendar years was:

	Tons
1952	59,449
1951	64,728
1950	56,178
1949	56,053
1948	55,124

III. ST. HELENS' MODERNIZATION PROGRAM

25. In November 1948, the St. Helens mill had reached a condition where certain major repairs and replacements had become necessary and a modernization program consisting principally of repairs and replacement was authorized by the directors at an estimated cost of $1,406,000. This was increased on December 20, 1949, to include a bleaching plant at an estimated cost of $285,000. On November 21, 1950, while some of this work was still in progress, a more comprehensive modernization program was submitted which was expected to effect a saving of not less than $622,000 per year, involving an estimated expenditure of $3,600,000.

26. On June 19, 1951, the directors were informed that the cost of the modernization program would be approximately $5 million, and the management was authorized to negotiate a loan for $4 million

which was done by obtaining a $3 million loan from the Prudential Insurance Co. of America, and $1 million loan from the United States National Bank. From time to time the vice president reported to the directors commitments made on the reorganization program and the amounts paid.

27. The directors of St. Helens at a meeting held August 19, 1952, made a complete review of the modernization and expansion program on which commitments had been made in the amount of $5,500,000 and upon which $3,500,000 had been paid. A revised estimate was submitted showing the estimated cost of the entire modernization program as being $8,875,000 and that its completion would require additional financing of $2 million.

28. At a subsequent meeting on September 24, 1952, the directors unanimously voted that the modernization and expansion program be continued up to the limit of the funds available. They also instructed the president to negotiate with the Beloit Iron Works relative to some relief on the contract to rebuild the No. 1 paper machine. The president was unable to arrive at a complete settlement with the Beloit Iron Works, but they did suspend all work on their orders without penalty as 80 percent of the Beloit orders were cast and 50 percent were machined.

29. An analysis of expenditures and a summary of funds available, prepared for the board of directors, showed that, as of September 1952 there were available $6,613,680 to meet the cost then incurred in the modernization program, including a balance of more than $3 million to be expended after June 30, 1952. This figure excluded the cost of rebuilding the No. 1 machine auxiliary equipment, building alterations and the lime kiln, but included the equipment already provided by Beloit for the No. 1 paper machine.

30. At a meeting on October 21, 1952, the directors determined that one individual should handle the financing of the modernization program and elected J. W. Fish, one of the directors, to handle this matter. Mr. Fish later reported on January 20, 1953, that he had contacted the United States National Bank and the Prudential Insurance Co. of America and that at the time they were willing to go along with the additional financing, but that in the meantime other matters had come up which postponed the negotiations and it was thought that this money might not be available at the present time. At this meeting, J. W. Fish was authorized to act on behalf of the company in negotiating with corporations inquiring as to the possible acquisition of St. Helens. Prior to this the company had had in-

quiries from the Marathon Corp. and Olin Industries, but nothing came of these inquiries.

IV. THE ACQUISITION OF ST. HELENS

31. St. Helens' board of directors on February 17, 1953, entered into a memorandum of intent which provided that respondent would offer to exchange its own common stock for the shares of St. Helens, and in June 1953 respondent acquired substantially all of St. Helens' stock in exchange for 339,806 shares of its own common stock valued at approximately $9,557,000. St. Helens was fully merged into respondent pursuant to the laws of Oregon and Nevada on September 12, 1955.

32. In its official statement (CX 4) respondent asserted that the exchange ratio was fair and reasonable whether tested singly or by all of the factors of comparative per share earnings, dividends, market values, and book values. The following table summarizes the factors taken into consideration in arriving at the proposed exchange offers. These figures have been adjusted to reflect the stock split-up and to place respondent's common stock on the basis of equivalent fractional shares to be offered for each share of St. Helens' stock.

	St. Helens Exchange Offer	
	Crown (Adjusted)	*St. Helens*
Earnings per share—average last 5 years	[a] $3. 07	$2. 73
Dividends paid per share—average last 5 years	1. 10	. 89
Market values—average of the high and low for the 14 months ended Feb. 28, 1953	24⅝	18⅜
Book values per share at Dec. 31, 1952	$21. 73	$23. 60

[a] Based on earnings of the company for the 4 years and 8 months ended December 31, 1952.

33. The reasons for the acquisition as explained by the respondent in its official statement to stockholders was as follows:

* * * St. Helens owns a paper mill located at St. Helens, Oreg., in which it produces bleached and unbleached kraft papers and bags, and also owns substantial timberlands, the majority of which are adjacent to or almost intermingled with timber holdings of the company.

* * * * * * *

The timber holdings of St. Helens would not only complement but would also advantageously supplement the company's timber holdings, since St. Helens has substantial holdings of hemlock, spruce and other high-grade species in age classifications in which the company is somewhat deficient in its United States holdings. A major reconstruction program is now underway at the St. Helens mill, which will modernize its facilities and increase its capacity. If the St. Helens exchange

offer is completed, the company would continue to serve St. Helens' present customers and, when the reconstruction program is completed, it would also have substantial additional tonnage for its own immediate market requirements. This additional tonnage would enable the company to supply the increasing requirements of its customers while its proposed major new expansion program, involving in part a new unit at the Elk Falls mill, is under development.

34. Another major interest of respondent in acquiring St. Helens' mill was its bleaching capacity which would permit respondent to concentrate its bleaching at St. Helens and omit a bleach plant at any new mill. It enabled respondent to proceed with the construction of its new Antioch mill without incurring the complications and expenses that would have been incurred otherwise to provide for the production of both bleached and unbleached papers at the Antioch mill.

35. As of May 31, 1953, St. Helens had spent the following sums on the modernization and expansion program authorized in 1950:

Pulp mill building	$559, 734
Pulp mill rebuild	1, 077, 434
Bleach system rebuild	874, 256
Electrical equipment for pulp mill and bleach system rebuild	222, 345
Recovery department addition	1, 706, 106
Beater room rebuild	508, 277
B.R. basement, motor generator D.C. supply	34, 406
Finishing room addition	81, 526
New water treatment plant	603, 385
Mill water distribution	88, 876
Total cost	5, 756, 345
No. 1 paper machine deposit (work suspended)	479, 859
Grand total	6, 236, 204

36. Subsequent to the acquisition, respondent proceeded with the St. Helens modernization program, amending it to provide additional capacity. In so doing respondent spent the following sums to complete the items unfinished on June 5, 1953, as follows:

Recovery system	$771, 575
Pulp mill	1, 660, 613
No. 1 paper machine	3, 238, 990
Steam plant	190. 015
Water system	234, 356
Beater room	114, 251
	6, 209, 800

37. In addition to the items listed above, respondent made major replacements on the No. 2 machine—added a third Fourdrinier paper

machine increasing the paper capacity of St. Helens mill up to 350 tons per day. These and other improvements are listed as follows:

Lime kiln	$ 459, 507
Finishing department	287, 751
No. 3 paper machine	5, 623, 661
Lighting modernization	29, 247
No. 2 paper machine	136, 283
Shipping department	224, 409
Bleach plant	61, 583
Wood supply	525, 640
Yard improvements	102, 684
Electrical improvements	583, 208
Real estate	57, 044
	8, 091, 017

V. FINANCIAL STATUS OF ST. HELENS

38. On March 31, 1953, prior to the acquisition of St. Helens by respondent, the capitalization of St. Helens stood at $13,637,782, consisting of the following items:

Capital stock	$3, 998, 680
Surplus	5, 539, 102
Long-term loans	4, 100, 000
	13, 637, 782

39. St. Helens made a profit in every year of its operation from 1927 to 1952, inclusive, except in 1932 when it sustained a loss of $33,181. For the 26 years its total profits were more than $13,000,000. Beginning in 1929, St. Helens paid dividends in every year except 1932.

40. During the 10-year period from 1943 to 1952 St. Helens' annual earnings per share ranged from a low of 66 cents in 1945 to a high of $3.56 in 1948. During the same period St. Helens' dividends per share ranged from 50 cents to $1.50. Complete record of yearly earnings and dividends are as follows:

Year	*Earnings per share, common stock*	*Dividends per share, common stock*
1943	$0. 89	$0. 50
1944	. 79	. 50
1945	. 66	. 50
1946	1. 62	. 65
1947	3. 54	. 95
1948	3. 56	1. 10
1949	1. 90	. 75
1950	2. 41	. 85
1951	3. 04	1. 00
1952	2. 73	. 75

41. During the 10-year period from January 1, 1943, to December 31, 1952, St. Helens' net sales increased from $5,435,053 to $9,258,508, and its net income increased from $357,754 to $638,534. This latter amount is less than the reported figure for December 31, 1952, of $1,090,940, since this included a rebate of excess profits taxes for prior years and the proceeds of a life insurance policy on the life of the company's late president. As of December 31, 1952, its total assets were $15,223,754, and its net worth was $9,436,441.

VI. THE PAPER INDUSTRY

42. Paper is a matted or felted sheet of fiber formed on a fine wire screen from a water suspension. The fiber stock from which paper is made is called the pulp or furnish. In 1953, wood pulp accounted for 66 percent of the furnish for the production of paper; wastepaper accounted for 30 percent; the balance was straw and other materials.

43. Wood pulp is produced from wood by chemical or mechanical treatment. The mechanical process is used to produce groundwood used in making newsprint and printing paper.

44. In the chemical treatment of wood to produce pulp, three major processes are used:

1. The sulphite process in which wood chips are cooked in an acid liquid, the active ingredients of which are sulphur dioxide and bisulphite of lime. This was the leading process until 1938 and is still in large-scale use.

2. The sulphate or kraft process in which the main chemical used is sodium sulphate. This process permits the use of types of wood unsuitable for pulping by the sulphite process, particularly the southern pines and Douglas fir. It generally makes a stronger paper than sulphite pulp, and by 1953 it accounted for 55 percent of all wood pulp used in making paper.

3. The semi-chemical process, which is a still later development, has as its main advantage that it can use hardwoods which are not generally suitable for sulphite or kraft pulp production.

45. The natural color of paper made from sulphite pulp is manila. The natural color of kraft is the familiar brown grocery bag. If necessary, these pulps can be bleached up to a high white. They can be colored by the addition of dyes, but in bleaching, kraft paper loses most of its strength advantages over sulphite paper.

46. All types and grades of paper are manufactured on one or two basic types of paper machine, the Fourdrinier machine and the cylinder machine. On the Fourdrinier machine, the pulp or stock, at a low concentration suspension in water, flows from a headbox

through a slice or opening onto a moving endless belt of wire cloth, where the paper web is formed and much of the water removed. It then passes through presses which remove further excess water, to the drier section where the water is evaporated by steam heat until the desired dryness is achieved. It then passes through a calendar section which gives the desired finish to the paper. The cylinder machine is characterized by the use of wire covered cylinders on which the web of paper is formed, these cylinders being partly immersed and rotated in vats containing a dilute stock suspension. The machine may consist of one or several cylinders, permitting the simultaneous production of different layers of paper. The rest of the machine is essentially the same as the Fourdrinier machine.

47. The Harper and Yankee machines are modifications of the Fourdrinier and are used as alternatives to the regular Fourdrinier for the manufacture of lightweight papers. The Yankee machine, using one highly polished large steam-heated drying cylinder instead of several smaller ones, can produce an M.G. (machine glaze finish) on the side of the sheet next to the drier. An M.F. (machine finish paper) is one with any finish other than M.G.

48. Standard Fourdrinier machines are used for the production of every type and grade of paper except that they are little used in the production of nonbending board, cardboard and wet machine board. Yankee Fourdriniers are used principally in the production of tissue grades and Census coarse paper, with some use in fine paper, special industrial paper, absorbent paper and building paper. Cylinder machines are used for every grade of paper listed by the U.S. census except newsprint and book paper.

49. In the West, where there is a smaller percentage of old machines than in the nation as a whole, there is also a smaller percentage of cylinder machines. The term "West" as used in this decision refers to the region defined by the U.S. Bureau of the Census comprising the 11 Western States, namely: the Pacific Coast States (Washington, Oregon, and California) and the Mountain States (Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, and Nevada). The West has 89 Fourdrinier machines and 38 cylinder machines. Thirty-one of the cylinder machines in the West make roofing felt, boxboard, and similar products in nonintegrated mills using nonwood pulp or waste paper pulp rather than kraft or sulphite wood pulp. Only seven cylinder machines, mostly old ones, make paper from wood pulp in integrated mills. Of the 89 Fourdrinier machines in the West, however, 81 are used for the production of paper and paperboard, and almost all of these 81 machines are in integrated mills.

50. The several types and grades of paper vary from each other in basis weight, thickness, color, finish, and sometimes in special characteristics such as wet strength, sizing, or porosity. Basis weight, as herein used, is the weight in pounds of a ream of paper (500 sheets) measuring 24 x 36 inches.

51. The Fourdrinier machine is adjustable within wide limits. By adjusting the slice, papers of different basis weights or thickness can be made on the same machine. By introducing bleached or unbleached pulp into the headbox, the same machine can make bleached or unbleached paper. By variations in the beating or preparation of the pulp, different strength or porosity characteristics can be given to the paper. Dyes can be added to the pulp for producing a complete range of colored papers. Sizing can be added either in the stock solution or at a size press. The paper can be finished in different ways by adjustment of the calendar stacks.

52. The Fourdrinier machine has no inherent limitations as to the type of paper it can produce, except that each machine has an upper and lower basis weight limitation, depending upon its maximum and minimum machine speed and its maximum and minimum drying capacity. In addition to these upper and lower basis weight limits, paper machine production begins to decline when the basis weight is lowered to the point that even at maximum speed, the machine cannot make as much paper as can be dried by the drier section. This production decline typically occurs at about 40 to 50 pounds basis weight.

53. All 81 Fourdrinier machines in the West now producing paper and paperboard can make 40-pound paper, and 58 of them can also make 126-pound paper. Only rarely is special equipment required for the production of any grade of trade coarse paper. A size press is desirable for certain grades, and most modern machines in the West have a size press; when they do not, the size can be added to the pulp before it reaches the machine head box.

54. An integrated pulp and paper mill costs about $85,000 per ton of daily capacity to build. A 260-ton mill would cost about $24 million; a larger mill is proportionally less expensive; a 450-ton mill would cost about $30,300,000.

VII. LINE OF COMMERCE

55. In trade usage and as defined in "The Dictionary of Paper," grades of paper are given broad definitions and fall within three mutually exclusive grades: coarse, fine, and newsprint. The U.S. Bureau of the Census in its Paper and Board Classification Guide

(RX1, RX62, pp. 34–52) separates the broad trade definition of coarse papers into coarse paper, special industrial paper, sanitary tissue paper, tissue paper, except sanitary and thin paper, container board, bending board, special paper board stock, nonbending board, and cardboard, and paper products made therefrom.

56. The respondent introduced into evidence as respondent's exhibit 62, a series of tabulations which contains at pages 28 through 33 a comparative table outlining the coarse papers sold by St. Helens and by Crown Zellerbach for the year 1953 in the 11 Western States. This exhibit sets out the census grades of paper sold by St. Helens at or about the time of its acquisition. While the respondent acquired substantially all of the stock of St. Helens in June 1953, and later merged St. Helens into respondent on September 12, 1955, the record indicates that no substantial change was made in the paper and paper products produced by St. Helens during the year 1953. This is further borne out by the fact that a comparison of respondent's exhibit 62 with Commission's exhibit 168A–B, which is a comparative chart of production of census coarse papers in the 11 Western States for 1952 between St. Helens and other producers of paper, shows that the papers sold by St. Helens in the years 1952 and 1953 were substantially the same.

57. Respondent's exhibit 62, pages 28 through 33, is based upon information obtained from the Census Bureau showing the report of production in the 11 Western States by respondent and St. Helens of the papers falling within the census categories. This exhibit indicates that at the time of acquisition, St. Helens produced papers falling within all the census categories covering trade coarse papers. In 1953, St. Helens produced 48,155 tons of census coarse papers which was approximately 84 percent of its production. The remaining 16 percent was distributed among the other census categories as follows: special industrial paper, 3,052 tons; sanitary tissue, 1,513 tons; tissue paper, except sanitary and thin, 2,858 tons; container board 413 tons; bending board, 166 tons; and special paperboard stock, 1,460 tons.

58. The total industry production of census coarse papers in the West for the year 1953 was 437,384 tons of which respondent accounted for 225,276 tons or 51.5 percent and St. Helens accounted for 48,155 tons or 11.0 percent, making a total production of the two together of 62.5 percent.

59. The total industry production of census category special industrial paper in the West for the year 1953 was 53,099 tons, of which respondent accounted for 43,382 tons, or 81.7 percent; and St. Helens accounted for 3,052 tons, or 5.7 percent, making a total production for the two together of 87.4 percent.

60. The total industry production of census sanitary tissue in the West for 1953 was 112,536 tons, of which respondent accounted for 76,532 tons, or 68 percent; and St. Helens accounted for 1,513 tons, or 1.4 percent, making a total production of the two together of 69.4 percent.

61. The total industry production of census category tissue paper, except sanitary and thin, in the West for the year 1953 was 36,052 tons, of which respondent accounted for 13,211 tons, or 36.7 percent; and St. Helens accounted for 2,858 tons or 7.9 percent, making a total production of the two together of 44.6 percent.

62. The total industry production of census category container board in the West for the year 1953 was 587,708 tons of which respondent accounted for 56,729 tons, or 9.6 percent; and St. Helens accounted for 413 tons, or .1 percent, making a total production of the two together of 9.7 percent.

63. The total industry production of census category bending board in the West for the year 1953 was 448,020 tons, of which respondent accounted for 9,761 tons, or 2.2 percent; and St. Helens accounted for 166 tons, or .04 percent, making a total production of the two together of 2.24 percent.

64. The total industry production of census special paperboard stock in the West for the year 1953 was 130,619 tons, none of which was produced by Crown, and St. Helens accounted for only 1,460 tons, or 1.1 percent.

65. On July 8, 1955, the respondent submitted a list purporting to be all the producers of paper in the western area at or about the time of the acquisition of St. Helens, who sold papers competitive with those sold by St. Helens. These producers were as follows:

Columbia River Paper Co.
Container Corp. of America
Fibreboard Products, Inc.
Inland Empire Paper Co.
Longview Fibre Co.
Oregon Pulp & Paper Co.
Pacific Coast Paper Mills of Washington, Inc.
Potlatch Forests, Inc.
Publishers Paper Co.
St. Regis Paper Co.
Scott Paper Co.
Simpson Logging Co.
Weyerhaeuser Timber Co.

Representatives of these respective companies were called as witnesses and introduced in evidence testimony or exhibits showing their production of census coarse paper for the years 1952 and 1954. A tabulation of the production information obtained through these witnesses was prepared and offered in evidence as Commission's exhibit 168 A–D, including the production figures for census coarse papers of respondent and St. Helens for the years 1952 and 1954. The California Container Corp., Division of Container Corporation of America, and Pacific Coast Paper Mills did not produce any papers under the census coarse paper category.

66. Based upon the testimony of the witnesses and the data produced, there were 10 western producers of census coarse papers in 1952, but 4 of the 10 produced only insignificant quantities. Four western producers accounted for 94.2 percent of the western production of census coarse papers in 1952, and three accounted for 93.9 percent in 1954.

67. The total industry production of census coarse papers in the West for the year 1952 was 443,152 tons, which was distributed among the western producers as follows:

	Tons	*Percent*
Crown Zellerbach Corp	226, 430	51. 1
St. Helens	53, 821	12. 1
Longview Fibre Co	77, 749	17. 5
St. Regis Paper Co	59, 851	13. 5
Oregon Pulp & Paper Co. and Columbia River Paper Co	14, 700	3. 3
Publishers Paper Co	7, 471	1. 7
Potlatch Forests, Inc	1, 400	0. 3
Inland Empire Paper Co	1, 008	0. 2
Fibreboard Products, Inc	435	0. 1
Simpson Paper Co	287	0. 1

The tabulation of Simpson Paper Co. contains 272 tons kraft white wove envelope which was listed as a coarse paper.

68. The total industry production of census coarse papers in the West for the year 1954 was 455,934 tons, which was distributed among the western producers as follows:

	Tons	*Percent*
Crown Zellerbach Corp	242, 539	53. 2
Former St. Helens	49, 317	10. 8
Longview Fibre Co	80, 108	17. 6
St. Regis Paper Co	56, 068	12. 3
Oregon Pulp & Paper Co. and Columbia River Paper Co	14, 540	3. 2
Publishers Paper Co	6, 929	1. 5
Potlatch Forests, Inc	4, 990	1. 1
Inland Empire Paper Co	681	0. 1
Fibreboard Products Co	81	
Simpson Paper Co	377	0. 1
Weyerhaeuser Timber Co	304	0. 1

The tabulation of Simpson Paper Co. contains 335 tons kraft white wove envelope which was listed as a coarse paper.

69. In 1952 in the 11 Western States, respondent, Longview, and St. Helens were the principal producers of coarse paper, with St. Regis, Oregon Pulp & Paper and Columbia River Paper Co., and Publishers Paper Co. being important producers only for a limited array of papers.

70. Longview produced substantially the same range of papers as was produced by St. Helens. It converted a substantial portion of its production of converting papers and sold most of its jobbing papers to one jobber, Blake, Moffitt & Towne. In areas where Blake, Moffitt & Towne did not operate it sold only to two other jobbers: Carpenter Paper Co. and Dixon & Co. These three jobbers were large and important jobbing outlets in the Western States.

71. Respondent, St. Helens, and Longview met only limited competition from some of the other west coast producers of census coarse papers. The census coarse papers produced by other western mills in both 1952 and 1954 are as follows:

1. St. Regis Paper Co. produced principally unbleached kraft shipping sack paper, a small quantity of grocers and variety bag papers, and, in the bleached category, small amounts of shipping sack paper, other bag paper, and cup stock.

2. Oregon Pulp & Paper Co. and Columbia River Paper Co. confined their production of coarse paper largely to glassine, greaseproof and vegetable parchment paper, and bleached envelope stock, most of their output being designated as converting papers.

3. Publishers Paper Co. produced only papers in the census "Other coarse paper" category. Its production was exclusively wrapping paper.

4. Potlatch Forests, Inc., produced principally two grades of bleached converting paper, waxing stock and other converting paper.

5. Inland Empire Paper Co.'s production with respect to wrapping paper was principally in the census "Other coarse paper" category.

6. Fibreboard Products, Inc.'s production was reported in the same category.

7. In 1954, Inland Empire Paper Co. produced a small quantity of envelope stock.

8. Simpson Paper Co.'s production of coarse paper was limited to bleached envelope stock.

9. Weyerhaeuser Timber Co.'s paper production in 1954 was grocers and variety bag paper.

VIII. THE WESTERN MARKET

72. The geographic areas of effective competition for western producers may be analyzed in terms of the sales policies of St. Helens, respondent, and other western producers, and in terms of the buying habits of converters, paper merchants and other purchasers in the Western States.

73. Respondent sold from 80 to 85 percent of its products comparable to those produced by St. Helens in the 11 Western States and competed very aggressively with St. Helens in that trade area. The bulk of respondent's western sales other than exports was concentrated in the three Pacific Coast States. In 1952, 63 percent of its wrapping paper was sold in the Pacific Coast States and 14 percent in the Mountain States; 86.4 percent of its converting paper was sold in the Pacific Coast States and 1.5 percent in the Mountain States; and 69.2 percent of its bags were sold in the Pacific Coast States and 15.4 percent in the Mountain States. The proportions were similar in 1953: 62.6 percent of the wrapping paper in the Pacific Coast States and 14.1 percent in the Mountain States; 89.5 percent of the converter paper in the Pacific Coast States and 1.4 percent in the Mountain States; and 68.2 percent of the bags in the Pacific Coast States, and 16.7 percent in the Mountain States.

74. St. Helens was engaged in competition directly and primarily in the 11 Western States. In 1952, St. Helens made 85 percent of its domestic sales in the 11 Western States and about 15 percent outside of the 11 Western States. St. Helens' primary market was the Pacific Coast States, which accounted for 88.7 percent of its sales within the 11 Western States in 1952 and for 75.4 percent of its U.S. sales. St. Helens' sales in the Mountain States in 1952 amounted to $955,000, which was 11.3 percent of its sales in the 11 Western States and 9.6 percent of its total domestic sales. Although St. Helens sold regularly in the export trade, its total sales for export in 1952 were less than $500,000.

75. With the exception of three Atlantic coast customers and one small converter located in Denver, Longview Fibre Co.'s market for converting papers was confined primarily to converters located in the three Pacific Coast States. Longview sold approximately 85 percent of its jobbing papers to Blake, Moffitt & Towne, which operates primarily in the Pacific Coast States, with additional sales in the intermountain and Rocky Mountain areas to Carpenter Paper Co. and Dixon & Co.

76. Western mills producing coarse papers and coarse paper products sold their production principally in the 11 Western States, with their

largest markets concentrated in the three Pacific Coast States. Western supplies of coarse paper and coarse paper products have come principally and primarily from western mills.

77. Mills producing coarse papers not located in the West were at a serious disadvantage in attempting to sell western buyers because of the high freight charges and also the preference as expressed by a number of witnesses for the purchase of merchandise from western suppliers. Furthermore, an eastern supplier would be handicapped in filling orders unless a complete warehouse stock was maintained. Certain eastern suppliers, International Paper Co. and Hudson Paper Co., did make limited sales in the western area, principally in the Los Angeles area. Sales of other eastern suppliers was sporadic and of no significance insofar as the line of commerce in this proceeding is involved.

78. The rapid growth in the western market has enabled western mills to operate substantially at capacity throughout the war and postwar periods. This condition has persisted even in the presence of substantial increases in capacity by western mills since the end of the Second World War.

79. The failure of western production to keep pace with the growing demand of the western market, has created a limited opportunity for eastern suppliers to enter the western market despite the handicap of high transportation costs.

IX. COMPETITIVE CHARACTERISTICS OF THE WESTERN MARKET

80. The western coarse paper industry is characterized by price leadership. Western producers followed the prices established by respondent without reference to their costs of production. Respondent in turn, in establishing prices or price changes, followed the prices of the eastern market with the result that delivered prices in both the East and the West were substantially the same.

81. Respondent placed its coarse paper customers on an allotment in June 1955 on the basis of their 1954 purchases. The allotment program was made on a grade basis, and the customer could not transfer his allotment from one grade to another if his customers' paper requirements changed. Within a few weeks thereafter, respondent instructed its salesmen to accept orders (subject to approval of respondent's headquarters) for grades which the customer had not purchased in 1954 or for grade quantities in excess of 1954 purchases in that grade, so long as the customer's total order did not exceed 1954 purchases. This allotment was due to the fact that at that time the demand was greater than mill capacity.

82. Prior to the acquisition, St. Helens scheduled short runs of papers to fill particular orders. Following the acquisition, respondent increased the minimum quantities in which paper and paper products had to be ordered if the purchaser were to obtain the minimum prices, and on occasion refused to fill small quantity orders. Respondent also refused to sell paper distributors in marketing areas where respondent already had a jobber customer. Respondent also adopted the policy of making deliveries for paper distributors only in the market area in which the paper distributor maintained a warehouse, and would not ship direct to such distributor's customers located in other areas, thereby placing a burden upon such a distributor to reship to his particular customers on purchases made from respondent.

X. ECONOMIC SURVEY—COMMISSION'S EXHIBIT 176

83. Subsequent to the issuance of the complaint herein, the Bureau of Economics of the Federal Trade Commission, pursuant to authorization by the Commission, made a survey by sending out questionnaires to coarse paper jobbers, converters and wholesale grocers, located in 11 Western States, under section 6 of the Federal Trade Commission Act.

84. A tabulation of the replies received was identified and offered in evidence, by counsel supporting the complaint, as Commission's exhibit 62. Objection was made to the receipt of this exhibit in evidence because the basic material, namely the reports of the various converters and jobbers on which the survey was based, had not been made available to the respondent for use in cross-examination. This objection was sustained by the hearing examiner, and an interlocutory appeal was taken from this ruling to the Commission, and the Commission, after consideration of said appeal, issued its order dated May 16, 1955, directing that the basic information and work papers be made available to the respondent and remanded the case to the hearing examiner for further proceedings in accordance with its decision.

85. Thereafter, Commission's exhibit 62 was again offered in evidence and was received by the hearing examiner.

86. Subsequent thereto, certain corrections and deletions were made in the survey as brought out by the testimony and pointed out by counsel for respondent and as a result of rulings of the hearing examiner. This survey, so corrected, was substituted for Commission's exhibit 62, which was withdrawn, and was received in evidence as Commission's exhibit 176.

87. In its order and opinion of May 16, 1955, the Commission further provided that:

"No information secured on FTC forms EE–1 or EE–2 that can be identified with reporting companies shall be admitted into the public record for any purpose."

This provision of the order of the Commission was strictly construed by counsel supporting the complaint, and the answers to the questionnaires, which served as a basis for the survey, were not offered in evidence in this proceeding in camera or otherwise. This has greatly hampered the cross-examination and the making of an intelligible record in this proceeding. Where errors in a specific report have been pointed out on cross-examination, the hearing examiner, in the absence of the report or the figures involved being placed in evidence, is precluded from making a factual determination as to the extent of the errors or their significance with relation to the survey as a whole.

88. It was stated in the survey, Commission's exhibit 176, appendix I, that said survey was prepared pursuant to a resolution of the Commission authorizing the collection of data for the purpose of ascertaining market characteristics and to prepare statistical compilations of the results for use in the present proceeding. It was stated by Dr. Barnes, the witness under whose direction and supervision this survey was made, that it was not a share of the market survey and was not prepared to show a share of the market. In view of this, it must be concluded that the survey is instead a factual survey which shows that a specified number of jobbers or converters purchased a specified quantity of a particular paper from each of several suppliers.

89. In making corrections on Commission's exhibit 176, Dr. Barnes altered the figures supplied by certain reporting companies based upon information contained in field reports. To this extent the exhibit ceases to be a survey of reports of jobbers and converters and becomes a document based upon the independent judgment of Dr. Barnes and his staff. Corrections were made without prior consultation with the reporting companies or the calling of representatives of such companies as witnesses to clarify such possible discrepancies.

90. In preparing the questionnaires used in making the survey, special categories of papers were adopted which were considered to cover the various papers sold by St. Helens before and after the acquisition. In so doing the census definitions with which the trade is familiar were abandoned. This procedure has resulted in confusion among the reporting companies and has raised serious question as to the correctness or value of the survey in its various divisions.

91. In view of the questionable probative value of this economic survey, no consideration has been given it in making this decision.

CONCLUSIONS

1. Section 7 of the Clayton Act, as amended by Congress in 1950, was enacted for the purpose of overcoming the deficiencies of the original section 7, as indicated by court decisions, and to reestablish the concept of Congress that the Clayton Act was designed to reach mergers not subject to the rigid requirements of the Sherman Act.

2. The portion of section 7, as amended, applicable to this proceeding reads as follows:

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

3. The term "in any line of commerce" which was inserted in section 7, as amended, was defined by the Senate Judiciary Committee as intended to reach those acquisitions which substantially lessen competition as well as those which tend to create a monopoly, if they have this specified effect in any line of commerce whether or not that line of commerce is a large part of business of any of the corporations involved in the acquisition.[1]

4. The term "any section of the country" was clarified by the Senate Judiciary Committee in the following statement:

> What constitutes a section will vary with the nature of the product. Owing to the differences in the size and character of markets, it would be meaningless, from an economic point of view, to attempt to apply for all products a uniform definition of section, whether such a definition were based upon miles, population, income, or any other unit of measurement. A section which would be economically significant for a heavy, durable product, such as large machine tools, might well be meaningless for a light product, such as milk.
>
> As the Supreme Court stated in *Standard Oil Co.* v. *U.S.* (337 U.S. 293), "Since it is the preservation of competition which is at stake, the significant proportion of coverage is that within the area of effective competition."
>
> In determining the area of effective competition for a given product, it will be necessary to decide what comprises an appreciable segment of the market. An appreciable segment of the market may not only be a segment which covers an appreciable segment of the trade, but it may also be a segment which is largely segregated from, independent of, or not affected by the trade in that product in other parts of the country.
>
> It should be noted that although the section of the country in which there may be a lessening of competition will normally be one in which the acquired

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[1] Senate Report 1775, 81st Congress, p. 5.

company or the acquiring company may do business, the bill is broad enough to cope with a substantial lessening of competition in any other section of the country as well.[2]

5. The area of effective competition as shown by the foregoing findings of fact is the 11 Western States. It is in this area that both the respondent and St. Helens sold the greater volume of papers produced by them. The attempt by respondent in its proposed findings and briefs to extend the area of effective competition to the entire nation is an attempt to revert to the decisions applicable to section 7 of the Clayton Act prior to the amendment and is contrary to the facts developed in this proceeding, contrary to the expressed provisions of the statute, and contrary to the expressed intention of Congress in the adoption of the amendment of section 7.

6. The line of commerce involved in this proceeding is the various papers falling within the census category of coarse papers. About 84 percent of the production of St. Helens was census coarse papers. Respondent produced 51.5 percent of the total of census coarse papers produced in the 11 Western States. Consequently census coarse papers is the line of commerce principally affected by the acquisition. The attempt by respondent in its proposed findings and briefs to extend the line of commerce to practically all categories is not in accord with the facts in this proceeding. Since the greater portion of the production of both respondent and St. Helens was in the category of census coarse papers, the area of effective competition as to products would be within that category.

7. At the time of the acquisition of St. Helens, Crown, Longview Fibre Co., and St. Helens were the principal producers of coarse papers in the West and accounted for 80.7 percent of the production of census coarse papers in the 11 Western States. In 1954, after the acquisition, two companies, Crown and Longview, produced 81.6 percent of census coarse papers in the 11 Western States. The percentage of production of Longview remained substantially the same, while the percentage of the respondent increased to 64 percent, including St. Helens' production.

8. The removal of St. Helens from the competitive picture through its acquisition by respondent, removed one of the three principal producers of census coarse papers in the West, and left only two sources of supply for the greater portion of census coarse papers which were available to converters and jobbers. This greatly enhanced the dominant position of respondent in the western market.

9. Prior to the acquisition of St. Helens, jobbers in the 11 Western States had two significant sources of supply for coarse papers that

[2] Senate Report 1775, 81st Congress, 2d Session, pp. 5-6.

could be relied upon by them. The Longview Fibre Co. was not available to jobbers generally as it sold most of its jobbing paper and paper products to three jobbers. Subsequent to the acquisition, paper jobbers generally were dependent for all practical purposes on respondent for a source of supply. Respondent through its division, Zellerbach Paper Corp., competed with all jobbers for sales at the consumer level. As a result of the acquisition, these western jobbers are in the precarious position of being dependent upon a company as a source of supply which was in fact an active competitor and which could suddenly decide that it wished to make all the profit possible in the sale of paper and dispose of its entire production through its own jobbing division. If the respondent should adopt this policy, it would, in effect, put independent jobbers of coarse paper in the 11 Western States out of business.

10. As far as the converter is concerned, he had two sources of supply from which he could obtain coarse papers after the acquisition. However, both of these sources—Crown and Longview—converted a substantial portion of their production. A decision by respondent to convert all of its coarse papers produced for converting purposes would have the effect of forcing most of the independent converters in the West out of business. The futility of converters and jobbers relying upon Longview Fibre Co. for their supply is borne out by the fact that while respondent had 30 Fourdrinier machines in operation at the time of the acquisition, Longview had only 4 Fourdrinier machines. The total capacity of Longview was 850 tons per day, two-thirds of which was container board for use in making shipping cartons.

11. Prior to its acquisition by respondent, St. Helens was an independent source of converting grades which supplied many converters, who are now forced to look principally to their competitors for their supply of converting papers.

12. Respondent's latent power to control the economic life of jobbers and converters in the 11 Western States was demonstrated by the system of allocations it imposed in the spring of 1955. Respondent informed each jobber and converter customer of the tonnage of each grade of paper which they would be allowed to purchase. While it is true that such reduction was necessitated by a shortage of paper, it nevertheless points up the power of respondent to set and enforce allocations and its ability to hinder, restrict, and destroy competition if so inclined.

13. Respondent's policy of refusing to make deliveries in any location except to places deemed by respondent to be within the

jobber's selling area, even though freight charges for deliveries directly to the jobber's customer may have been cheaper or no greater than the delivery cost directly to the jobber, reveals the power in the possession of Crown to prevent growth on the part of the small jobber. This has hindered and prevented competition by the small jobber in that it has prevented expansion by him. The service by direct shipments to the jobber's customers was an advantage which the jobber enjoyed when St. Helens was a separate entity. This practice tended to restrain and restrict competition to the benefit of such distributors' competitors, including Zellerbach Paper Co.

14. Prior to the acquisition, St. Helens made no limitations on the size of orders or the length of runs of paper. This was an advantage to the small jobber and customer who could not afford to purchase or use large quantities. After the acquisition, respondent placed a limitation on the size of orders, particularly for specialty papers, which prevented the jobber or customer from purchasing the quantities formerly purchased from St. Helens.

15. While St. Helens did not engage in the sale of substantial amounts of timber, and while timber does not come within the line of commerce involved in this proceeding, the acquisition of 117,000 acres of timberland outright, plus first right of refusal to cutting rights on a substantial additional acreage upon the acquisition of St. Helens, served to enhance the dominant position held by respondent.

16. Since neither respondent nor St. Helens sold pulp, but instead consumed their pulp production in the manufacture of their products, pulp cannot be considered as a line of commerce for the purposes of this proceeding, although the acquisition of the pulp facilities at the St. Helens plant by respondent did to some extent tend to increase its dominant position in the industry in the 11 Western States.

17. At the time of its acquisition, St. Helens was well along toward completion of a soundly conceived modernization and expansion program. The cost of the program had increased substantially from its original inception, due partly to an enlargement of the program and partly to inflated material and equipment costs. St. Helens had financed $4 million of its expansion program on the basis of bank and insurance loans. It required an additional $2 million in loans to complete the program as finally planned. The additional financing was available. As of December 31, 1952, its total assets were $15,223,754, and its net worth $9,436,441. By reference to earnings and dividend payments, as set out in the findings herein, it is evident that St. Helens was not in a failing condition at the time of its

acquistion by the respondent or that the sale of the company was necessary to its continued operation.

18. The fact that western producers followed the leadership of respondent in pricing their paper is a clear indication of the dominant position held by respondent in the western market. Respondent in turn, by following the prices of eastern producers, made certain that such eastern producers could not compete satisfactorily in the western market because of the necessity of absorbing freight in order to be competitive pricewise.

19. In the course of its defense, the respondent maintained that the flexibility of the Fourdrinier machine is a deterrent to any producer attempting to obtain a competitive advantage by unduly increasing his share of the market in any grade or type of paper since competitive producers had the ability to undertake production of the same types or grades of paper. Such contention cannot be used to justify or excuse an acquisition which has a present serious impact upon competition. As of October 1, 1955, there were 89 Fourdrinier machines in operation in the West, 34 of which were operated by the respondent. All of these machines are now engaged in the manufacture of types or grades of paper for which there is a present customer demand and for which types and grades of paper sales organizations have been developed to sell. In the opinion of the hearing examiner, while flexibility of these machines is recognized, it does not have any serious impact upon the competitive situation existing in the West so far as the acquisition of St. Helens is concerned, nor does it have any serious impact upon the present dominant position of the respondent.

20. Respondent has also claimed in its proposed findings and briefs that its share of the western market has decreased from 33.4 percent in 1947, to 27.3 percent in 1953, although its own production increased from 568,068 tons to 744,455 tons, exclusive of St. Helens and that the addition of St. Helens production increased respondent's share of western production in 1953 to 29.4 percent. In arriving at these percentages, respondent included papers never produced by St. Helens, some of which could not even be produced by it, and all of the papers were not within the line of commerce involved in this proceeding. For example, statement of 1953 production included newsprint, groundwood paper, machine-coated printing and converting paper, bag paper, fine paper, and cardboard. The total of these papers not produced by St. Helens amounted to approximately 47 percent of respondent's total production for 1953. The industry total also included construction paperboard and construction building board which was not produced by either respondent or St. Helens.

Such evidence is of no value to prove a declining share of the market involved, and is not relevant where a substantial supplier has been removed from the market with a consequent enhancement of the dominant position held by respondent in the relevant market.

21. In addition, respondent in its defense has introduced economic evidence with reference to potential production in the future and in this connection made projections of disposable income and future consumption to 1975. Such projections, however, are based upon the assumption that conditions will remain the same as they are at present and that there will be no decline in the national economy over a long term in the future. Such evidence is merely speculative and cannot be used to justify or excuse an acquisition which has a present serious impact upon competition. Furthermore, it is recognized that increases in new production usually come from existing firms in the industry since potential new producers will tend to be deterred from entering the industry because of the relatively concentrated competition to be faced in marketing their products and the difficulty in marshalling the factors of production. The respondent with its present paper capacity and its present sales organization would as an existing firm be expected to increase its production to keep abreast of increased demand. This is particularly evident if it be considered that during the past four years respondent has acquired St. Helens Pulp & Paper Co., Canadian Western Lumber Co., Ltd., and Gaylord Container Corp.

22. Evidence has been introduced as to the acquisition of Long-Bell Lumber Co. by International Paper Co., submitted for approval by stockholders on October 17, 1956. The International Paper Co. is an eastern company and is the largest in the United States. The reasons for the merger as set out in notice to stockholders was the opportunity to establish facilities for the production of paper and board in the west coast area, and the construction of a mill in Oregon which will initially produce bleached and unbleached paper and paperboard, and eventual production of newsprint. This acquisition is now the subject matter of a complaint filed by the Commission under section 7 of the Clayton Act. Regardless of the outcome of this proceeding before the Commission, the erection of this mill is now only in the planning stage and it will be some time before its completion. It can reasonably be expected that respondent will in the meantime continue its expansion policies to meet this added competition and that this mill, if established, will not materially affect respondent's present dominant position in the West.

23. The acquisition of St. Helens by respondent had the effect of substantially lessening competition and tending to create a monopoly in the relevant line of commerce in violation of section 7 of the Clayton Act, as amended.

ORDER

It is ordered, That the respondent, Crown Zellerbach Corp., a corporation, and its officers, directors, agents, representatives, and employees shall divest itself absolutely, in good faith, of all assets, properties, rights and privileges, including but not limited to timberlands, cutting rights, timber, plant, machinery, equipment, trade names, trademarks and good will acquired by Crown Zellerbach Corp. as a result of the acquisition by Crown Zellerbach Corp. of the stock or share capital of the St. Helens Pulp & Paper Co., together with so much of the plant machinery, buildings, improvements, and equipment of whatever description that has been installed or placed on the premises of the St. Helens plant by respondent as may be necessary to restore St. Helens Pulp & Paper Co. as a competitive entity in the paper trade, as organized and in substantially the basic operating form it existed at or around the time of the acquisition.

It is further ordered, That in such divestment no property above mentioned to be divested shall be sold or transferred, directly or indirectly, to anyone who at the time of the divestiture is a stockholder, officer, director, employee, or agent of, or otherwise directly or indirectly connected with or under the control or influence of, respondent or any of respondent's subsidiaries or affiliated companies.

It is further ordered, That pending the divestiture herein ordered, respondent, Crown Zellerbach Corp., a corporation, its officers, agents, representatives and employees shall refrain from:

1. Cutting or removing any timber or forest residuals on or from lands owned or upon which cutting rights were possessed which were acquired and held by Crown Zellerbach Corp. as a result of the acquisition by Crown Zellerbach Corp. of the stock or share capital of the St. Helens Pulp & Paper Co.

2. Offering for sale, selling or distributing any timber, forest residuals or cutting rights from lands acquired and held by Crown Zellerbach Corp. as a result of the acquisition by Crown Zellerbach Corp. of the stock or share capital of the St. Helens Pulp & Paper Co.

It is further ordered, That respondent, Crown Zellerbach Corp., shall, within sixty (60) days from the date of the service upon it of this order, submit in writing, for the consideration and approval of the Federal Trade Commission, its plan for compliance with this

order, such plan to include the date within which compliance can be effected, the time for compliance to be hereafter fixed by order of the Commission, jurisdiction being retained for these purposes.

OPINION OF THE COMMISSION

By Tait, Commissioner:

The complaint in this proceeding charges respondent with violating the provisions of section 7 of the Clayton Act (15 U.S.C., sec. 18), as amended,[1] by acquisition of St. Helens Pulp & Paper Co., a corporation. The hearing examiner found that the allegations of the complaint were sustained and issued an order requiring divestiture. This matter is before the Commission upon the cross-appeals of respondent and counsel supporting the complaint. Respondent principally contends in its appeal that certain essential findings of the hearing examiner are not supported by the evidence and that the form of the order contained in the initial decision is unreasonable as to several requirements. Counsel supporting the complaint contend that the order is not sufficiently broad in scope to accomplish the purposes of the statute.

Respondent, Crown Zellerbach Corp., a corporation (sometimes hereinafter referred to as Crown), directly and through its subsidiaries, is engaged principally in the production and in the sale and distribution of pulp, paper, and paper products. It ranks as one of the largest producers of paper and paper products in the United States. Crown is a fully integrated producer of pulp, paper, and paper products in the United States, and through Canadian subsidaries is an integrated producer of pulp, paper, paper products, plywood, lumber, and lumber products in Canada. In its United States operations, respondent owns and controls timber reserves; produces its own pulp requirements; manufactures various kinds of paper; converts paper into paper products; and sells paper and paper products to converters, jobbers and others. Crown owns and operates western mills in Camas, Wash.; West Linn, Oreg.; Port Angeles, Wash.; Lebanon, Oreg.; Port Townsend, Wash.; Antioch, Calif.; and Los Angeles, Calif.

[1] Section 7 reads in pertinent part as follows:

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

Net sales of respondent and its subsidiaries in the year ended December 31, 1955, were $414,080,000. In the fiscal year ended April 30, 1953, respondent produced paper and paperboard as follows:

395,383 tons of newsprint and other printing papers;
332,343 tons of wrapping papers;
115,976 tons of tissues and sanitary papers; and
50,682 tons of paperboard.

During the 11-year period from May 1, 1942, to April 30, 1953, respondent's annual net sales increased from $84,656,362 to $252,765,012.

St. Helens Pulp & Paper Co. (referred to hereinafter as St. Helens) was, prior to the acquisition, a corporation doing business by virtue of the laws of the State of Oregon, with its principal office and place of business located at St. Helens, Oreg. It was a fully integrated mill, owning and controlling its own timber reserves, producing most of its own pulp requirements, manufacturing various kinds of paper, converting paper into paper products, and selling paper and paper products to converters, jobbers, and others.

On February 17, 1953, Crown entered into a memorandum of intent with the board of directors of St. Helens which provided that respondent would offer to exchange its own common stock for the shares of St. Helens, and in 1953, respondent acquired substantially all of St. Helens stock in exchange for 339,806 shares of its own common stock, valued at approximately $9,557,000. St. Helens was fully merged into respondent on September 12, 1955.

Among respondent's arguments on this appeal are the following:

(1) That the line of commerce is trade coarse paper[2] rather than census coarse paper[3] as determined by the hearing examiner;

(2) That the appropriate section of the country is the Nation or at least the area west of the Mississippi River rather than the 11 Western States (sometimes hereafter referred to as the West), as determined by the hearing examiner;[4]

(3) That the acquisition of St. Helens does not have the potentiality of adverse competitive consequences prohibited by section 7.

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[2] Trade coarse paper is a term used to cover the following classifications of paper: wrapping, bag, sack and converting papers, special industrial papers, sanitary tissue and other tissue papers, and paperboard, which includes containerboard, bending board, and other paperboard categories.

[3] Census coarse paper includes those papers defined by the Bureau of the Census as coarse papers and includes wrapping papers, bag and sack papers and other converting papers.

[4] The 11 Western States are as follows: the Pacific Coast States, Washington, Oregon, California, and the Mountain States, Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, and Nevada.

Considering the first contention, it is noted that the phrase "in any line of commerce," as used in section 7, is comprehensive and means that if the forbidden effect or tendency is produced in one out of all of the various lines of commerce, the words "in any line of commerce" literally are satisfied. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586; H.R. Rep. No. 1191, 81st Cong., 1st Sess. (1949); S. Rep. No. 1775, 81st Cong., 2d Sess. (1950).

In this connection, a question for determination is whether or not the coarse paper line, including wrapping, bag and sack papers and converting papers, which the hearing examiner refers to as census coarse papers, is a "line of commerce" within the meaning of the Clayton Act.

All such papers are in a relatively allied line, particularly in respect to markets and end uses. They generally relate to the packaging and wrapping field where a flexible type packaging material is appropriate or desirable. Wrapping papers, as the name implies, are made and used primarily for wrapping; they are produced in many sizes, colors, finishes, weights and other specifications appropriate for this field. Similar considerations apply as to bag and sack papers and other converting papers. Such factors as physical characteristics, markets, prices, and uses, all or in part tend to distinguish these papers from other papers and paperboard.

Distinctions among individual types of paper or paperboard are readily apparent. As an example, one of the papers which respondent would include with the relevant product is container board, a separate category in the broad line of trade coarse papers. Container board is used in the manufacture of boxes, particularly the corrugated paper box. This is ordinarily a heavier paper than the usual run of wrapping and bag papers. Container board also utilizes a high proportion of waste paper as compared with the coarse wrapping and bag papers, resulting generally in a lower quality paper. In addition, these particular papers involve different markets. Container board is made into boxes and sold to manufacturers of products requiring strong, lightweight shipping containers. Wrapping papers and bags (the converted product) are generally sold in markets which include paper jobbers, wholesalers, such as grocery wholesalers, and large consumers, such as chain grocers, ultimately to be used in large part by retailers for packaging or wrapping at the point of sale to the consumer. Moreover, there is evidence of price variations as between such categories of paper or paperboard. These and other differ-

entiating factors illustrate the distinctiveness of the competitive fields involved in the broad trade coarse paper line.

It is argued by the respondent that some of the papers in the coarse wrapping, bag, sack, and converting paper field are substantially similar to some of the papers in other fields and that since they may be used interchangeably, the product line of commerce should not be so narrowly defined. The nature of many papers indicates that they are unsuitable generally for any purpose other than that for which they are made, such as toilet tissue. On the other hand, some papers such as certain container boards and certain wrapping papers might replace each other in use, but the evidence indicates that there is little such substitution in actual practice.

It is our opinion, in view of the foregoing considerations, that the coarse paper line relating generally to coarse wrapping papers, bag and sack papers and converting papers is a sufficiently distinct product line to be a "line of commerce" within the meaning of section 7. To the extent that the hearing examiner relied on factors other than those mentioned in this opinion in determining the relevant line of commerce, the initial decision does not represent the view of the Commission.

Relative to respondent's contention as to the section of the country, we are satisfied that in this instance the 11 Western States, as found by the hearing examiner, is an appropriate section. This area constitutes the greater natural market for the western producers of the relevant product and it is the market in which both Crown and St. Helens made the majority of their sales of this product.

In 1952, 85 percent of St. Helens' domestic sales were in the 11 Western States. The Pacific Coast States alone accounted for 88.7 percent of its sales within the 11 Western States and 75.4 percent of its sales in the United States. Respondent also sold 80 to 85 percent of its products comparable to those produced by St. Helens in the 11 Western States with the greater portion being sold in the Pacific Coast States. In 1952, 63 percent of respondent's wrapping paper, 86.4 percent of its converting paper and 69.2 percent of its bags were sold in the Pacific Coast States, while 14 percent of its wrapping paper, 1.5 percent of its converting paper and 15.4 percent of its bags were sold in the Mountain States.

It may be fairly concluded with consideration given to all the evidence that sales of the papers involved in this proceeding in the 11 Western States from producers outside this area were relatively

insignificant. The record shows that western supplies of the relevant coarse papers and the products into which they are converted have come primarily from western mills. Factors such as the preferences of purchasers and particularly the high cost of shipping over long distances have resulted in effectively separating the West as a competitive area from the rest of the country with respect to the relevant product line.

The evidence is likewise sufficient to show that the three Pacific Coast States, California, Oregon, and Washington, constitute a section of the country, within the meaning of section 7, for much the same reasons. This is where the great bulk of the domestic sales, of the papers involved, by Crown and St. Helens were concentrated. For the purpose of this decision, however, the 11 Western States will be regarded as the appropriate section.

The relevant market here is a substantial market. Papers in the coarse wrapping, bag, sack and converting paper field accounted for 437,384 tons of the production in the West in 1953, which was 36.3 percent of the total paper produced in the area exclusive of paperboard.

In terms of the relevant market, a further question for consideration is whether the effect of the acquisition may be substantially to lessen competition or tend to create a monopoly. Both Crown and St. Helens were substantial producers of the coarse wrapping, bag, sack, and coverting papers. About 84 percent of the production of St. Helens was in this line and, other than for newsprint and printing papers, over 50 percent of Crown's production. Such papers accounted for about 30 percent of all grades of paper and paperboard produced by Crown. In 1953, the production in tons of Crown and St. Helens of these papers as compared with other trade coarse papers was as follows:

Category of paper	Industry total in West	Crown	Crown's percentage of total	St. Helens	St. Helens percentage of total
Coarse paper	437,384	225,276	51.5	48,155	11.0
Special industrial papers	53,099	43,382	81.7	3,052	5.7
Sanitary tissue	112,536	76,532	68	1,513	1.4
Other tissue paper	36,052	13,211	36.7	2,858	7.9
Container board	587,708	56,729	9.6	413	.1
Bending board	448,020	9,761	2.2	166	.04
Special paper board stock	130,619	----------	----------	1,460	1.1

The total industry production in the West of the coarse papers in the wrapping, bag and allied paper field for 1954 was 455,934 tons. This was shared among the various western producers as follows:

	Tons	*Percent*
Crown Zellerbach Corp	242, 539	53. 2
Former St. Helens	49, 317	10. 8
Longview Fibre Co	80, 108	17. 6
St. Regis Paper Co	56, 068	12. 3
Oregon Pulp & Paper Co. and Columbia River Paper Co	14, 540	3. 2
Publishers Paper Co	6, 929	1. 5
Potlatch Forests, Inc	4, 990	1. 1
Inland Empire Paper Co	681	. 1
Fibreboard Products Co	81	
Simpson Paper Co	377	. 1
Weyerhaeuser Timber Co	304	. 1

Crown and St. Helens prior to the acquisition were competing in the sale of the relevant product in the West. At the time of the acquisition, there were only 10 producers of such products in the West, and 4 of the 10 manufactured only small quantities. In 1952, Crown, St. Helens, Longview Fibre Co., and St. Regis Paper Co., in combination, produced 94.2 percent of the total; in 1954, 93.9 percent of the total. Of the four, only Crown, St. Helens and Longview Fibre Co. sold a relatively broad line of wrapping papers, bag papers and allied papers which was of particular importance to the jobbing trade. St. Regis sold only a limited selection of such papers. Its production was principally in bleached shipping sack paper. Longview Fibre Co., while it produced and sold a relatively broad line, converted a substantial portion of its production and sold jobbing papers to only three jobbers.

Respondent produced 51.5 percent and St. Helens 11.0 percent of the relevant product in the West in 1953, for a total of 62.5 percent of the western production. This clearly constituted a predominant share of the market considering its relative isolation. One immediate result of the acquisition was to remove from the western supplier market an important, fully integrated competitor having its own timber reserves, pulp manufacturing and converting facilities and fully developed sales outlet to the trade. Another immediate result was to increase significantly the size of respondent in the relevant line of commerce in which it already had a commanding lead.

Respondent, a company which produced in the West in 1953, 56.2 percent of all the paper produced in the area and 27.3 percent of the paper and paperboard production combined, was by far the leading

producer in the relevant line of papers with 51.5 percent of the total. In 1954, the year following the acquisition, of the 455,934 tons of the relevant papers produced, Crown manufactred 242,539 tons, or 53.2 percent, plus 49,317 tons or 10.8 percent through St. Helens, for a total of 64 percent. Only two western competitors produced any significant volumes of such papers in this year. These were Longview Fibre Co. with 80,108 tons or 17.6 percent of the total and St. Regis Paper Co. with 56,068 tons or 12.3 percent.

Crown's position has been additionally enhanced as a result of the acquisition because through its jobber division, Zellerbach Paper Co., it is now competing with many more jobbers for which it has become a major supplier. The record demonstrates that jobbers must have a dependable source of supply of a wide range of papers in the relevent line to be competitive. Very few producers in the West supplied a substantially broad line of such papers, and suppliers outside the West were generally unreliable sources, particularly in times of paper shortages. Clearly, with the elimination of St. Helens, western jobbers generally have been severely restricted as to sources from which the relevant papers may be purchased. It likewise appears that many converters which formerly could look to St. Helens for purchases of the relevant papers must now depend upon Crown as a primary source of supply, a company which is a major competitor since Crown converts a substantial share of its production.

There is little to suggest in this record that the competition represented by St. Helens will be effectively replaced in the foreseeable future by other paper mills. Respondent has listed a number of companies which it regards as new entrants to the market since 1949. Some of the companies referred to as new entrants do not as yet have mills producing in the West and others either do not produce the papers in the line here relevant or they produce generally in selective categories of papers. One such company is St. Regis, whose principal production in the pertinent line was in the category of shipping sack paper.

There is no indication that any new firm will produce a relatively broad line of the coarse papers so as to become a substantial supplier for jobbers and converters, nor is there any indication that any new supplier will offer the form of competition such as evidenced by the extra services which it had been customary for the St. Helens mill to provide. Under the circumstances, it does not appear that new entrants will measurably offset the lessening of competition apparent in this record.

Respondent points out that, in 1947, Crown accounted for 33.4 percent of the total western production of all grades of paper and paper-

board and that by 1953 its share was reduced to 29 percent. In the same period, however Crown's own production increased from 568,-068 tons to 744,455 tons, exclusive of St. Helens. These production statistics cover, of course, the full range of paper and paperboard produced in the West. There is no substantial evidence that respondent's position has so declined in the line of papers relevant to this inquiry.

The record contains evidence to the effect that many paper-making machines in use in the West are capable of producing a relatively wide range of papers and paperboard. While this may indicate a potential for increased competition from paper companiees now producing papers other than those involved in this proceeding, it does not appear that this is a substantial factor to be considered. Many paper mills produce in those areas of competition for which they are most appropriately equipped. Economic factors control to a large extent the types of papers which will be produced in particular mills. From the circumstances presented in this record, it does not appear likely that substantial shifts in production are to be expected, at least under ordinary market conditions.

Respondent argues that the coarse wrapping, bag and allied paper line was one which St. Helens itself planned to abandon, so that the acquisition could not have a substantial effect on competition. While St. Helens planned to produce other types of papers, the testimony indicates that it also planned to continue to supply its customers' needs of the same papers it had been making, particularly its jobber customers.

Considering all the factors, we conclude that the effect of this acquisition may be substantially to lessen competition or tend to create a monopoly in the relevant line of commerce and, as such, is in violation of section 7 of the Clayton Act.

Respondent argues that since St. Helens was in some financial difficulty as a result of its modernization program, it was not an effective competitor but, rather, was in a failing condition. Under these circumstances, respondent contends that the Commission cannot find the acquisition to be in violation of section 7, citing as authority *International Shoe Co.* v. *Federal Trade Commission*, 280 U.S. 291. In that case, the facts disclose a corporation with resources so depleted and the prospect of rehabilitation so remote that it faced the grave probability of a business failure. Such is not the case here.

As of December 31, 1952, St. Helens' total assets were $15,223,754, and its net worth was $9,436.441. St. Helens' annual net sales in the 10-year period between January 1, 1943, and December 31, 1952, in-

creased from $5,435,053 to $9,258,508. Its annual net income during the same period increased from $357,754 to $638,534, the latter amount not including proceeds from insurance on life of the company's late president or credit in connection with the excess profits tax. From 1943 to 1952 St. Helens' earnings per share of common stock ranged from a low of $0.66 in 1945 to a high of $3.56 in 1948, with earnings of $2.73 in 1952, which earnings apparently are based on net profits, including the aforementioned excess profits tax refund and the proceeds from the life insurance policy. Beginning in 1929, St. Helens paid dividends in every year except 1932. There are no facts in this record to clearly indicate that St. Helens would have been unable to complete its modernization program. We are of the opinion that St. Helens had been and was at the time of the acquisition an effective competitor, and that there is no sufficient reason to believe that it was in a failing or bankrupt condition.

The hearing examiner, during the course of this proceeding, denied respondent's motion to strike from evidence an economic survey identified in the record as Commission's exhibit 176. Respondent now requests that we order this evidence stricken from the record. However, no substantial reason has been advanced to warrant its being stricken.[5] In the initial decision, the hearing examiner gave the survey no consideration because he believed it to be of questionable probative value. Nor have we relied upon it in making our decision. Respondent seems to argue in substance that if the Commission agrees the survey is lacking in probative value and should not be considered, it then follows it should be stricken. We cannot agree with such contention. We are of the opinion that the survey evidence should remain in the record.

Respondent additionally objects to a number of the hearing examiner's conclusions. It is believed that such objections have been answered in substance by our determination of the principal questions raised on this appeal.

Finally to be considered in connection with both appeals are the arguments of respondent and counsel supporting the complaint with respect to the requirements of the order.

Respondent contends that the order is unreasonable chiefly because it requires divestiture of a property which respondent has substantially added to or improved. It is noted that Crown has added new ma-

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[5] The Administrative Procedure Act, section 7(c), Public Law 404, 79th Cong. (1946); The Attorney General's Manual on the Administrative Procedure Act, p. 76 (1947) and citations therein.

chinery and improvements to the St. Helens property valued at $14,300,817, as found by the hearing examiner; but, clearly, the broad purpose of the statute cannot be thwarted merely because respondent has commingled its own assets with those of the acquired firm. However, it is not believed that the order should necessarily require the divestiture of all such assets added to the property by the respondent if the divestment may be otherwise accomplished without destroying the operating condition and organization of the acquired mill, substantially as it existed at or around the time of the acquisition.

Respondent suggests that, under the circumstances, it would be appropriate for the order to require Crown to submit, within a reasonable time, a plan for compliance. Such a procedure appears to have considerable merit in this instance and we believe the order should so provide. It is our further opinion that in said plan for compliance, respondent should specify the time in which it can reasonably carry out the divestiture. The Commission will thereafter fix the date within which compliance is to be effected.

We have also considered respondent's objection to the order that the disqualification of Crown's stockholders may preclude most potetial investors. We believe that the order will contain no unreasonable restriction if it is modified to make clear that present stockholders may be qualified as purchasers if they dispose of such stock holdings in Crown prior to the actual divestiture.

Counsel supporting the complaint argue principally that the order permits piecemeal selling of the St. Helens property and that to be effective it should require divestiture in such a manner that St. Helens will be restored as the competitive factor it was prior to the aquisition. As previously indicated, we are of the opinion that the order should require the substantial restoration of the competitive entity destroyed. A remedy of this nature is necessary since one of the adverse effects of the acquisition was to remove St. Helens as a competitor, and, by so doing, to severely restrict the sources of supply of western jobbers and converters. To permit piecemeal sale of the property would only partially correct the harm that has been rendered to competition.

It is directed, therefore, that the order contained in the initial decision be modified in accordance with the views herein expressed.

The appeals of both respondent and counsel supporting the complaint are granted to the extent indicated in this opinion, and otherwise denied.

Mr. Kern did not participate in the decision of this matter.

FINAL ORDER

This matter having come on to be heard upon the cross-appeals of respondent and counsel supporting the complaint from the hearing examiner's initial decision and upon the briefs and oral argument of counsel in support thereof and in opposition thereto; and

The Commission having rendered its decision denying in part and granting in part both the appeal of respondent and of counsel supporting the complaint, and having directed that the order contained in the initial decision be modified in accordance with its views as therein expressed:

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

It is ordered, That the respondent, Crown Zellerbach Corp., a corporation, and its officers, directors, agents, representatives, and employees shall divest itself absolutely, in good faith, of all assets, properties, rights and privileges, including but not limited to timberlands, cutting rights, timber, plant, machinery, equipment, trade names, trademarks and good will acquired by Crown Zellerbach Corp. as a result of the acquisition by Crown Zellerbach Corp. of the stock or share capital of the St. Helens Pulp & Paper Co., together with so much of the plant machinery, buildings, improvements and equipment of whatever description that has been installed or placed on the premises of the St. Helens plant by respondent as may be necessary to restore St. Helens Pulp & Paper Co. as a competitive entity in the paper trade, as organized and in substantially the basic operating form it existed at or around the time of the acquisition.

It is further ordered, That in such divestment no property above mentioned to be divested shall be sold or transferred, directly or indirectly, to anyone who at the time of the divestiture is a stockholder, officer, director, employee, or agent of, or otherwise directly or indirectly connected with or under the control or influence of, respondent or any of respondent's subsidiaries or affiliated companies.

It is further ordered, That pending the divestiture herein ordered, respondent, Crown Zellerbach Corp., a corporation, its officers, agents, representatives and employees shall refrain from:

1. Cutting or removing any timber or forest residuals on or from lands owned or upon which cutting rights were possessed which were acquired and held by Crown Zellerbach Corp. as a result of the acquisition by Crown Zellerbach Corp. of the stock or share capital of the St. Helens Pulp & Paper Co.

2. Offering for sale, selling or distributing any timber, forest residuals or cutting rights from lands acquired and held by Crown Zellerbach Corp. as a result of the acquisition by Crown Zellerbach Corp. of the stock or share capital of the St. Helens Pulp & Paper Co.

It is further ordered, That respondent, Crown Zellerbach Corp., shall, within sixty (60) days from the date of the service upon it of this order, submit in writing, for the consideration and approval of the Federal Trade Commission, its plan for compliance with this order, such plan to include the date within which compliance can be effected, the time for compliance to be hereafter fixed by order of the Commission, jurisdiction being retained for these purposes.

It is further ordered, That the findings, conclusions and order, as modified, contained in the initial decision be, and they hereby are, adopted as those of the Commission.

Commissioner Kern not participating.

IN THE MATTER OF

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

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

Docket 5592. Complaint, Oct. 5, 1948—Decision, Dec. 27, 1957

Order dismissing complaint as to certain respondents, in conformity with the decree of the Court of Appeals for the Second Circuit of January 9, 1957, 240 F. 2d 341, which set aside insofar as it related to those respondents, the Commission's cease and desist order of September 24, 1954, 51 F.T.C. 307, prohibiting concerted price fixing for fine and wrapping paper.

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

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

Barshay & Frankel, of New York City, for Shuttleworth Wollny Co., Inc. and Fred Free, Jr.

Wechsler & Solodar, of New York City, for Imperial Bag & Paper Co., Inc. and Liberty Bag & Paper Co.

Javits, Levitan & Held, of New York City, for Robins Paper Co. of Baltimore City.

SUPPLEMENTAL ORDER DISMISSING THE COMPLAINT AS TO CERTAIN RESPONDENTS AND STRIKING THEIR NAMES FROM THE ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the amended complaint of the Commission, answers of certain respondents, substitute answers of other respondents, testimony relating to certain respondents and documentary evidence and stipulations relating to other respondents, in support of and in opposition to the allegations of the aforesaid complaint, taken before a hearing examiner of the Commission theretofore duly designated by it; and the hearing examiner having thereafter filed his recommended decision in which he concluded that all of the respondents, with the exception of respondents Robert Engel and Graham Paper Co. had violated section 5 of the Federal Trade Commission Act as alleged; and the matter having thereafter come on to be heard by the Commission on the complaint, as amended, the answers, substitute answers, evidence, stipulations, recommended decision of the hearing examiner

and the exceptions thereto, briefs in support of and in opposition to said complaint, and oral argument of counsel; and,

The Commission having duly considered the matter, and being fully advised in the premises, made its findings as to the facts, and, on the 24th day of September 1954, issued its order in which it dismissed the complaint as to respondents Graham Paper Co., Pittsburgh Paper Association, Robert Engel, Morris Paper Co., Anderson Paper & Twine Co., Clarence E. Dobson, and as to all of the respondents named in the complaint only by reference to the list of members of the respondent trade associations attached as exhibits to the complaint and who were not specifically named as respondents in the complaint or in the first paragraph of the order to cease and desist, and, ordered all other respondents to cease and desist from the acts and practices which the Commission had found to be unlawful; and,

Respondents Metropolitan Bag & Paper Distributors Association, Inc., A. E. MacAdam & Co., Inc., John H. Free, Inc., Shuttleworth Wollny Co., Inc., S. Posner Sons, Inc., Yorkville Paper Co., Inc. and Fred Free, Jr. having filed in the United States Court of Appeals for the Second Circuit their joint petition for the review of and to set aside the aforesaid order to cease and desist insofar as it related to them; and,

Respondents Harlem Paper Products Corp., Imperial Bag & Paper Co., Inc., Daniel W. Margolin, doing business as Liberty Bag & Paper Co., and David Kasson, having filed in the United States Court of Appeals for the Second Circuit their joint petition for the review of and to set aside the aforesaid order to cease and desist insofar as it related to them; and,

Respondent Robins Paper Co. of Baltimore City (named in the complaint as Robins Paper Co., Inc.), having filed in the United States Court of Appeals for the Fourth Circuit its petition for the review of and to set aside the aforesaid order to cease and desist insofar as it related to it; and that circuit, acting upon a motion filed by the Commission, having removed and transferred the said petition for review, together with all pleadings and other papers pertaining thereto to the U.S. Court of Appeals for the Second Circuit, which had acquired exclusive jurisdiction of the subject matter; and,

The U.S. Court of Appeals for the Second Circuit having heard these several and separate petitions for review on briefs and oral argument and having thereafter, on the 9th day of January 1957, handed down its decision setting aside the aforesaid order to cease and desist as it related to petitioners Shuttleworth Wollny Co., Inc., Imperial Bag & Paper Co., Inc., Daniel W. Margolin, doing business

as Liberty Bag & Paper Co., Robins Paper Co. of Baltimore City (named in the complaint as Robins Paper Co., Inc.) and Fred Free Jr., and affirming said order to cease and desist as to the remaining petitioners, and, on the 19th day of March 1957, entered its final decree setting aside the aforesaid order to cease and desist as it related to the aforesaid petitioners and dismissing the said petitions for review filed, as aforesaid, by Metropolitan Bag & Paper Distributors Association, Inc., A. E. MacAdam & Co., Inc., John H. Free, Inc., S. Posner Sons, Inc., Yorkville Paper Co., Inc., Harlem Paper Products Corp. and David Kasson, and affirming and enforcing said order to cease and desist as to these said petitioners; and,

Respondents Metropolitan Bag & Paper Distributors Association, Inc., Yorkville Paper Co., Inc., A. E. MacAdam & Co., Inc., John H. Free, Inc. and S. Posner Sons, Inc., having thereafter, on the 13th day of June 1957, and respondents Harlem Paper Products Corp. and David Kasson, having thereafter on the 17th day of June 1957, filed in the Supreme Court of the United States their respective petitions for a writ of certiorari to the U.S. Court of Appeals for the Second Circuit, to review the aforesaid decree of that court affirming the said order to cease and desist issued against them by the Commission as aforesaid; and

The Supreme Court of the United States having, on the 14th day of October 1957, denied the aforesaid petitions for writ of certiorari; and,

The Commission being of the opinion that its said order to cease and desist, issued as aforesaid, should be brought into conformity with that portion of the said decree of the U.S. Court of Appeals for the Second Circuit in which the court set aside the aforesaid order to cease and desist insofar as it related to Shuttleworth Wollny Co., Inc., Imperial Bag & Paper Co., Inc., Daniel W. Margolin, doing business as Liberty Bag & Paper Co., Robins Paper Co. of Baltimore City (named in the complaint as Robins Paper Co., Inc.) and Fred Free, Jr.

Now, therefore, it is ordered, That the complaint be, and it hereby is, dismissed as to respondents Shuttleworth Wollny Co., Inc., Imperial Bag & Paper Co., Inc., Daniel W. Margolin, doing business as Liberty Bag & Paper Co., Robins Paper Co. of Baltimore City (named in the complaint as Robins Paper Co., Inc.) and Fred Free, Jr.; and

It is further ordered, That the names of respondents Shuttleworth Wollny Co., Inc., Imperial Bag & Paper Co., Inc., Daniel W. Margolin, doing business as Liberty Bag & Paper Co., Robins Paper Co. of Baltimore City (named in the complaint as Robins Paper Co., Inc.) and Fred Free, Jr. be, and they hereby are, stricken from the aforesaid order to cease and desist issued on the 24th day of September 1954, as aforesaid.