mission a report in writing setting forth in detail the manner and form in which it has complied with Paragraphs I, III, IV and V of this Order to cease and desist.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, published May 6, 1955, as amended, the initial decision of the hearing examiner shall, on the 6th day of January 1962, become the decision of the Commission; and, accordingly:

It is therefore ordered, That respondents shall, within the times provided for in the order contained in the initial decision herein, file with the Commission reports, 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

THE NATIONAL SCHOOL OF CONSTRUCTION, INC., ET AL.

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

Docket C-62. Complaint, Jan. 8, 1962—Decision, Jan. 8, 1962

Consent order requiring Milwaukee sellers of a correspondence course in the operation and maintenance of heavy construction equipment, to cease using false representations in advertising in newpapers and periodicals, leaflets, form letters, etc., to sell its courses, including false employment offers and opportunities, exaggerated earnings claims, GI and Justice Department approval, operation of several branches, etc., as in the order below indicated.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The National School of Construction, Inc., a corporation, and Raymond F. Watt and Richard Kolpin, individually and as officers of said corporation; and James Haig Advertising, a corporation, and James Haig, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be

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

PARAGRAPH 1. Respondent The National School of Construction, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located at 10852 West Wisconsin Avenue, in the city of Milwaukee, State of Wisconsin.

Respondent Raymond F. Watt is an individual and President of corporate respondent The National School of Construction, Inc., and respondent Richard Kolpin is an individual and Vice President and Treasurer of said corporate respondent. They formulate, control and direct the policies and practices of said corporate respondent, and have the same address as that of the corporate respondent.

Respondent James Haig Advertising is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located at 3707 North 92nd Street, in the city of Milwaukee, State of Wisconsin.

Respondent James Haig is an individual and President of corporate respondent James Haig Advertising. He formulates, controls and directs the policies and practices of said corporate respondent, including those hereinafter referred to, and his address is the same as that of said corporate respondent. Corporate respondent James Haig Advertising is the advertising agent of corporate respondent The National School of Construction, Inc., and prepares and places for publication or broadcast advertising material, including but not limited to that hereinafter set forth, to promote the instruction courses sold by corporate respondent The National School of Construction, Inc.

PAR. 2. Respondent The National School of Construction, Inc., is now, and for some time last past has been, engaged in the business of conducting a correspondence school and in selling and distributing courses of instruction in the operation and maintenance of heavy construction equipment.

PAR. 3. Respondents have caused, and are now causing, said courses of instruction in said subjects, when sold, to be transported from their place of business in the State of Wisconsin to purchasers thereof at their respective locations in other States of the United States and in the District of Columbia. Said respondents have maintained, and now maintain, a course of trade in said courses of instruction in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, and for the purpose of enrolling prospective students and thereby promoting the sale of their said courses of instruction in the operation and maintenance of heavy construction equipment, respondents, through advertisements inserted and published in newspapers and periodicals having general circulation throughout the United States, in pamphlets, letterheads, leaflets, circulars, form letters, cards, printed contracts and other media distributed through the United States mail, and by radio broadcasts across state lines, and through oral representations made by their salesmen, and by other means and media, have made, and are now making, numerous statements with respect to their said courses of instruction and the advantages and benefits which the purchasers thereof will receive. Among and typical of such statements, but not limited thereto, are the following:

Men Needed to operate all kinds of heavy equipment Tractors, Scrapers, Graders, Bulldozers, etc. State in letter if you are experienced operator or trainee. Also untrained men needed to learn heavy equipment operation.

You don't have to relocate to learn. Men are needed now everywhere.

(Under "Help Wanted" columns in newspapers)

Men Wanted to Move the Earth.

Trained men are needed now to operate construction equipment * * *.

900,000 men will be needed in the ever expanding heavy equipment operating field.

(Radio-Television Script)

Men are needed now in your hometown.

Get Ahead Fast with Top Pay.

Learn to operate Big Construction Equipment.

You can be one of America's high-pay operators of giant Earth Moving Equipment * * *.

A short knowledge course which you can complete in your own home plus actual field training will enable you to operate the largest dozers, graders and tournapulls.

If you qualify Heavy Equipment & Gas Turbine Training Division will even help you finance your training as you learn.

Today contractors throughout the country watching National graduates at work know that these men have learned their jobs well * * *.

The National School of Construction, first of the kind in the nation, has proved to the industry that it is needed . . . that it is turning out graduates who step into their jobs . . . "moving earth the very first day" . . . in an efficient manner.

Learn the SURE WAY by DOING!

Practical Resident courses of 220 to 440 hours give you the actual practice you need.

Did you know the men operating heavy equipment earn up to $10,000? So can you.

Operators with time off for winter have been earning $7,000–$10,000! Advancement to foreman earns up to $12,000 to $15,000.

I make myself up to $225 per week or $10,000 per year and work only 11 months, all because of one simple reason. I signed up with National Schools to take a short knowledge course and spent 3 weeks of intensive training at their resident training grounds.

National Schools are GI Approved.

Approved by Commission on Adult Education.

Approved by the Immigration and Naturalization Department of the Justice Department.

National Schools of Construction, Inc. Offices in Milwaukee, Wisconsin—Charlotte, North Carolina.

Students learn by Doing-Photos taken at our Training Grounds.

We will train you to become a heavy equipment operator or field mechanic. Our huge proving grounds are staffed with qualified instructors * * * Write now.

National School of Construction, Inc.
10852 Wisconsin Ave., Milwaukee, Wisconsin.

Printed seals used by respondents on their agreements, etc., contain the following wording:

Carolinas Branch
AGC
Associate Member
Licensed
By N.C.
State Dept.
Of Public
Instruction
American Road Builders Assn.
A
R B
A
1902

PAR. 5. Through the use of the aforesaid statements and representations, and others of similar import not specifically set forth herein, with respect to their courses of instruction in the operation and maintenance of heavy equipment, respondents represent, and have represented, directly or by implication, that:

1. Respondents offer employment in the operation of construction equipment, including tractors, scrapers, graders, bulldozers, and other earth moving equipment.

2. There is a shortage of heavy equipment operators and men are needed everywhere to operate construction equipment, and that purchasers of respondents' courses will secure employment as heavy machine operators.

3. Respondents' courses provide all the necessary instruction and experience to qualify persons who complete the courses for immediate employment as operators of heavy construction equipment.

4. Completion of respondents' courses will assure purchasers thereof of earnings of up to $10,000 yearly, or $7,000 to $10,000 without working in the winter, or high pay as an operator of earth moving equipment.

5. Respondents will aid in financing the training of persons who purchase their courses.

6. Respondents' school is GI Approved, approved by the Commission on Adult Education and by the Bureau of Immigration and Naturalization of the Department of Justice.

7. Respondents' school is licensed by the North Carolina State Department of Public Instruction; is an associate member of the Associated General Contractors of America and of the American Road Builders Association.

8. Respondents operate more than one school, with branches in several locations.

9. Respondents own facilities for practical training and students will be trained at the school's proving grounds.

In soliciting the sale of said courses, respondents' salesmen repeat in substance the statements made in the foregoing advertisements and scripts, and in addition represent, directly or by implication, that:

1. Students will be placed in jobs or their names furnished to companies or others needing heavy equipment operators.

2. Persons who purchase and complete said courses will earn $9,000 to $15,000 yearly, a minimum of $165.00 a week, or from $7,000 to $9,000 a year without working during the winter.

3. Purchasers of the courses will receive from 80 to 220 hours of practice on heavy equipment.

PAR. 6. The aforesaid statements and representations are grossly exaggerated, false, misleading and deceptive. In truth and in fact:

1. Respondents do not offer employment. Their sole purpose in advertising is to interest prospects in purchasing their said courses of instruction.

2. There is no shortage of heavy equipment operators in many areas of the United States, and purchasers of respondents' courses are not assured of securing employment as heavy equipment operators.

3. Respondents' courses do not provide all the necessary instruction and experience to qualify persons who complete the courses for immediate employment as operators of heavy construction equipment.

4. Completion of respondents' courses will not assure the purchasers thereof earning up to $10,000 or high pay as an operator of heavy equipment, and in most instances will not assure any such employment.

5. Respondents do not aid in financing the training of persons who purchase their courses.

6. Respondents' school is not GI Approved, nor approved by the Commission of Adult Education or the Bureau of Immigration and Naturalization of the Department of Justice.

7. Respondents' school is not licensed by the North Carolina State Department of Public Instruction, is not an associate member of the Associated General Contractors of America nor of the American Road Builders Association.

8. Respondents operate only one school, the residence school in Milwaukee, and have no other branches.

9. Respondents do not own any facilities for practical training or training grounds. Purchasers of their courses are trained by other schools, under contract, which are not owned by or affiliated with respondents.

10. Respondents do not place students or purchasers of their courses in jobs, nor do they furnish such persons with the names of contractors or others who will employ them.

11. Persons who purchase and complete respondents' courses do not earn from $9,000 to $15,000 yearly, or a minimum of $165.00 a week, nor do they earn from $7,000 to $9,000 a year without working during the winter.

12. Purchasers of respondents' courses do not receive from 80 to 220 hours of practice on heavy equipment.

PAR. 7. At all times mentioned herein respondents have been, and are, in substantial competition, in commerce, with corporations, firms and individuals also selling and distributing courses of instruction of the same general kind and nature as those sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements and representations and the acts and practices engaged in by them, as aforesaid, have had, and now have, the tendency and capacity to mislead and deceive members of the purchasing public into the erroneous belief that said statements and representations were true and by reason of said erroneous and mistaken belief to induce the purchase of respondents' said courses of instruction.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and the injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent The National School of Construction, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located at 10852 West Wisconsin Avenue, in the city of Milwaukee, State of Wisconsin.

Respondents Raymond F. Watt and Richard Kolpin are officers of said corporation, and their address is the same as that of said corporation.

Respondent James Haig Advertising is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its office and principal place of business located at 3707 North 92nd Street, in the city of Milwaukee, State of Wisconsin.

Respondent James Haig is an officer of corporate respondent James Haig Advertising, and his address is the same as that of said corporation.

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

ORDER

It is ordered, That The National School of Construction, Inc., a corporation, and its officers, and respondents Raymond F. Watt and

Richard Kolpin, individually and as officers of said corporation; and James Haig Advertising, a corporation, and its officers, and James Haig, individually and as an officer 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 courses of instruction in the operation and maintenance of heavy construction equipment, or any other courses of instruction containing substantially the same material, do forthwith cease and desist from representing, directly or by implication, that:

1. Respondents offer employment in the operation of construction or earth moving equipment.

2. There is a shortage of heavy equipment operators or that men are now needed everywhere to operate construction equipment.

3. Persons who purchase and complete said courses of instruction will find employment as heavy machine operators or operators of construction equipment.

4. Said courses provide the necessary instruction and experience to secure immediate employment as operators of heavy construction equipment.

5. Persons who have completed said courses will be able to earn from $7,000 to $15,000 a year, or $165.00 a week, or any amount in excess of the amount that is usually and customarily earned by said persons.

6. Respondents will finance or assist in financing the training of persons who purchase their courses.

7. Respondents' school is GI Approved, or approved by the Commission of Adult Education or by the Bureau of Immigration and Naturalization of the Department of Justice, or by any other agency of the United States Government.

8. Respondents' school is licensed by the North Carolina State Department of Public Instruction, or is an associate member of the Associated General Contractors of America or of the American Road Builders Association.

9. Respondents operate more than one school or have branches in several locations.

10. Respondents own facilities for practical training or that students will be trained on proving grounds owned by the respondents.

11. Respondents will place persons who complete said courses in jobs or furnish the names of contractors or others who will employ said persons.

12. Purchasers of respondents' courses will receive from 80 to 220 hours of actual practice on heavy equipment, or any number of hours in excess of the number of hours actually given in the operation of such equipment.

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

IN THE MATTER OF

RICHARDSON-MERRELL, INC., FORMERLY VICK CHEMICAL COMPANY

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

Docket 8392. Complaint, May 5, 1961—Decision, Jan. 10, 1962

Consent order requiring the New York City distributor of a drug preparation designated "Vicks Double-Buffered Cold Tablets" to cease representing falsely in advertising in newspapers, magazines, by radio and television, and otherwise, by such statements as "acts in minutes instead of days", "DOES IN 15 MINUTES WHAT NATURE TAKES 7 DAYS TO DO", etc., that said preparation would cure or shorten the duration of a common cold.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Richardson-Merrell, Inc., a corporation, formerly known as Vick Chemical Company, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Richardson-Merrell, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 122 East 42nd Street, in the city of New York, State of New York. Respondent's former corporate name was Vick Chemical Company.

PAR. 2. Respondent is now and has been, for more than one year last past, engaged in the sale and distribution of a preparation containing ingredients which come within the classification of drugs, as the term "drugs" is defined in the Federal Trade Commission Act.

The designation used by respondent for said preparation, the formula thereof, and directions for use are as follows:

Designation: Vicks Double-Buffered Cold Tablets.
Formula: Salicylamide 2½ grs.
Phenacetin 2½ grs.
Ephedrine Sulphate 1/16 gr.
Caffeine Alkaloid Anhydrous ¼ gr.
Pyrilamine Maleate 13 mg.
Aluminum Hydroxide Dried Gel ¼ gr.
Sodium Citrate ¼ gr.
Magnesium Hydroxide 1 gr.
Corn Starch 1.166 grs.
Veegum 0.35 gr.
D & C Yellow #5 1 mg.
Magnesium Stearate 2.7 mg.
Directions: Dosage: "Adults, 2 tablets at onset of discomfort, then 1 tablet every 4 hours as needed. Do not exceed 6 tablets every 24 hours. Children, 6 to 12, one tablet every 4 hours, as needed. Do not exceed 3 tablets every 24 hours. . . . Consult your physician . . . for dosage for children under 6."

PAR. 3. Respondent causes the said preparation, when sold, to be transported from its place of business in the State of New York to purchasers thereof located in various other states of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its said business, respondent has disseminated and caused the dissemination of certain advertisements concerning the said preparation by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines and other advertising media, and by means of television and radio broadcasts transmitted by television and radio stations located in various states of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation; and has disseminated, and caused the dissemination of, advertisements concerning said preparation by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical of the statements and representations contained in said advertisements, disseminated as hereinabove set forth, are the following:

In newspapers, magazines and other advertising media:

NEW COLD-RELIEF DISCOVERY
DOES IN 15 MINUTES WHAT
NATURE TAKES 7 DAYS TO DO

Not only drains sinuses—but works with nature's own anti-virus factors to help dry up your head cold—bring relief in minutes.

NEW YORK, N.Y. (SPECIAL)

Today, cold-sufferers need never again wait for Nature to relieve miserable head cold symptoms. Now a new tablet discovery does far more than drain sinuses . . . does in 15 minutes what Nature takes 7 days to do—helps turn off that constant sniffling and sneezing. Helps stop running nose. Actually helps you get through the entire day without constantly reaching for messy handerchiefs!

WORKS IN 15 MINUTES

The secret is a remarkable new virus-cold tablet released by Vicks under the name VICKS DOUBLE-BUFFERED COLD TABLETS. This amazing tablet actually works with Nature's own anti-virus factors. That is, supplements your body's natural defenses with special high-speed medication that acts in minutes instead of days. Sends that medication speeding through your blood to the very source of colds distress—virus inflamed tissues deep behind sinuses.

DOES FAR MORE THAN
DRAIN SINUSES

In minutes, this special medication soothes and comforts those inflamed tissues. Helps you—
1. Stop running nose.
2. Stop sneezing, sniffling.
3. Clear congested sinuses.
4. Breathe in comfort.

Yes, in just 15 minutes VICKS DOUBLE-BUFFERED COLD TABLETS dry up your head cold so effectively they help you get through the entire day without messy handkerchiefs.

RELIEVES HEADACHE
PAIN, FATIGUE

In addition, VICKS DOUBLE-BUFFERED COLD TABLETS contain pain relievers to relieve headaches, ease bodyaches and pains . . . plus energy boosting medication to help fight off colds fatigue and restore your vitality. So, when cold strikes—stop reaching for messy handkerchiefs all day. Get new VICKS DOUBLE-BUFFERED COLD TABLETS.

In radio advertisements:

How long will nature take? When you have a miserable head cold and want to feel better fast, ask yourself—How long will nature take?—to relieve your stuffed-up head, aching sinuses, running nose? Five, six, seven days? Well, now Vicks releases a remarkable new cold tablet. Actually does in 15 minutes what nature takes seven days to do. Vicks double-buffered cold tablets help dry up your head cold so fast you save days of misery. Take Vicks Cold Tablets. Time it yourself. Vicks special, high-speed medication works through your blood,

works with nature's own anti-virus factors. Helps stop running nose, dry up your head cold in just 15 minutes. You'll say Vicks Cold Tablets really work. They do so much more than just drain sinuses. Vicks does in 15 minutes what nature takes seven days to do. Helps save you days of head cold misery. Get Vicks double buffered cold tablets.

PAR. 6. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondent has represented and is now representing, directly or by implication, that said cold tablets will cure or shorten the duration of a common cold.

PAR. 7. The said advertisements were and are misleading in material respects and constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, said cold tablets will not cure or shorten the duration of a common cold.

PAR. 8. The dissemination by the respondent of the false advertisements, as aforesaid, constituted and now constitutes unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

Mr. Terral A. Jordon, for the Commission.

Rogers, Hoge & Hills, of New York, N.Y., by *Mr. Andrew J. Graham;* and *Mr. Sherwood E. Silliman*, of New York, N.Y., for the respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

The complaint in this matter charges the respondent with misrepresenting the therapeutic effectiveness of one of its drug preparations in violation of the Federal Trade Commission Act. 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 intial 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 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 they provide an adequate basis for appropriate disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings made, and the following order issued:

1. Respondent Richardson-Merrell, Inc., formerly known as Vick Chemical Company, is a Delaware corporation with its office and principal place of business located at 122 East 42nd Street, New York, N.Y.

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 Richardson-Merrell, Inc., a corporation, formerly known as Vick Chemical Company, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of the drug "Vicks Double-Buffered Cold Tablets" or any preparation of substantially similar composition or possessing substantially similar properties, whether sold under the same name or under any other name, do forthwith cease and desist from, directly or indirectly:

1. Disseminating, or causing to be disseminated by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which represents, directly or by implication, that said drugs will cure a common cold or shorten its duration.

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

Provided, however, that nothing herein contained shall prevent respondent from making appropriate claims and representations respecting such relief of the symptoms of the common cold as may be afforded by said drugs.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, published May 6, 1955, as amended, the initial decision of the hearing

examiner shall, on the 10th day of January 1962, 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.

IN THE MATTER OF

MUELLER CO.

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

Docket 7514. Complaint, June 10, 1959—Decision, Jan. 12, 1962

Order requiring a Decatur, Ill., manufacturer of water and gas distribution service products designed for use in municipal and industrial gas and water plants—with factories in Illinois, California, and Tennessee and with gross sales in 1957 in excess of $25,000,000—to cease discriminating in price among its competing customers in violation of Sec. 2(a) of the Clayton Act by its practice of giving only a 15% discount on items accounting for about 40% of all sales to its "regular" jobbers but giving 25% on such items to others classified as "limit" jobbers.

COMPLAINT

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

PARAGRAPH 1. Respondent named herein is the Mueller Co. Respondent is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Illinois with its office and principal place of business at 512 West Cerro Gordo Street, Decatur, Ill.

PAR. 2. Respondent is engaged in the business of manufacturing, distributing and selling of water and gas distribution and service products throughout the United States. These products include a complete line of valves, fittings, tools and machines and related items and parts and accessories therefor which are specially designed and particularly suitable for use in municipal and industrial gas and water plants.

Respondent's business is substantial with gross sales in excess of $25,000,000 for the year 1957.

PAR. 3. Respondent owns, maintains and operates manufacturing plants in the States of Illinois, California, and Tennessee from which it sells and distributes water and gas distribution and service products of like grade and quality to purchasers located throughout the various states of the United States and other places under the jurisdiction of the United States.

PAR. 4. In the course and conduct of its business respondent is now, and for many years past has been, engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, transporting its water and gas distribution and service products, or causing the same to be transported from the state or states in which such products are manufactured to purchasers located in other states of the United States and in other places under the jurisdiction of the United States in a constant current of commerce.

PAR. 5. Respondent sells approximately fifty percent of the water and gas distribution and service products manufactured by it to purchasers who are engaged in the business of reselling such products to the ultimate users thereof. For purposes of brevity these purchasers shall hereinafter be referred to as jobber purchasers.

Many of the aforesaid jobber purchasers of respondent's products compete with other jobber purchasers of respondent's products within their respective areas of trade in the resale of respondent's products to the ultimate users thereof.

PAR. 6. In the course and conduct of its business in commerce, as aforesaid, respondent is now discriminating, and for several years past has discriminated in price in the sale of its water and gas distribution and service products of like grade and quality by charging different prices to different and competing purchasers of such products.

PAR. 7. The following practice on the part of respondent is set out as an example of the discriminations alleged in paragraph 6.

Respondent classifies all its jobber purchasers into two categories. Those in the first category are known as "limit jobbers," while those in the second category are known as "regular jobbers." Respondent grants a 25 percent discount from the prices set out in its published price lists for certain specific items on sales made to "limit jobbers." On the same specific items respondent grants a 15 percent discount from its published price lists on sales made to "regular jobbers." As a result of this practice those jobbers in the "regular" category must pay 10 percent higher prices for a substantial portion of their purchases from respondent than other jobbers in the "limit" category.

In very nearly every instance each of respondent's "regular jobbers" is in competition with one or more of respondent's "limit jobbers" in the resale of respondent's products to the ultimate users thereof.

PAR. 8. The effect of the discriminations alleged herein has been and may be substantially to lessen, injure, destroy or prevent competition between respondent's jobber purchasers paying higher prices and competing jobber purchasers paying lower prices to respondent for respondent's water and gas distribution and service products.

PAR. 9. The discriminations in price as herein alleged are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

Mr. James R. Fruchterman for the Commission.

Bell, Boyd, Marshall & Lloyd, of Chicago, Ill., by *Mr. John T. Loughlin;* and *Webber, Webber & Welsh*, of Decatur, Ill., by *Mr. A. G. Webber III* for the respondent.

INITIAL DECISION BY WILLIAM L. PACK, HEARING EXAMINER

1. The respondent, Mueller Co., is charged with price discrimination in violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. Hearings have been held at which evidence both in support of and in opposition to the complaint was received. Proposed findings and conclusions have been submitted by the parties, oral argument not having been requested, and the case is now before the hearing examiner for final consideration. Any proposed findings or conclusions not included herein have been rejected.

2. Respondent, an Illinois corporation, has its main office and principal plant in Decatur, Ill. It is engaged in the manufacture and sale of water and gas distribution and service products, the products being used by municipalities and private companies engaged in constructing and operating water and gas distribution systems. The products are of almost unlimited variety, ranging from small valves and fittings to large and expensive machines and appliances. Respondent is one of the largest and best known producers in the industry.

3. Respondent sells its products both direct to the ultimate users—municipalities and private companies operating gas and water works systems—and to jobbers, who resell to such users. Water products account for some 60 percent of respondent's business, gas products some 40 percent. Practically all of the gas products are sold direct to users. Sales of water products are divided about equally as between sales direct to users and sales to jobbers. The evidence in the present proceeding relates almost entirely to water products.

4. The case arises out of the fact that respondent maintains two categories of jobbers, and on certain items grants to jobbers in one category a larger discount from list prices than is granted jobbers in the other category. The two categories are "limit jobbers" and "regular jobbers". In the case of regular jobbers, most of their purchases are drop shipped by respondent to the ultimate user, that is, the municipality or privately owned utility. And limit jobbers have many of their purchases drop shipped to the ultimate user. On all drop shipments jobbers in both categories receive exactly the same discount. And on numerous items shipped to the jobbers direct the discount is the same, regardless of the category in which the jobber may fall.

5. There are, however, a number of items shipped to the jobbers direct on which the discount is 25 percent to limit jobbers, 15 percent to regular jobbers. These items for the most part consist of the smaller, most commonly used products—those which are needed most frequently by the ultimate user, often to meet an emergency.

6. The reason for the difference in discounts is that the limit jobber maintains an adequate inventory of such items and can supply them to the user immediately upon request. The regular jobber, on the other hand, maintains little or no inventory and can supply the needs of the user only by special order to respondent or to a limit jobber. The added 10 percent discount is a functional discount granted the limit jobber as compensation for the services performed by him in maintaining an adequate inventory of the items in question. The discount is not allowed on any other items, whether carried in stock or not.

7. Warehouses for the purpose of stocking the items in question were formerly maintained by respondent in several principal cities throughout the country. It was found, however, that the expense of maintaining the warehouses was too great and they were discontinued. In their stead, respondent adopted its present plan of allowing an extra 10 percent discount to jobbers who are willing to perform the warehousing function. The plan appears not to have been originated by respondent; it was already in use by others in the industry. Jobbers who perform the warehousing function are frequently referred to in the industry as "stocking jobbers", and the accompanying discount is known as a "stocking discount".

8. The increased discount of 10 percent is no greater than is necessary to reimburse respondent's limit jobbers for the function they perform. The undisputed evidence is that it costs at least 10 percent, and probably more, to maintain an inventory of goods such as are here involved and supply them to users when needed.

9. The evidence as to existence of competition between the limit jobbers and regular jobbers is not strong, but probably is sufficient. And the evidence as to competitive injury to the regular jobbers probably would be sufficient in the ordinary secondary line price discrimination case. In fact, a difference in discounts of 10 percent is so substantial that it would appear that ordinarily, in a secondary line case, no specific evidence of competitive injury would be required.

10. But this is not an ordinary case. Rather, it is a case in which purchasers receiving the larger discount perform a very definite, substantial and valuable function which otherwise would have to be performed by the seller. An the increased discount is no greater than is necessary to compensate the purchaser for the services rendered.

11. The leading Commission case on functional discounts appears to be that of Doubleday and Company, Inc., (1955) Docket No. 5897, 52 F.T.C. 169, in which the Commission, at page 209, said:

> In our view, to relate functional discounts solely to the purchaser's method of resale without recognition of his buying function thwarts competition and efficiency in marketing, and inevitably leads to higher consumer prices. It is possible, for example, for a seller to shift to customers a number of distributional functions which the seller himself ordinarily performs. Such functions should, in our opinion, be recognized and reimbursed. Where a businessman performs various wholesale functions, such as providing storage, traveling salesmen and distribution of catalogues, the law should not forbid his supplier from compensating him for such services. Such a legal disqualification might compel him to render these functions free of charge. The value of the service would then be pocketed by the seller who did not earn it. Such a rule, incorrectly, we think, proclaims as a matter of law that the integrated wholesaler cannot possibly perform the wholesaling function; it forbids the matter to be put to proof.
>
> On the other hand, the Commission should tolerate no subterfuge. Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer. It should not exceed the cost of that part of the function he actually performs on that part of the goods for which he performs it.

12. The facts in the present case seem clearly to bring it within the principles announced in the Doubleday case.

13. It also seems clear that there is a failure of proof as to competitive injury, either actual or potential, in view of the fact that respondent's limit jobbers receive the higher discount only on certain goods actually warehoused by them, and the further fact that the cost of such service equals or exceeds the difference in discounts. In these circumstances it is difficult to see how there can be any substantial injury to the regular jobbers.

14. No arbitrary limitation is maintained by respondent on the number of limit jobbers. On the contrary, any reputable dealer who has a satisfactory credit rating can become a limit jobber, provided he is willing to maintain a reasonably adequate inventory of the items in question. Not infrequently respondent's regular jobbers change their status to that of limit jobbers, and, conversely, limit jobbers sometimes prefer to discontinue the maintenance of an inventory and become regular jobbers. Of respondent's total sales of all products, less than 2 percent are to regular jobbers.

15. In summary, it is concluded that the higher discount granted by respondent on certain of its sales to limit jobbers is a functional discount representing no more than reasonable compensation for services and facilities actually supplied by such jobbers; that in the circumstances here present there is no substantial competitive injury, nor any reasonable probability thereof, to respondent's regular jobbers; and that therefore no violation of the statute has been established.

ORDER

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

OPINION OF THE COMMISSION

By KERN, *Commissioner:*

Respondent herein is charged with price discrimination in violation of Section 2(a) of the Clayton Act, as amended. The hearing examiner in his initial decision held that the charge had not been sustained by the evidence and ordered that the complaint be dismissed. The matter is now before the Commission on the appeal of counsel supporting the complaint from this decision.

Respondent is engaged in the manufacture and sale of products used by privately owned companies and municipalities in constructing and operating water and gas distribution systems. Virtually all of the gas distribution products are sold by respondent directly to the ultimate users. The waterworks products, accounting for about 60% of respondent's business, are sold by respondent to the ultimate users and to jobbers who resell to such users.

The jobbers to whom respondent sells its products are classified by respondent as "limit" and "regular" jobbers. On all purchases made for drop shipment to ultimate users, jobbers in both categories are granted the same discount from prices in respondent's published price lists. The same discount also applies to many items shipped direct to the jobber, regardless of its classification. However, there are a num-

ber of items, accounting for about 40% of all sales of waterworks products, on which the discount is 25% when shipped to the "limit" jobber and 15% when shipped to the "regular" jobber. It is this difference in discounts which has given rise to the present charge of illegal price discrimination.

The first point raised on the appeal of counsel supporting the complaint concerns the failure of the hearing examiner to include in the initial decision a finding that respondent had discriminated in price between different purchasers in sales made in interstate commerce. We agree that the initial decision is deficient in this respect. The record fully supports a finding that "limit" and "regular" jobbers located in Kansas and Missouri were charged different prices for goods of like grade and quality sold to them from respondent's place of business in Decatur, Illinois. These price differences are price discriminations within the meaning of Section 2(a). *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960).

Counsel supporting the complaint has also taken exception to the hearing examiner's conclusion that no injury would result from the price discriminations involved herein and contends that certain findings on which this conclusion is based are neither accurate nor pertinent to the issue of whether respondent's price differential may have the requisite effect on competition. He further contends that the hearing examiner erred in his application of certain "principles" enunciated in the Commission's opinion in the matter of *Doubleday & Company, Inc.*, 52 F.T.C. 169 (1955), to the facts of this case.

The hearing examiner found, in this connection, that the "limit" jobber maintains an adequate inventory of the items on which it receives a 25% discount, whereas the "regular" jobber maintains little or no inventory, making almost all of its purchases for drop shipment. He further found that the added 10% discount received by the "limit" jobber is a functional discount granted as compensation for the services performed by this jobber in maintaining an adequate inventory of certain items, a function which would otherwise be performed by respondent, and that such discount is no greater than necessary to reimburse the jobber for performing this function. He concluded that the evidence as to competitive injury to the "regular" jobber "probably would be sufficient in the ordinary secondary line price discrimination case" and that "a difference in discounts of 10 percent is so substantial that it would appear that ordinarily, in a secondary line case, no specific evidence of competitive injury would be required." He held, however, that this is not an ordinary case in that the higher discount received by the "limit" jobber is a functional discount and that a determination of the legality thereof would be governed by the Commission's decision in *Doubleday*, *supra*. Relying

on this decision, the hearing examiner further held that since the higher discount is granted only on the purchase of certain goods actually warehoused by the "limit" jobber and since the cost of such service equals or exceeds the difference in discounts, there is no reasonable probability of substantial injury to respondent's "regular" jobbers.

The language in *Doubleday*, which the hearing examiner considered to be controlling, is as follows:

> In our view, to relate functional discounts solely to the purchaser's method of resale without recognition of his buying function thwarts competition and efficiency in marketing, and inevitably leads to higher consumer prices. It is possible, for example, for a seller to shift to customers a number of distributional functions which the seller himself ordinarily performs. Such functions should, in our opinion, be recognized and reimbursed. Where a businessman performs various wholesale functions, such as providing storage, traveling salesmen and distribution of catalogues, the law should not forbid his supplier from compensating him for such services. Such a legal disqualification might compel him to render these functions free of charge. The value of the service would then be pocketed by the seller who did not earn it. Such a rule, incorrectly, we think, proclaims as a matter of law that the integrated wholesaler cannot possibly perform the wholesaling function; it forbids the matter to be put to proof.
>
> On the other hand, the Commission should tolerate no subterfuge. Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer. It should not exceed the cost of that part of the function he actually performs on that part of the goods for which he performs it.

Although the initial decision is not quite clear on this point, it appears that the hearing examiner interpreted the above quoted language as either holding that a price differential granted as compensation for services performed by a purchaser for the seller will not result in injury to competition or as holding that a price differential granted for this purpose is permissible regardless of injury to competition. There is nothing in the amended Clayton Act or in the applicable case law, however, to support either of these propositions. The latter interpretation would add a defense to a *prima facie* violation of Section 2(a) which is not included in either Section 2(a) or Section 2(b). The other interpretation, that injury will not result from a functional discount "reasonably related to the expenses assumed by the buyer", ignores the fact that the favored buyer can derive substantial benefit to his own business in performing the distributional function paid for by the seller. Consequently, we disagree with both interpretations and, insofar as the language in *Doubleday* stands for either of them, it is rejected. We might add in this connection that the views expressed in *Doubleday* with respect to functional pricing

were, in effect, overruled by the Commission in a later decision. In the matter of *General Foods Corporation*, 52 F.T.C. 798 (1956), the Commission stated:

> While the Robinson-Patman Act does not mention functional pricing, it was written nevertheless against the background of the distribution system then in effect. As pointed out by respondent, a seller is not forbidden to sell at different prices to buyers in different functional classes and orders have been issued permitting lower prices to one functional class as against another, provided that injury to commerce as contemplated in the law does not result. * * *
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> * * * * * * * * *
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> * * * The law permits the seller to pay for services or facilities furnished in the resale of goods. If he elects to do so, however, the payments must be in accordance with the terms and conditions laid down in Section 2(d). To hold that the rendering of special services ipso facto gives him a separate functional classification would be to read Section 2(d) out of the Act.

We are also of the opinion that the hearing examiner erred in holding that there was a failure of proof as to competitive injury. It appears that he based this conclusion on "the fact that respondent's limit jobbers receive the higher discount only on certain goods actually warehoused by them, and the further fact that the cost of such service equals or exceeds the difference in discounts." We do not agree that these "facts" are supported by the record or that, even if true, they would support the hearing examiner's conclusion.

The record discloses with respect to the first finding that in some instances "limit" jobbers have received the 25% discount on goods which they purchased from respondent after having first received orders for such goods from their own customers. This merchandise, although received by the jobber at its warehouse, has been shipped directly to the jobber's customer without having been "actually warehoused" or stocked. As to the second "fact" found by the hearing examiner, we think the evidence adduced by respondent concerning the cost of warehousing its products is inconclusive. Some of the testimony on this point is contradictory. Moreover, all of the witnesses called by respondent testified as to the over-all cost of doing business on all products which they warehouse, not as to the cost of warehousing respondent's products. And there is testimony that warehousing costs vary from item to item.

As stated above, however, even if these findings were correct they would not support the conclusion that respondent's price discriminations do not have the proscribed effect on competition. These findings mean only that respondent has subsidized in whole or in part the "limit" jobbers' warehousing of certain products. This much, at least, it has done. By doing so, respondent has given this class of custom-

ers a substantial competitive advantage in the resale of such products. In this connection, the items on which the higher discount is given are, as found by the hearing examiner, the smaller, most commonly used products—those which are needed most frequently by the ultimate user, often to meet an emergency. That a jobber who has products of this type on hand is in a more favorable position than the jobber who does not is so obvious as to require little comment. Respondent, however, points up this advantage in its brief. In an attempt to distinguish the facts of this case from those of *Morton Salt*,[1] it states that in the sale of waterworks products "service is as important as the product". It then comments as follows: "In *Morton Salt* both favored and unfavored classes of purchasers carried the salt in stock. Obviously, when a housewife wants a package of salt she is going to buy it from stock or not at all; and if a merchant told a housewife that he was going to have the salt drop shipped from a factory in Chicago, he would be considered *non compos mentis*." We think that this reasoning applies with at least equal force to a situation where service is important and where the product is frequently needed to meet an emergency.

The hearing examiner has also made certain findings concerning the availability of the higher discount granted by respondent which suggest that each of respondent's customers has the choice of being a "limit" jobber and receive this discount or of being a "regular" jobber and receive the lower discount. The record discloses, however, that this is not the case. Respondent, and respondent alone, decides whether "limit" jobber status will be conferred on a customer. In making this decision, respondent takes into consideration such factors as the customer's credit rating, its location, and its ability to properly represent respondent and to maintain an adequate inventory of respondent's products. It is only when the customer is acceptable to respondent that respondent will grant it "limit" jobber status. And the record shows that some of respondent's "regular" jobbers were not acceptable. As illustrative of this point, the following letter was received by one of respondent's "regular" jobbers who had asked respondent to give it the "limit" jobber discount:

> In your letter dated March 6 you refer to the 15% discount mentioning that you feel you are entitled to 25% because you plan to stock several items which should qualify you as a stocking distributor.
>
> We cannot see our way clear to change your 15% discount, for we do not have a 20% discount. We do have a greater one, however it applies only to those large stocking jobbers who place hundreds of orders with us throughout the year, totaling thousands of dollars.

[1] *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948).

These old established jobbers, who have been carrying MUELLER goods in large quantities for a number of years, are entitled to this protection, and until there might be some major change in your State and surrounding states, it will be necessary to continue the same differential that we have been allowing you.

For the foregoing reasons, it is our opinion that, in many instances, the 25% "limit" jobber discount was not available to jobbers classified by respondent as "regular" jobbers.

In the brief filed in answer to the present appeal, respondent argues in effect that its practice of compensating customers for furnishing certain services and facilities complies with the requirements of Section 2(d) of the amended Clayton Act and consequently should not be held to be in violation of Section 2(a). We are not impressed with this contention for respondent's practice would not have been in compliance with Section 2(d) if this section were applicable. The added 10% discount granted "limit" jobbers, if regarded as an allowance for services furnished by said jobbers in connection with the processing, handling, sale or offering for sale of certain products, was not made available on proportionally equal terms to all other customers competing in the distribution of such products. As stated above, the discount for performing these services was not made available to the "regular" jobbers, nor was a discount or "allowance" for performing alternative services offered or made available to them.

From our consideration of the entire record, it is concluded that respondent has discriminated in price between different purchasers in the sale of certain of its products in commerce and that the effect of such discriminations may be substantially to injure, destroy or prevent competition with purchasers receiving the benefit of such discriminations. The appeal of counsel supporting the complaint is granted. The initial decision of the hearing examiner is vacated and set aside, and we are issuing our own findings, conclusions and order to cease and desist in lieu thereof.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND ORDER

Pursuant to the provisions of an Act of Congress, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (the Clayton Act), as amended by the Robinson-Patman Act, approved June 19, 1936 (15 U.S.C., Sec. 13), the Federal Trade Commission on June 10, 1959, issued and subsequently served upon the respondent named in the caption hereof its complaint in this proceeding, charging said respondent with having violated subsection (a) of Section 2 of

said Clayton Act, as amended. The respondent's answer to the complaint was filed on August 24, 1959. Hearings were thereafter held before a duly designated hearing examiner of the Commission, and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. In an initial decision filed March 10, 1961, the hearing examiner found that the charge had not been sustained by the evidence and ordered that the complaint be dismissed.

The Commission having considered the appeal of counsel supporting the complaint from the initial decision and the entire record in this proceeding and having determined that the appeal should be granted and that the initial decision should be vacated and set aside, now makes its findings as to the facts, conclusions drawn therefrom and order to cease and desist which, together with the accompanying opinion, shall be in lieu of the findings, conclusions and order contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, Mueller Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 512 West Cerro Gordo Street, Decatur, Ill.

2. Respondent is engaged in the business of manufacturing, distributing and selling water and gas distribution service products throughout the United States. These products include a complete line of valves, fittings, tools and machines and related items and parts and accessories therefor which are specially designed and particularly suitable for use in municipal and industrial gas and water plants. Respondent's business is substantial, with gross sales in excess of $25,000,000 for the year 1957.

3. Respondent owns, maintains and operates manufacturing plants in the States of Illinois, California, and Tennessee, from which it sells and distributes gas distribution and service products of like grade and quality to purchasers located throughout the various States of the United States and other places under the jurisdiction of the United States.

4. In the course and conduct of its business, respondent has been and now is engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

5. Respondent sells a substantial portion of its products to jobbers who resell such products to privately owned companies and munici-

palities for use in constructing and operating water and gas distribution systems. These jobbers are classified by respondent into two categories, one category being known as "limit" jobbers and the other as "regular" jobbers. On all puchases made for drop shipment to ultimate users, jobbers in both categories are granted the same discount from prices in respondent's published price lists. The same discount also applies to many items shipped direct to the jobber, regardless of its classification. However, there are a number of items, accounting for about 40% of all sales of waterworks products, on which the discount is 25% when shipped to "limit" jobbers and 15% when shipped to "regular" jobbers. These items are for the most part products most frequently needed by the ultimate users, often to meet emergencies.

6. Products sold by respondent to "limit" jobbers at 25% discount are ordinarily stocked by such jobbers and respondent claims that the price differential between products purchased for shipment to the jobber and products drop shipped to the ultimate user is to compensate the jobber for performing this stocking or warehouse function. In some instances, however, "limit" jobbers have received the 25% discount on the purchase of products which were not actually stocked by them.

7. The aforesaid products have been sold by respondent at 25% discount from list prices to "limit" jobbers who were in fact competing with "regular" jobbers who purchased said products from said respondent at 15% discount from the same list prices. The effect of these price discriminations may be substantially to injure, destroy or prevent competition with jobbers receiving the higher discount.

8. Respondent claims that it granted the higher discounts to "limit" jobbers for the purpose of meeting in good faith equally low prices of competitors and further claims that its lower prices to "limit" jobbers were cost justified. It has failed to establish either of these defenses on the record, however.

9. On the basis of the record herein, the Commission finds that respondent has discriminated in price between different purchasers in the sale of certain of its products in commerce and that the effect of such discrimination may be substantially to injure, destroy or prevent competition with purchasers receiving the benefit of such discriminations.

CONCLUSIONS

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

and practices of respondent, as herein found, constituted violations of subsection (a) of Section 2 of the Clayton Act, as amended.

ORDER

It is ordered, That respondent, Mueller Co., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the sale of its water and gas distribution and service products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

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

It is further ordered, That respondent, Mueller Co., 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.

IN THE MATTER OF

BISSELL, INC.

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

Docket 8086. Complaint, Aug. 24, 1960—Decision, Jan. 17, 1962

Order requiring a Grand Rapids, Mich., distributor of rug and upholstery cleaning devices and shampoos to jobbers and retailers to cease representing falsely in advertising in magazines and newspapers and by television that said devices and shampoo would give rugs professional-type cleaning at one-tenth the cost of professional cleaning, would dry clean rugs, and would clean merely by wiping the shampoo on a rug and letting it dry.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Bissell, Inc., a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest,

hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Bissell, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its principal office and place of business located at 2345 Walker Road, N.W., in the city of Grand Rapids, State of Michigan.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of rug and upholstery cleaning devices and rug and upholstery shampoos, to distributors and jobbers and to retailers for resale to the public.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said products, when sold, to be shipped from its place of business in the State of Michigan to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintains, and at all times herein mentioned has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, and for the purpose of inducing the sale of its products, respondent has made certain statements with respect to the cleaning abilities and qualities of its products, in advertisements in magazines of national circulation, on television and in newspapers, of which the following are typical:

* * * Bissell Shampoo Master cleans a 9 x 12 rug professionally * * * REMOVES EVERY KIND OF STAIN that professional cleaning can remove. * * *

* * * Bissell Shampoo Master Applicator and Liquid Rug Cleaner that will give rugs professional-type rug cleaning at one-tenth the cost. * * *

For BISSELL SHAMPOO MASTERS. The rug shampoos that dry clean.

NEW BISSELL RUG SHAMPOO—Guaranteed twice the cleaning power of other leading rug cleaners.

* * * With Bissell Rug Shampoo, there's no scrubbing or wiping up—and your rugs dry sparkling clean.

With the new Bissell Upholstery Master * * * No scrubbing. No mopping up! You just apply evenly and it dries clean. You get *twice* the cleaning power of other leading shampoos. * * *

BISSELL UPHOLSTERY SHAMPOO
Twice the cleaning power of other leading brands.

PAR. 5. Through the use of the aforesaid statements, respondent represented that its rug cleaning device, known as a "Shampoo Master", when used with its rug shampoo: (1) is as effective in cleaning rugs and carpets as professional rug or carpet cleaning; (2) will remove every kind of stain that professional cleaning can remove;

(3) will give rugs professional-type cleaning at one-tenth the cost of professional cleaning; (4) will dry clean rugs; (5) will clean a rug twice as clean as any other rug cleaner; and (6) will clean a rug merely by wiping on the shampoo and letting it dry. Respondent also represents that its upholstery shampoo when used with its upholstery cleaning device, known as an "Upholstery Master", will clean upholstery twice as clean as any other upholstery cleaner, and will clean upholstery merely by wiping on the shampoo and letting it dry.

PAR. 6. Said statements are false, misleading and deceptive. In truth and in fact said "Shampoo Master" and rug shampoo is not as effective in cleaning rugs and carpets as professional rug or carpet cleaning; will not remove every kind of stain professional cleaning can remove; will not give rugs professional-type cleaning at one-tenth the cost of professional cleaning; will not dry clean rugs; will not clean rugs twice as clean as any other rug cleaner; and will not clean a rug merely by wiping the shampoo on a rug and letting it dry. Also, said "Upholstery Master" when used with respondent's upholstery shampoo will not clean upholstery twice as clean as any other upholstery cleaner, and will not clean upholstery merely by wiping the shampoo on and letting it dry.

PAR. 7. In the course and conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as those sold by respondent.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondent from its competitors and substantial injury has thereby been, and is being, done to competition in commerce.

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

Mr. Frederick J. McManus supporting the complaint.
Mr. Gilbert H. Weil, of New York, N.Y., for respondent.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondent on August 24, 1960, charging it with engaging in unfair and deceptive acts and practices and unfair methods of competition, in commerce, by misrepresenting the cleaning abilities and qualities of its rug and upholstery cleaning products. After being served with said complaint, respondent appeared by counsel and thereafter filed its answer in which it admitted, with certain exceptions, having made the various representations charged, but denied that such representations were false, misleading and deceptive.

Hearings on the charges were thereafter held before the undersigned hearing examiner in Washington, D.C., on various dates between June 7, 1961, and September 13, 1961. At said hearings, testimony and other evidence were offered in support of and in opposition to the allegations of the complaint, the same being duly recorded and filed in the office of the Commission. All parties were represented by counsel and were afforded full opportunity to be heard and to examine and cross-examine witnesses. At the close of all the evidence, and pursuant to leave granted by the undersigned, proposed findings of fact and conclusions of law and an order were filed by counsel supporting the complaint on November 6, 1961, and by respondent on October 30, 1961.

After having reviewed the entire record in this proceeding, and the proposed findings,[1] conclusions and order, the undersigned finds that this proceeding is in the interest of the public and, based on the entire record, and from his observation of the witnesses, makes the following:

FINDINGS OF FACT

I. The Business of Respondent, Interstate Commerce and Competition

1. Respondent Bissell, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its principal office and place of business located at 2345 Walker Road, N.W., in the city of Grand Rapids, State of Michigan.

2. Respondent is now, and for some time last past, has been engaged in the advertising, offering for sale, sale and distribution of

[1] Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

rug and upholstery cleaning devices and rug and upholstery shampoos, to distributors and jobbers and to retailers for resale to the public.

3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, its said products when sold, to be shipped from its place of business in the State of Michigan to purchasers thereof located in various other states of the United States and in the District of Columbia, and maintains, and at all times herein mentioned has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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

II. The Alleged Illegal Practices

The Issues

1. The allegations of misrepresentation revolve about statements made by respondent in advertisements appearing in magazines of national circulation, in newspapers and on television, concerning its rug cleaning and upholstery cleaning devices and shampoos. The complaint alleges that respondent has represented in such advertisements that its rug cleaning device or applicator, known as "Shampoo Master", when used with its liquid rug cleaner or shampoo, (a) is as effective in cleaning rugs and carpets as professional rug or carpet cleaning, (b) will remove every kind of stain that professional cleaning can remove, (c) will give rugs a professional-type rug cleaning at one-tenth the cost, (d) will dry clean rugs, (e) will clean rugs twice as clean as any other rug cleaner, and (f) will clean rugs merely by wiping on the shampoo and letting it dry. With respect to its upholstery cleaning device or applicator, known as "Upholstery Master", it is alleged that respondent has represented such product, when used with its upholstery shampoo, (a) will clean upholstery twice as clean as any other upholstery cleaner and (b) will clean upholstery merely by wiping on a shampoo and letting it dry.

2. Respondent does not deny making the statements attributed to it in the various advertisements referred to in the complaint. In several instances it denies that the statements made by it can be interpreted as constituting representations of the type alleged in the complaint. However, for the most part, its defense it that its products will perform as represented. This is particularly true of those repre-

sentations comparing its products with professional cleaning and with other shampoos.

3. The evidence relied upon by Commission counsel, as supporting the allegations of the complaint that respondent has misrepresented the cleaning ability and qualities of its rug cleaning device and shampoo consists of (a) the testimony of a chemist, employed as technical director of the National Institute of Rug Cleaning (a trade association of rug cleaners), concerning certain rug cleaning tests performed by him using respondent's products and other rug cleaning methods and products and (b) the testimony of two so-called professional rug cleaners concerning the methods used by them in cleaning rugs and carpets commercially. Insofar as respondent's upholstery cleaner is concerned, counsel supporting the complaint called a single witness, a commercial rug and upholstery cleaner, who testified with respect to a test performed by him using respondent's product and two other products. Respondent called no witnesses as part of its own case, but merely offered certain documentary evidence. Its position, essentially, is that the evidence offered by counsel supporting the complaint fails to establish that its products will not perform as represented. To a consideration of whether the allegations of the complaint have been sustained the examiner now turns.

Comparison With Professional Cleaning

4. The principal thrust of the evidence offered in support of the complaint relates to whether respondent's rug cleaning shampoo, when applied with its applicator, will perform as effectively as professional cleaning. There is no doubt as to the fact that respondent has made certain representations in this respect, of which the following are typical:

> Bissell Shampoo Master cleans a 9 x 12 rug professionally * * * REMOVES EVERY KIND OF STAIN that professional cleaning can remove.
>
> Bissell Shampoo Master Applicator and Liquid Rug Cleaner that will give rugs professional-type rug cleaning at one-tenth the cost.

5. It seems evident, and it is so found, that by so advertising its rug cleaning shampoo and applicator respondent has represented that such products are as effective in cleaning rugs and carpets as professional rug or carpet cleaning, that they will remove every kind of stain that professional cleaning can remove, and that they will give rugs professional-type cleaning at one-tenth the cost of professional cleaning. The only issue presented concerning such representations is whether the evidence offered in support of the complaint establishes that they are false, misleading and deceptive.

6. In order to determine this issue, it is necessary to have some understanding as to what is meant by "professional" rug cleaning, since that is the standard with which respondent's products and method have been compared. Professional cleaning falls into two main categories, (a) in-plant cleaning, and (b) on-location cleaning. As the names imply, in-plant cleaning involves the cleaning of rugs and carpets in a special plant using fixed machinery and equipment set up for this purpose by a firm which is in the rug and carpet cleaning business. On-location cleaning involves the cleaning of rugs and carpets in the home using portable equipment which is taken into the home by the rug cleaner.

7. In in-plant cleaning the rug is first sent through a dusting machine which removes surface and sub-surface soils by a beating and vacuuming process. After pre-spotting, the rug is introduced into a rug cleaning machine where a detergent is applied by rows of reciprocating brushes, until it is thoroughly wet. It is then rinsed and sent to a drying room to dry. In the case of wall-to-wall carpeting and certain types of rugs, it is not practical to remove them to a cleaning plant, and the practice of cleaning them in the home developed.

8. In home or, "on-location" cleaning as it is called in the industry, the surface dirt is first removed by a vacuuming process. After pre-spotting, a detergent is applied by a mechanical rotary brush. Because of the danger of the back of the rug becoming wet, which may cause "brown stain", there is less wetting action applied than in the case of in-plant cleaning. After the detergent has been applied, some cleaners use what is known as a wet-dry vacuum to pick up the excess moisture, particularly in the case of detergents with a high foaming action. Others do not use a wet-dry vacuum. A pile brush or rubber rake may then be applied to erect the pile finish so that it will dry in proper shape. The rug is then allowed to dry naturally. It is vacuumed a day or two later to remove the dirt which has been loosened by the detergent. This is done either by the rug cleaner, using a commercial-type vacuum, or by the housewife, using a regular home vacuum.

9. There was some difference of opinion among the witnesses called in support of the complaint concerning the effectiveness of on-location cleaning, as compared with in-plant cleaning. According to the testimony of the technical director of the National Institute of Rug Cleaning (referred to herein as N.I.R.C.), and that of one of the professional cleaners, a higher degree of dirt removal is achieved in in-plant cleaning than in on-location cleaning. However, according

to the other professional cleaner called by counsel supporting the complaint, it is possible to achieve the same results in on-location cleaning as in rug cleaning in the plant, except in the case of heavily soiled rugs made of very closely woven yarns.

10. Whether or not in-plant cleaning is the ideal way to clean rugs or carpets, there is no question but that on-location cleaning is recognized and accepted by the industry and the public as professional cleaning. Many companies which operate cleaning plants also do on-location rug cleaning. Both of the so-called professional cleaners called to testify in support of the complaint are connected with companies which do both in-plant and on-location cleaning. At one time the N.I.R.C., which is a national trade association of professional rug cleaners, limited its membership to companies and individuals which operated rug cleaning plants, although some of them also did on-location cleaning as well. However, its membership is now open to on-location cleaners who do not operate any plant facilities. The Institute issues literature containing information and instructions regarding the approved professional methods for "on-location" rug cleaning for its members.

11. Respondent's method of rug cleaning is essentially the on-location method. It involves, first, the vacuuming of the rug before cleaning in order to remove surface dirt. Instead of a heavy commercial vacuum, the housewife uses her regular home-type machine. Respondent's rug shampoo is then mixed with water in a solution which is placed in the tank of respondent's applicator, called the "Shampoo Master", and is pushed across the rug by the housewife, who periodically releases the shampoo solution until the entire rug has been covered. After the rug has dried it is again vacuumed by the housewife.

12. The contention of counsel supporting the complaint, that respondent's Shampoo Master and Rug Shampoo are not as effective in cleaning rugs and carpets as professional rug cleaning, is based on the fact that the housewife does not have the skill of professional rug cleaners and that she does not have available the "heavy and specialized equipment" used by professional cleaners in on-location cleaning.[2] Counsel cites, in this connection, the testimony in the record concerning the methods and equipment used in professional on-location cleaning. However, there is nothing in the testimony cited to establish that such methods and equipment will necessarily result in, or do, in fact, result in a better cleaning job than can be achieved by respondent's method and products.

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[2] Fifth proposed finding of counsel supporting complaint.

13. While it may be that the equipment used in applying respondent's shampoo is not as heavy or as specialized as that used in professional on-location cleaning, it essentially involves the same procedures. Instead of using a commercial-type vacuum as the initial step, to remove surface dirt, respondent's method involves the use of a home-type vacuum by the housewife. It may be that the commercial-type vacuum is larger and operates more rapidly than the home type, but there is nothing in the record to establish that it does a significantly better job in removing surface dirt,[3] or to indicate that such differences as may exist materially affect the ultimate cleaning result achieved. Similarly, while the mechanical rotary brush used in applying the detergent is larger, heavier and operates more rapidly than respondent's Shampoo Master, there is nothing in the record to indicate that it is any more effective in applying the detergent to the rug or carpet. The purpose of applying the detergent is to loosen the more tenacious soil or dirt which has not been removed by the initial vacuuming, and to cause it to come to the surface where it can be removed by a later vacuuming after the rug has dried. There is nothing in the testimony cited by counsel supporting the complaint which establishes that better cleaning results are achieved by machine application than by manual-type application of a detergent.[4] On the contrary, the record discloses that professional cleaners themselves use manual methods of application in corners and other areas where it is not practical to apply a mechanical rotary brush, and that they achieve satisfactory results, albeit the manual method takes longer and is not economically feasible for commercial purposes in cleaning large areas.

Additional professional equipment referred to by counsel supporting the complaint, as not being used in respondent's method, are (a) the wet-dry vacuum, (b) the pile brush and (c) the commerical vacuum for final pickup. However, there is no showing that any of these results in a materially better cleaning job than does respondent's method. The wet-dry vacuum is used by professional cleaners only with certain types of detergents, and was not even used by one of the Commission's witnesses in conducting a test in accordance with the so-called professional method. The pile brush is used by some profes-

[3] The technical director of the N.I.R.C., while claiming that the commercial Hoover vacuum was more powerful than the home type, admitted that he had no information as to whether the former would pick up more dirt than the latter. (R. 213, 215).

[4] The only testimony cited by counsel supporting the complaint which suggests that more effective detergent action is achieved by mechanical application is that of the technical director of the N.I.R.C. (R. 174). However, this testimony is based on tests conducted by him which, as will hereafter appear, are of dubious validity and are not even cited by counsel supporting the complaint.

sionals because of the matting action caused by the heavy rotary brush which is used in applying the detergent. This would be unnecessary in the case of respondent's lighter applicator. Finally, there is no showing that a commerical-type vacuuming is needed for the final soil removal after the rug has dried. Many professionals do not perform this operation themselves, but direct the housewife to do it with her own vacuum a day or two after the professional cleaning. In fact, the N.I.R.C.'s recommended method for professional on-location cleaning envisions that the final vacuuming will be performed by the housewife using her own equipment, rather than by the professional using his own equipment.

14. The only evidence in the record purporting to show a difference, quantitatively or qualitatively, in the results achieved by the so-called professional method of on-location cleaning, in comparison with those achieved by the use of repondent's products, involves a test conducted by the technical director of the N.I.R.C., Mr. Ned Hopper. This test (referred to herein as the Hopper test) was allegedly undertaken, at the request of the Commission, and purports to compare respondent's and other home-type rug cleaning products with professional-type cleaning. Although the test was offered in evidence by counsel supporting the complaint, and although a major portion of the record consists of Hopper's testimony concerning the test, counsel supporting the complaint makes no reference to the test as establishing his position that respondent's product is not as effective as professional-type rug cleaning.[5] The test does purport to establish that home-type cleaners, including respondent's, "will not remove as much soil as professional on-location cleaning".[6] The failure of counsel supporting the complaint to refer to the test, as supporting any finding that respondent's shampoo is not as effective as professional cleaning, suggests that counsel recognizes the lack of probative weight which should be assigned to the test. However, in the event it may later be urged that counsel's failure to refer to the test in support of the allegation of the complaint here under consideration was merely an oversight or, to the extent the Commission may regard the test as material on this issue, the examiner will hereinafter set forth his views concerning the probative weight which should be accorded to it.

15. The Hopper test, conducted under the auspices of the N.I.R.C., involved the soiling of clean, white samples of carpeting and the

[5] Counsel does cite the test as supporting his position that respondent's product does not possess twice the cleaning power of other leading home rug cleaners, but makes no reference to the test as supporting the allegation with regard to its effectiveness in comparison with professional cleaning.

[6] CX 2–B.

separate cleaning thereof by (a) respondent's cleaner, (b) three other "do-it-yourself" home cleaners, and (c) the so-called professional method. The results of each of the tests were measured by a photoelectric machine known as the Gardner Automatic Photometric Unit or, as it was sometimes referred to, the Gardner Reflectometer. This machine has a light source which shines through two mirrors and strikes the carpet at a 45° angle. The light is reflected back into a photometric unit which then magnifies it and causes the activization of a dial on which a reading is made. The machine does not actually measure the amount of dirt or absence of dirt in the carpet, but the degree of grayness thereof, i.e., the various gradations of color from white to black. The darker gray the carpet is, the lower the reading on the dial will be; conversely, the whiter the carpet is, the higher the reading on the dial.

In conducting the tests in question, the original samples, which were white in color and unsoiled, were placed under the reflectometer and a reading was taken. They were then soiled in a so-called soiling machine with dirt which had been taken from dusting machines used in professional rug cleaning plants, and a reading was taken on the reflectometer. The soiled samples, which were each 5½ x 6 inches in size, were then tacked down in groups of four on a board 4 x 6 feet in size, surrounded by clean, unsoiled carpeting. Each group of four samples was separately cleaned using a different one of the methods referred to above, and a reading was taken on the Gardner reflectometer after each cleaning. A computation was then made as to the percentage by which the cleaning process returned each group of samples to its original reflectance reading.

The basic assumption on which the Hopper tests rests is that there is a direct correlation between the gray reflectance reading and the presence or absence of dirt.[7] It is thus assumed that the extent to which the samples were restored to their original reflectance reading reflects the per cent of cleaning achieved. On this basis, the samples cleaned with the so-called professional method purported to show the highest percentage of cleaning, viz, 68.2%. Those cleaned with respondent's product by a female employee of the N.I.R.C., who allegedly used little or no pressure in applying the Shampoo Master applicator, purported to show a percentage of cleaning achieved of 31.1%. However, when the process was repeated by Hopper himself on other samples, using more pressure on the applicator and more of respondent's solution, a percentage of 62.0% was achieved. The tests

[7] As Hopper testified (R. 149): "The grayer a white piece of goods is, the more soil that it has on it."

using three other home rug cleaning products purported to show cleaning results of 5.0%, 23.0% and 52.7%, respectively.

16. It is respondent's position that the Hopper test fails to establish that its rug cleaning shampoo is not as effective as professional cleaning methods for three reasons: (a) because of the bias of Hopper and the N.I.R.C., by whom he is employed, the test "is not entitled to credibility", (b) even if accorded credibility, the test "did not measure the cleaning efficiency of either the Bissell or the so-called professional method", and (c) even if the test is accepted, it actually demonstrates that respondent's product will clean as effectively as the professional method. The basis and validity of each of these contentions is hereinafter discussed.

17. With respect to the matter of bias, it is undisputed that the N.I.R.C., as the trade association of professional rug cleaners, is "interested in promoting professional rug cleaning".[8] Conversely, it is clear that the Institute looks with disfavor on the competition of home, do-it-yourself cleaning products. The concern with which it regards such competition may be gauged from the following comment made by Hopper to a member of the organization, in requesting him to make certain tests on home and professional upholstery cleaning products and methods: "It will be bad for us if you happen to give an opinion in favor of the [home] product".[9] It was conceded by Hopper that the outcome of the test conducted by him could be influenced by the manner in which it was carried out, such as applying more brushing action and detergent in connection with the use of one method than another. In its proposed findings, respondent calls attention to various ways in which Hopper departed from the methods recommended by the Institute for professional on-location cleaning which, it is argued, was done in order to influence the outcome of the tests. The examiner finds it unnecessary to discuss these matters. It is sufficient to note that, under all the circumstances, a serious doubt is created in the mind of the examiner as to the objectivity of the manner in which the Hopper test was conducted. However, the probative weight which should be accorded to the test need not be determined on the basis of the objectivity or lack of objectivity of those who conducted it, since there are more fundamental grounds for finding that the test fails to support the allegations of the complaint.

18. Respondent's second contention, to the effect that the test did not measure the cleaning efficiency of any of the products or methods involved, is based on the fact that the reflectometer actually measured

[8] R. 125.
[9] R. 30.

the degree of grayness of the samples tested, rather than the amount of soil therein. As above noted, it was Hopper's position that there is a direct correlation between the two, in that the more dirt there is in the sample, the darker gray its color becomes and the lower the reflectance reading thereof; whereas the more dirt that is removed, the lighter the sample becomes and the higher the reflectance reading. Assuming, for purposes of this decision, that there is a significant correlation between the reflectance readings and the presence or absence of dirt in the samples being tested, it does not necessarily follow that, because certain of the samples had a higher reflectance reading after the use of the so-called professional method such method is more effective in cleaning.

The Gardner reflectometer only reads the color of the surface of the sample on which the head of the machine is placed. If, as a result of the action of the rotary brushes or other method of applying the detergent, the dirt is driven deeper into the pile or is transferred to other portions of the rug which are not read by the reflectometer, a true test of cleaning ability will not be achieved. The outcome of the test may also have been influenced by the fact that some detergents contain optical brighteners or bleaches. These make the carpet appear brighter, but are not indicative of the amount of dirt removed.

The extent to which these factors may have determined the outcome of the test at issue cannot be precisely determined. It is clear, however, that some or all of them played a part in influencing the results since some of the readings achieved are otherwise unexplainable. For example, on one group of samples tested by a home rug cleaning product other than respondent's, the test purported to show that the samples were returned to 52.7% of their original reflectance reading after having been cleaned. Yet, in following the manufacturer's directions, Hopper admittedly did nothing to remove the dirt from the samples. The manufacturer's directions provided for the application of the detergent with a bristle brush, but made no reference to subsequent vacuuming, possibly on the assumption that the housewife would do this anyway, without instructions. Hopper applied the detergent, but did not vacuum the samples after they had dried. Since the application of the detergent merely loosens the dirt and it is the subsequent vacuuming which removes it, it is clear that in this instance nothing was done to remove the dirt. Yet the samples showed a significantly higher reflectance reading than they did after being soiled. Hopper sought to explain the results as being due to the fact that the soil had merely "migrated down * * * to the middle of the tuft" where it would not be visible to the reflectometer, or to

the fact that it had been "transferred from these [soiled] swatches to the unsoiled area" surrounding them.[10]

It seems evident that the same factors which could have affected the reflectance reading of the samples cleaned with the competitive do-it-yourself product, were also present in the case of those cleaned by the professional method. In fact, the margin for error would appear to be even greater. Thus, instead of applying the detergent with a hand applicator, under the professional method it was applied by a power-driven rotary brush 16 inches in diameter, operating at a speed of approximately 175 revolutions per minute, and weighing approximately 50 pounds. The machine was used to clean four small swatches of carpet, each 5½ x 6 inches in size, which were surrounded by clean carpeting on a board 4 x 6 feet in size, the entire area being cleaned but only the soiled samples being read by the reflectometer. The soiled samples were thus less than one square foot in size in an area of 24 square feet. It seems evident that in the operation of the rotary brushes, under such circumstances, some "wicking" of the dirt from the soiled to the unsoiled carpeting was inevitable, a possibility which Hopper conceded in this instance,[11] as in the case of the home-type cleaner discussed above. Any reading taken of the soiled samples would, at best, indicate that a certain percentage of the dirt had been removed from the surface of those portions of the carpet tested, but would not establish the over-all ability of the cleaner to remove dirt from an entire carpet in the home.

19. Assuming, however, that the Hopper test is valid, to the extent of permitting a comparison between respondent's cleaner and the professional method, it fails to establish that respondent's cleaner will not clean as effectively as professional cleaning. The test disclosed that when respondent's product was applied "with force" it achieved a cleaning effectiveness of 62.0%, as compared with 68.2% for the samples cleaned by the so-called professional method. According to Hopper's testimony, a result of 65% of soil removal is considered satisfactory by professional cleaners for on-location cleaning and, further, there is no significant difference between a score of 62% and 68.2%, insofar as the amount of additional dirt removed is concerned. It may also be noted, in this connection, that in performing the so-called professional test Hopper used the allegedly more powerful commercial-type vacuum for the final dirt removing procedure, whereas ordinarily (and according to the N.I.R.C.'s own instructions) this is done by the housewife herself using a home-type vacuum.

[10] R. 225.
[11] R. 289.

It is true that the test also purports to show a percentage of cleaning of 31.1% when respondent's product was applied not using "force". However, it is dubious whether this reflects a true test of the cleaning efficiency of respondent's product. Hopper did not himself apply the rug shampoo in the latter test, but it was done by a female employee who apparently applied it lightly without rubbing it into the carpet. Hopper was extremely vague as to the amount of detergent and amount of pressure used by the female employee, who was not herself called to testify. In his own test of respondent's product, he allegedly applied greater force and a greater amount of liquid. He was uncertain whether it was either or both of these which produced a result indicating a cleaning efficiency twice as great as that achieved by the female employee, or as to how much less force could have been used to achieve a substantially similar result.

The record fails to establish that a housewife, using a reasonable amount of pressure and a proper amount of solution, cannot achieve results equal to those achieved by Hopper in using respondent's cleaner. While Hopper claimed that a mechanical rotary brush would have greater mechanical power and thus result in greater cleaning action than would be achieved by a housewife lightly moving a hand applicator across a carpet, he conceded that the machine could deliver only a certain amount of pressure effectively without damaging the carpet. Although covering a wider area than respondent's applicator, a 16-inch rotary brush would normally exert a pressure of only one-third to one-fourth of a pound per square inch of carpet. A housewife, using respondent's applicator, could achieve the equivalent amount of pressure by exerting one pound of pressure per square inch on the applicator. There is nothing to indicate that this could not be done by the average housewife. There is likewise nothing in the record to indicate that respondent's shampoo is not as effective in loosening dirt as professional detergents. No chemical analysis was made of respondent's product or of the products used by professional cleaners, so as to disclose that respondent's product is incapable of cleaning a rug as effectively as professional-type detergents. The evidence also fails to establish that the loosened dirt cannot be removed effectively by home vacuuming, as recommended by respondent. This method, as above noted, is that recommended by the N.I.R.C. and by a number of professional cleaners. Thus, the record does not disclose any scientific reason why respondent's product, applied through respondent's applicator, will not clean rugs as effectively as professional methods. The test made by the N.I.R.C. fails to establish that it will not in fact do so.

20. Not only does the Hopper test fail to support the complaint, but it is at variance with an earlier test conducted by him, insofar as the test discussed above purports to establish an unfavorable comparison between respondent's product and professional methods. The earlier test, which was conducted by Hopper considerably prior to the motive of the present litigation, involved a so-called jury test. This consisted of the cleaning of rugs separately, by the use of respondent's product, by the use of the professional method and by the use of other do-it-yourself products. A jury of lay persons was asked to examine the rugs and to designate the order of cleanliness of each. The results of the tests disclose that five persons selected the rug cleaned by respondent's product as being the cleanest, while five members of the jury selected the rug cleaned by the professional method as being the cleanest. While no quantitative analysis of the dirt removal was made, the fact that half of the jurors selected the rug cleaned by respondent's method as being the cleanest, from a practical point of view, is a factor which cannot be ignored, particularly in view of the weaknesses in the later Hopper test.

21. Considering, (a) the presence of circumstances which raise serious doubts as to the objectivity of the National Institute of Rug Cleaning test using the Gardner reflectometer, (b) the existence of factors which militate against the scientific accuracy of the test as a proper indicator of cleaning efficiency, (c) the fact that the test, even if accepted as an adequate test of dirt removal, fails to establish that respondent's product is incapable of dirt removal to an extent substantially comparable to that of the professional method, and (d) the fact that a jury test conducted *ante litem motam* establishes that, on a practical visual basis, respondent's product was found to clean rugs better than rugs cleaned by the professional method, by at least as many persons as found the professional method to clean better, it is concluded and found that counsel supporting the complaint has failed to sustain the burden of proving the allegations of the complaint that respondent's rug cleaning shampoo will not clean rugs and carpets as effectively as the professional method. The mere fact that some of the equipment or techniques used in cleaning rugs professionally are not used in respondent's method does not, as counsel supporting the complaint contends, establish the allegations of the complaint in the absence of substantial reliable and probative evidence that such equipment or techniques will necessarily insure the more effective cleaning of rugs. Such evidence, as heretofore noted, is lacking in the record.

Removal of Stains

22. Counsel supporting complaint has offered no proposed findings with respect to the allegation of the complaint that the representation by respondent to the effect that its shampoo will remove every kind of stain that professional rug cleaning can remove, is false, misleading and deceptive. It is not clear whether counsel has abandoned this charge in the complaint. It may be that counsel is relying on the evidence offered in support of the broader charge, concerning the falsity of the representation that respondent's product is as effective as the professional method in rug cleaning, as also sustaining the charge with respect to the removal of stains. In any event, as above found, the broader charge has not been sustained. There is no other evidence in the record which separately establishes that respondent's product is not as effective in removing stains as professional rug cleaning methods. It is, accordingly, concluded and found that counsel supporting the complaint has failed to establish by reliable, probative and substantial evidence the allegation of the complaint that respondent has falsely represented that its rug shampoo and applicator will not remove every kind of stain professional cleaning can remove.

Cost of Cleaning

23. As above found, respondent has represented that rugs can be cleaned by its method at one-tenth the cost of professional-type cleaning. The issue raised is whether this representation is true. Respondent's rug shampoo is sold in three sizes, viz, a 22-ounce can selling for $1.98, a 64-ounce container selling at $3.98 and a gallon container selling for $6.98. The advertisements in evidence involve principally the 22-ounce can. Some of them state that the can will clean a "9 x 18 rug area" or "one-and-a-half 9 x 12 rugs or 162 square feet of carpeting." [12] The cost of cleaning is also stated to be 1¼¢ a square foot.[13]

24. The evidence in the record as to the cost of professional rug cleaning involves the Washington, D.C., area, and indicates that the charge therefor ranges between 8¢ to 10¢ a square foot, depending on the amount of furniture in the room. Two of the cleaners had minimum charges of $17.50 and $15.00, respectively, and one had a minimum charge of $9.72 for a 9 x 12 rug. On this basis, a professional cleaner would charge between $12.96 and $16.20 for a 9 x 18 rug, except for the cleaners whose minimum charges would be $15.00 and $17.50, respectively. Since $1.98 is 10% of $19.80, it is evident that the cost of respondent's 22-ounce can is more than one-tenth of the cost of cleaning an area 9 x 18, professionally.

[12] CX 23, 24, and 27.
[13] CX 23 and 27.

25. Respondent seeks to justify its advertising claims on several grounds. First, it points out that the cost of cleaning a 9 x 12 rug with its rug cleaner is only $1.32, on the basis that it requires only 14.7 ounces to do so. This, it notes, is less than 10% of the minimum charge of two of the three professional cleaners who testified in this proceeding. The trouble with this argument is that it assumes respondent's advertising claim with respect to comparative cost is limited to a 9 x 12 rug. Respondent's claim is not so limited. In one of the advertisements at issue it stated that the "regular" 22-ounce can "cleans a 9 x 18 rug area," and in another that it "will clean one-and-a-half 9 x 12 rugs, or 162 square feet of carpeting." [14] In the latter advertisement respondent itself fixed the cost of cleaning with its product at "1¼ cents" a square foot. This figure is certainly more than 10% of the usual cost of cleaning a square foot of carpeting, viz, 8¢ to 10¢.

26. As additional justification for its advertising claims, respondent cites the fact that the cost per ounce of its shampoo in the larger containers is even cheaper than in the 22-ounce can. Thus, the cost per ounce of the shampoo in the 64-ounce container is 6¢, and in the gallon container is 5½¢, compared to 9¢ in the 22-ounce can. While this may be true, it is completely irrelevant, since the advertising claims made by respondent involve principally its 22-ounce can. It does refer in one of the advertisements to the fact that it has an "Economy Half Gallon for only $3.98," but its comparison with the cost of professional cleaning is not limited to this size.[15]

27. In the foregoing discussion it has been assumed that the cost comparison made by respondent with professional cleaning includes only the cost of the shampoo itself and not the applicator. This is the frame of reference of the proposed findings of counsel supporting the complaint. However, when respondent's advertising material is viewed as a whole, it is clear that the comparision made is not so limited. The advertising material features the "Bissell Shampoo Master", which is the hand applicator sold by respondent for applying its shampoo. The offerings include the Shampoo Master and the shampoo as a "Kit" for the combined price of $14.95, stating that the shampoo is being offered "free." [16] The comparison made with the cost of professional cleaning suggests that the cost of *both* the applicator and the shampoo are only one-tenth that of professional cleaning. Thus, one of the advertisements specifically states that:

[14] CX 24 and 27.
[15] CX 24.
[16] CX 24 and 27.

Bissell has now perfected a new Shampoo Master Applicator and Liquid Rug Cleaner that will give rugs professional type cleaning at *one-tenth the cost*—as easily as using a carpet sweeper.[17]

Another advertisement states that "this convenient new method [not merely the shampoo] costs only one-tenth as much as professional cleaning".[18] When the cost of the applicator is added to that of the shampoo, and until such time as the cost of the applicator has been amortized, it is clear that the combined cost is greatly in excess of one-tenth of the cost of professional cleaning.

28. Respondent contends, finally, that there is no likelihood of deception since even if its claims of one-tenth of the cost of professional cleaning are inaccurate, it does disclose that the cost is 1¼¢ a square foot, and that the customer is therefore advised what the actual cost is. While it may be that the customer is advised what the actual cost per square foot is, he is at the same time told that this does not exceed one-tenth the cost of professional cleaning. The latter representation, as above indicated, is not in accordance with the facts. Furthermore, in at least one advertisement the flat statement is made that respondent's method costs only one-tenth as much as professional cleaning, with no indication of the per square foot cost.[19]

29. It is concluded and found that, whether respondent's comparative cost claims are limited to its rug cleaning shampoo alone or the combined cost of the applicator and shampoo, its representations are false, misleading and deceptive since the cost thereof, separately or in combination, exceeds one-tenth the cost of professional cleaning.

Dry Cleaning of Rugs

30. The complaint alleges that respondent has falsely represented that its rug shampoo will "dry clean" rugs. Unlike the allegations of the complaint heretofore discussed, with respect to which respondent admits making the representation but denies the falsity thereof, in this instance respondent denies making any claim that its shampoo will dry clean rugs. It concedes that its cleaning method, which involves the use of a detergent in a solution of water, is not dry cleaning. The issue, therefore, is as to the interpretation to be given to respondent's advertising.

31. The evidence discloses that respondent did advertise its rug shampoo as follows:

[17] CX 27.
[18] CX 24.
[19] CX 24.

The rug shampoos that dry clean—truly a one-step cleaning method.[20]

This statement is clearly subject to the interpretation that respondent has represented that its rug cleaner will "dry clean" rugs. However, respondent contends that such an interpretation was not intended. It claims that what it meant to say was that its rug shampoo "dries clean", rather than that it will "dry clean" a rug. Thus it points out that in a number of television broadcasts the statement was made that its shampoo "dries clean",[21] and that rugs so cleaned "dry sparkling clean".[22] It claims that such statements were made in the context that it is not necessary to scrub or wipe the rug in cleaning it, but that by applying the shampoo with the applicator the rug will "dry clean".

32. In the opinion of the examiner respondent's advertising is, at best, ambiguous and is subject to the interpretation that it will "dry clean" rugs, not merely that a rug so cleaned "dries clean". It may be noted that in the advertisement where the statement at issue appears, respondent uses the plural of the word shampoo, referring to its product as: "The rug shampoos that dry clean". While several models of the rug applicator are referred to in the advertisement, only one rug shampoo is mentioned. So far as appears from the record, respondent makes only a single-type shampoo for rug cleaning. Its choice of the plural appears, under the circumstances, to be a deliberate play on words calculated to associate its product with the dry cleaning method. In any event, since the language used by respondent is readily subject to the interpretation that its shampoo will "dry clean" rugs, it is immaterial whether it intended to convey this impression or not. The Federal Trade Commission Act is violated if the statements made have a tendency to deceive. Intent or bad faith are not necessary elements of the offense.[23] Furthermore, even the meaning which respondent allegedly intended to convey, viz, that a rug cleaned with its shampoo "dries clean", is open to question as to accuracy since, as a minimum, further vacuuming is necessary to remove the dirt insofar as it has been loosened by the shampoo.[24]

33. Respondent further contends that the advertisement at issue appeared only in a single publication, the Home Furnishing Daily,

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[20] CX 26.

[21] CX 14, 16 and 19.

[22] CX 17.

[23] *Gimbel Bros.* v. *FTC,* 116 F. 2d 578, 579 (C.A. 2); *Koch* v. *FTC,* 206 F. 2d 311, 317 (C.A. 6).

[24] For further discussion of this point, see portion of this decision dealing with charge of "Cleaning Merely by Spreading".

which it claims is a trade publication not addressed to the consuming public, and that there is therefore no likelihood of deception in the future. It is true that the only advertisement in evidence in which the challenged statement appears is in the Home Furnishing Daily of March 17, 1960. However, there is nothing in the record to disclose that this is the sole such advertisement inserted by respondent or that its circulation was limited to dealers. It was not incumbent upon counsel supporting the complaint to introduce any particular number of advertisements in evidence. Having introduced a sample of respondent's advertising into evidence, the burden shifted to respondent to show that the advertisement appeared only once in a paper not circulated to the public. Considering the record as a whole, including the ambiguity of the statements appearing in the other advertisements upon which respondent relies for support, the examiner is not convinced that there is no likelihood that the challenged advertisement or one resembling it will not again be inserted by respondent in the future. Even if it be assumed, arguendo, that the advertisement appeared only in a trade publication whose circulation was limited to dealers, this is no bar to a finding that the statement is calculated to mislead. Presumably, it was intended to encourage the purchase of respondent's product by dealers and to give them a basis for making advertising claims in the sale thereof. One who places an instrumentality for deception in the hands of another is equally as guilty as the person who makes the misrepresentation directly to the public.[25]

34. It is concluded and found that respondent has represented that its rug shampoo will dry clean rugs and that such claim is false, misleading and deceptive since, admittedly, respondent's product does not dry clean rugs, but is a detergent which is applied in a solution of water.[26]

Comparison With Other Rug Cleaners

35. The complaint alleges respondent has represented that its rug shampoo will clean rugs "twice as clean as any other rug cleaner". Respondent's actual advertising claim is not that its rug shampoo will clean twice as clean as *any other cleaner*, but twice as clean as *other leading shampoos*. Thus in one of the advertisements in evidence, it is stated that its shampoo is "guaranteed" to have "twice the cleaning

[25] *FTC* v. *Winsted Hosiery Co.*, 258 U.S. 483; *Irwin* v. *FTC*, 143 F. 2d 316, 325 (C.A. 8).

[26] Respondent suggests that the fact it reveals its shampoo must be diluted in water precludes any possibility of deception. This assumes that the public is aware of the technicalities of the dry cleaning method to such an extent that it will know that water is never used in so-called dry cleaning. Such assumption cannot be made. Furthermore, it overlooks the fact that the revelation was not made in the advertisement at issue. Where the first contact is deceptive the law is violated, even though the true facts are later made known. *Carter Products* v. *FTC*, 186 F. 2d 821, 824 (C.A. 7).

power of other leading shampoos", and in a television broadcast it stated that its shampoo "has twice the cleaning power of other leading brands".[27] Counsel supporting the complaint apparently concedes in his proposed findings that the comparison made by respondent is with other leading rug cleaners rather than with all other rug cleaners, but claims that such representation is, nevertheless, false, misleading and deceptive.

36. The contention of counsel supporting the complaint concerning the false and misleading nature of respondent's statements relative to the cleaning power of its shampoo, in comparison with other leading cleaners, is based entirely on the so-called Hopper report,[28] which has been previously discussed in connection with the allegations concerning the comparison made between respondent's shampoo and professional cleaning methods. As there indicated, the Hopper test purported to test not merely respondent's rug shampoo and the professional method of cleaning, but also three other home rug cleaners, viz, Easy Glamur, Glamorene (powder), and Glamorene Shampoo. Whether these are the other leading brands of rug cleaners does not appear from the record. In any event, the test purports to show that respondent's product is not twice as effective as all of the other cleaners tested.

37. For the reasons discussed above, no finding can be made as to whether respondent's product is or is not twice as effective as other leading rug cleaners, based on the Hopper test. The same infirmities which apply to the test, insofar as it purports to measure the cleaning ability of respondent's product and the professional method also apply to the testing of the other cleaners. As previously noted with respect to one of the other cleaners tested, viz, the Glamorene Shampoo, the test purports to show that the sample tested was restored to 52.7% of its original state, even though no steps had been taken to actually remove any of the soil from the sample after the application of the shampoo. In view of the unsatisfactory nature of the Hopper test and the absence of any other evidence, it must be concluded and found that counsel supporting the complaint has failed to sustain the burden of proving, by reliable, probative and substantial evidence, that the statement that respondent's product is twice as effective as other leading cleaners, is false, misleading and deceptive.

Cleaning Merely by Spreading

38. The complaint alleges respondent has represented that its rug shampoo, when applied with its applicator, "will clean a rug merely

[27] CX 24 and 15.
[28] Ninth Proposed Finding.

by wiping on the shampoo and letting it dry". Respondent's position as to whether it made such a representation is not entirely clear. It apparently contends that any statements made by it, in this connection, were merely intended to convey the impression that the shampoo could be applied easily by the housewife in a stand-up position, as distinguished from a hands and knees, scrubbing operation. As thus qualified, respondent contends that the representation is true.

39. The record discloses that respondent has made the following statements, in advertisements, concerning its rug shampoo and the method of application thereof:

> Easy as using a carpet sweeper! This is all you do: Simply push the Bissell Shampoo Master Applicator over your rug or carpet. A trigger in the handle releases the liquid rug cleaner which sponges deep into the fiber of the rug, removing all soil and stains. When rug is clean, simply vacuum.[29]
>
> * * * * * * *
>
> For the easiest, quickest rug cleaning you've ever known—use Bissell Rug Shampoo in one of these famous Bissell Shampoo Masters, and you shampoo your rugs *standing up*. With Bissell shampoo, there's no scrubbing or wiping up—and your rugs dry sparkling clean.[30]

40. While respondent does, as it contends, emphasize in its advertising material the fact that its shampoo may be applied standing up and that it is unnecessary for the housewife to get down on her hands and knees and to scrub the solution into the rug, it goes beyond this in suggesting the lack of effort which is required in cleaning a rug. Viewing the advertisements as a whole, it is clear that respondent suggests to the housewife that little or no effort is required in cleaning and that all that is necessary is to guide the applicator over the rug, thereby causing the rug to become clean by merely releasing the shampoo.

41. The record establishes that a rug cannot be cleaned in the effortless manner suggested by respondent. The detergent does not automatically cause the rug to become clean merely by releasing it as the applicator is pushed over the carpet. It is necessary to apply a reasonable amount of pressure in order to cause the solution to penetrate into the carpet, so as to result in a loosening of the sub-surface soil. Furthermore, the rug does not dry sparkling clean. As a minimum, it is necessary to vacuum the carpet in order to remove the dirt which has been loosened by the shampoo. The extent to which the carpet has been cleaned will depend on the care and effort used in applying the detergent and in vacuuming the rug when it is dry.

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[29] CX 27.
[30] CX 17.

42. It is concluded and found that (a) respondent's advertisements convey the impression that rugs can be cleaned merely by spreading on its shampoo with its applicator, using little or no effort, and (b) that statements made by it to this effect are false, misleading and deceptive in that rugs cannot be cleaned merely by spreading the shampoo on the rug and letting it dry but additional effort and steps are required.

Upholstery Shampoo

43. As previously noted, the complaint contains two allegations of misrepresentation concerning respondent's upholstery shampoo, first, that when applied with its applicator it will clean twice as clean as any other upholstery cleaner and, secondly, that it will clean upholstery merely by wiping on the shampoo and letting it dry. The record discloses that respondent has advertised that its upholstery shampoo has "*twice* the cleaning power of other leading shampoos", and that it requires: "No scrubbing. No mopping up! You just apply evenly and it dries clean."[31] Respondent contends that its upholstery cleaner will perform as advertised.

44. The only evidence concerning the performance of respondent's upholstery cleaner involves the testimony of a professional rug and upholstery cleaner called by counsel supporting the complaint. The witness performed a practical test in the cleaning of a sofa using, (a) respondent's product, (b) a competing "do-it-yourself" product and (c) the normal method used by him in cleaning upholstery professionally. According to the witness' testimony, respondent's product did "a far better job than the competitive do-it-yourselfer", but not as good a job as the professional method.[32] The test was performed by the witness at the request of Ned Hopper, technical director of the National Institute of Rug Cleaning, who, as previously noted, informed him that: "It will be bad for us if you happen to give an opinion in favor of the [Bissell] product."[33]

45. Counsel supporting the complaint has proposed no findings with respect to the charges of the complaint involving respondent's upholstery shampoo, and has submitted no order prohibiting such practices. Presumably counsel has abandoned these charges. In any event, it is the opinion of the examiner that no findings in support of the complaint can be made on the basis of the testimony of the sole witness who testified with respect to respondent's upholstery shampoo in view of the dubious circumstances of the test conducted by him, and

[31] CX 20.
[32] R. 13.
[33] R. 30.

its incompleteness insofar as affording a basis for determining (a) whether respondent's product does or does not have twice the cleaning power of other leading home cleaners and (b) what steps, if any, are required in order to achieve effective cleaning of upholstery through the use of respondent's cleaner other than the wiping on thereof. It is concluded and found that counsel supporting the complaint has failed to sustain the burden of proving, by reliable, probative and substantial evidence, that respondent has made false, misleading and deceptive statements to the effect that respondent's upholstery shampoo will clean upholstery twice as clean as other leading shampoos, and that it will clean upholstery merely by wiping on the shampoo and letting it dry.

CONCLUSIONS

1. The use by respondent of the statements, representations and practices hereinabove found to be false, misleading and deceptive has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief. As a consequence thereof, it may be inferred that substantial trade in commerce has been, and is being, unfairly diverted to respondent from its competitors and that substantial injury has been, and is being, done to competition in commerce.

2. The acts and practices of respondent, as thus found, were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That Bissell, Inc., a corporation, and its officers, employees, agents and representatives, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of any rug cleaning device and any rug shampoo in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such rug cleaning device and shampoo:

1. Will give professional-type cleaning at one-tenth the cost of professional cleaning.

2. Will clean a rug merely by spreading the shampoo on the rug and allowing it to dry.

3. Will dry clean rugs.

It is further ordered, That the complaint be, and the same hereby is, dismissed insofar as it alleges that respondent made false, misleading and deceptive statements other than those hereinabove found to be false, misleading and deceptive.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 4.19 of the Commission's Rules of Practice, effective July 21, 1961, the initial decision of the hearing examiner shall, on the 17th day of January 1962, 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.

IN THE MATTER OF

THE PLASTIC CONTACT LENS COMPANY ET AL.

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

Docket 8159. Complaint, Oct. 28, 1960—Decision, Jan. 17, 1962

Consent order requiring Chicago distributors of contact lenses to optometrists for resale to cease representing falsely in pamphlets and other advertising media that anyone could wear their contact lenses successfully, wear them all day without discomfort, and discard eyeglasses; and that the lenses provided a protective covering for the eye.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Plastic Contact Lens Company, a corporation, and George N. Jessen, Newton K. Wesley and Joseph Cinefro, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Plastic Contact Lens Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its main office and principal place of business located at 59 East Madison Avenue, Chicago 3, Ill.

Respondents George N. Jessen, Newton K. Wesley and Joseph Cinefro are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of contact lenses to optometrists for resale to the purchasing public.

Contact lenses are designed to correct errors of vision in the wearer and are devices as the term "device" is defined in the Federal Trade Commission Act.

PAR. 3. Respondents cause their said contact lenses, when sold, to be transported from their place of business in the State of Illinois to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said contact lenses in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of such business is, and has been, substantial.

PAR. 4. In the course and conduct of their said business, respondents have disseminated, and caused to be disseminated, certain advertisements concerning their said contact lenses by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to pamphlets and other advertising media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said contact lenses, and have disseminated, and caused to be disseminated, advertisements concerning such contact lenses by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said contact lenses in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical, but not all inclusive of the statements and representations contained in the advertisements, disseminated as hereinabove set forth, are the following:

Are most people able to wear contact lenses?

If there is a definite need for them and the patient has a desire to wear them, there is no reason why contact lenses cannot be worn providing that one is fitted properly.

They are comfortable to wear and provide a protective covering to the eye.

And today, you have the Wesley-Jessen contact lens that is wearable all day.

Eliminate your spectacles * * * acquire that chic look. Call your contact lens specialist. He will be glad to advise you about the Wesley Jessen Contact Lenses.

You no longer need to wear eyeglasses.

PAR. 6. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, and now represent, directly or by implication, that:

1. All persons in need of visual correction can successfully wear respondents' contact lenses.

2. There is no discomfort in wearing respondents' lenses.

3. All persons can wear said lenses all day without discomfort.

4. Said lenses provide a protective covering for the eye.

5. Respondents' lenses can replace eyeglasses to the extent that eyeglasses can be discarded.

PAR. 7. The said advertisements were, and are, misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact:

1. A significant number of persons in need of visual correction cannot successfully wear respondents' contact lenses.

2. Practically all persons will experience some discomfort when first wearing respondents' lenses. In a significant number of cases discomfort will be prolonged.

3. Many persons cannot wear respondents' lenses all day without discomfort and no person can wear said lenses all day without discomfort until such person has become fully adjusted thereto.

4. Said lenses afford protection only to the small portion of the eye covered by them.

5. Said lenses cannot replace eyeglasses for all purposes for all persons. Some persons cannot discard their eyeglasses upon the purchase of respondents' lenses but must continue to use them for substantial periods of time.

PAR. 8. The dissemination by the respondents of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Mr. Frederick McManus for the Commission.
Mr. W. M. Van Sciver, of Chicago, Ill., for respondents.

INITIAL DECISION BY MAURICE S. BUSH, HEARING EXAMINER

The Federal Trade Commission on October 28, 1960, issued its complaint against the above-named respondents, charging them with having violated the Federal Trade Commission Act, by making false statement concerning their products, to wit, (1) that all persons in need of visual correction can successfully wear respondents' contact lenses; (2) that there is no discomfort in wearing respondents' lenses; (3) that all persons can wear said lenses all day without discomfort; (4) that said lenses provide a protective covering for the eye; and (5) that respondents' lenses can replace eyeglasses to the extent that eyeglasses can be discarded. Respondents appeared and entered into an agreement dated October 30, 1961, containing a consent order to cease and desist, disposing of the issues in this proceeding without further hearings, which agreement has been duly approved by the Chief, Division of Food and Drug Advertisting, and the Director of the Commission's Bureau of Deceptive Practices. Said agreement has been submitted to the undersigned, heretofore duly designed 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 and 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 issues the following order:

1. Respondent, The Plastic Contact Lens Company, is a corporation existing and doing business under and by virtue of the laws of the State of Illinois, with its main office and principal place of business located at 59 East Madison Avenue, in the city of Chicago, State of Illinois.

2. Respondents George N. Jessen, Newton K. Wesley and Joseph Cinefro are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their address is the same as that of said corporation.

3. 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.

It is ordered, That the Plastic Contact Lens Company, a corporation, and its officers, and George N. Jessen, Newton K. Wesley and Joseph Cinefro, 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 of contact lenses, 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, that:

(a) All persons in need of visual correction can successfully wear respondents' contact lenses.

(b) There is no discomfort in wearing respondents' lenses unless it is clearly revealed that practically all persons will experience some discomfort when first wearing respondents' lenses, and in a significant number of cases discomfort will be prolonged.

(c) Respondents' contact lenses can be worn all day unless it is clearly revealed that this is possible only after the wearer has become fully adjusted thereto.

(d) Respondents' lenses protect the eye unless limited to the portion of the eye that is covered thereby.

(e) Respondents' lenses can replace eyeglasses to the extent that eyeglasses can be discarded by all persons.

2. Disseminating, or causing to be disseminated by any means, any advertisement for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of said product, in commerce as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any representation prohibited in paragraph 1 above, or which fails to comply with the affirmative requirements of paragraphs 1(b) and 1(c) above.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, published May 6, 1955, as amended, the initial decision of the hearing examiner shall on the 17th day of January 1962, 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

GILCHRIST COMPANY ET AL.

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

Docket C-63. Complaint, Jan. 17, 1962—Decision, Jan. 17, 1962

Consent order requiring Boston furriers to cease violating the Fur Products Labeling Act by failing, in labeling, invoicing, and advertising, to show the true animal name of fur used in fur products and when the fur was artificially colored; failing, in invoicing, to show the country of origin of imported furs; using the term "blended" improperly in labeling and advertising; advertising falsely that prices were reduced from usual prices which were in fact fictitious, that they were reduced "⅓ to ½", and that fur products on sale were "surplus stock" of another firm; failing to maintain adequate records as a basis for price and value claims; and failing in other respects to comply with requirements of the Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority

vested in it by said Acts, the Federal Trade Commission, having reason to believe that Gilchrist Company, a corporation, and Cummins Furs, Inc., a corporation, and Lewis H. Cummins, individually and as an officer of Cummins Furs, Inc., hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Gilchrist Company is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its office and principal place of business located at 417 Washington Street, Boston, Mass.

Cummins Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts. Lewis H. Cummins is an officer of Cummins Furs, Inc. He controls, directs and formulates the acts, practices and policies of Cummins Furs, Inc.

The office and principal place of business of Cummins Furs, Inc., and Lewis H. Cummins is the same as that of the Gilchrist Company.

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

PAR. 3. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed:

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

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

PAR. 4. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in ac-

cordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "blended" was used as part of the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe the pointing, bleaching, dyeing or tip-dyeing of furs, in violation of Rule 19(f) of said Rules and Regulations.

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was mingled with non-required information, in violation of Rule 29(a) of said Rules and Regulations.

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

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

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

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

3. To show the country of origin of the imported furs used in the fur product.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in that the term "blended" was used as part of the information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe the pointing, bleaching, dyeing, tip-dyeing or otherwise artificial coloring of furs, in violation of Rule 19(f) of the said Rules and Regulations.

PAR. 7. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that respondents caused the dissemination in commerce, as "commerce", is defined in said Act, of certain newspaper advertisements, concerning said products, which were not in accordance with the provisions of Section 5(a) of the said Act and the Rules and Regulations promulgated thereunder; and which advertisements were intended to aid, promote, and assist, directly or indirectly, in the sale and offering for sale of said fur products.

PAR. 8. Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of respondents which appeared in issues of the Boston Globe, a newspaper published in the city of Boston, State of Massachusetts, and having a wide circulation in said State and various other States of the United States.

By means of said advertisements and others of similar import and meaning, not specifically referred to here, respondents falsely and deceptively advertised fur products in that said advertisements:

(a) Failed to disclose the name or names of the animal or animals that produced the fur contained in the fur product as set forth in the Fur Products Name Guide, in violation of Section 5(a)(1) of the Fur Products Labeling Act.

(b) Failed to disclose that fur products contained or were composed of bleached, dyed or otherwise artificially colored fur, when such was the fact, in violation of Section 5(a)(3) of the Fur Products Labeling Act.

(c) Used term "blended" as part of the information required under Section 5(a)(3) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe the pointing, bleaching, dyeing, tip-dyeing, or otherwise artificial coloring of furs, in violation of Rule 19(f) of said Rules and Regulations.

(d) Represented prices of fur products as having been reduced from regular or usual prices where the so-called regular or usual prices were in fact fictitious in that they were not the prices at which said merchandise was usually sold by respondents in the recent regular course of business, in violation of Section 5(a)(5) of the Fur Products Labeling Act, and Rule 44(a) of said Rules and Regulations.

(e) Represented through the use of percentage savings claims such as "⅓ to ½ off" that prices of fur products were reduced in direct proportion to the percentage of savings stated when such was not the fact, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

(f) Represented that fur products offered for sale were "surplus stock" of another firm when such was not the fact, in violation of Section 5(a)(5) of the Fur Products Labeling Act and Rule 44(g) of said Rules and Regulations.

PAR. 9. In advertising fur products for sale as aforesaid respondents made claims and representations respecting prices and values of fur products. Said representations were of the types covered by subsections (a), (b), (c) and (d) of Rule 44 of the Rules and Regulations promulgated under the Fur Products Labeling Act. Respondents in making such claims and representations failed to maintain

full and adequate records disclosing the facts upon which such claims and representations were based in violation of Rule 44(e) of said Rules and Regulations.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent, Gilchrist Company, is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its office and principal place of business located at 417 Washington Street, Boston, Mass.

Respondent, Cummins Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts.

Respondent, Lewis H. Cummins, is an officer of Cummins Furs, Inc. The office and principal place of business of Cummins Furs, Inc., and Lewis H. Cummins is the same as that of Gilchrist Company.

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

ORDER

It is ordered, That respondents Gilchrist Company, a corporation, and its officers, and Cummins Furs, Inc., a corporation, and its officers, and Lewis H. Cummins, individually and as an officer of Cummins Furs, Inc., and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce of any fur product; or in connection with the sale, advertising, offering for sale, transportation, or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce", "fur", and "fur product" 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 in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

B. Setting forth the term "blended" as part of the information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe the pointing, bleaching, dyeing, tip-dyeing or otherwise artificially coloring of furs.

C. Setting forth information required under Section 4(2) of the Fur Products Labeling Act and Rules and Regulations promulgated thereunder mingled with non-required information.

2. Falsely or deceptively invoicing fur products by:

A. Failing to furnish invoices to purchasers of fur products showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of section 5(b)(1) of the Fur Products Labeling Act.

B. Setting forth the term "blended" as part of the information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe the pointing, bleaching, dyeing, tip-dyeing or otherwise artificial coloring of furs.

3. 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:

A. Fails to disclose:

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 bleached, dyed or otherwise artificially colored fur when such is the fact.

B. 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 respondents have usually and customarily sold such products in the recent regular course of business.

C. Represents directly or by implication through percentage savings claims that prices of fur products are reduced in direct proportion to the amount of savings stated when such is not the fact.

D. Misrepresents in any manner the savings available to purchasers of respondents' fur products.

E. Represents directly or by implication that fur products are surplus stock of another firm when such is not the fact.

F. Sets forth the term "blended" as part of the information required under Section 5(a) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe the pointing, bleaching, dyeing, tip-dyeing or otherwise artificial coloring of furs.

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

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

IN THE MATTER OF

GEORGE C. PALMER CO., INC., ET AL.

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

Docket C-64. Complaint, Jan. 17, 1962—Decision, Jan. 17, 1962

Consent order requiring a Minneapolis wholesale distributor of citrus fruit, produce, and other food products, to cease accepting illegal brokerage on purchases for its own account, such as a discount of 10 cents per 1⅗ bushel box of citrus fruit from Texas packers, or a lower price reflecting such commission.

COMPLAINT

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

PARAGRAPH 1. Respondent George C. Palmer Co., Inc., is a corporation organized on October 1, 1960, existing and doing business under and by virtue of the laws of the State of Minnesota with its offices and principal place of business located at 4300–B West 36½ Street, Minneapolis, Minn.

The corporate respondent is successor to George C. Palmer Brokerage Co., Inc., a corporation organized on January 5, 1953. Respondent Oscar Edward Johnson served as Vice President of the predecessor corporation.

Respondent Oscar Edward Johnson is an individual and is president of the corporate respondent, and owns substantially all of its capital stock. As president and substantial owner, he formulates, directs and controls the acts, practices, and policies of the said corporate respondent, including the acts and practices hereinafter mentioned. Such corporate respondent and individual respondent are hereinafter jointly referred to as respondents.

PAR. 2. Respondents are now, and for the past several years have been, engaged in business primarily as a wholesale distributor, buying, selling and distributing citrus fruit, produce, and other food products, all of which are hereinafter sometimes referred to as food products. Respondents purchase their food products from a large number of suppliers located in many sections of the United States. The annual volume of business done by respondents in the purchase and sale of food products is substantial.

PAR. 3. In the course and conduct of their business for the past several years, respondents have purchased and distributed, and are now purchasing and distributing, food products, in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, from suppliers or sellers located in several states of the United States other than the State of Minnesota, in which respondents are located. Respondents transport or cause such products, when purchased, to be transported from the places of business or packing plants of their suppliers located in various other states of the United States to respondents who are located in the State of Minnesota, or to respondents'

customers located in said state, or elsewhere. Thus, there has been at all times mentioned herein a continuous course of trade in commerce in the purchase of said food products across state lines between respondents and their respective suppliers of such food products.

PAR. 4. In the course and conduct of their business for the past several years, but more particularly since October 1, 1960, respondents have been and are now making substantial purchases of food products for their own account for resale from some, but not all, of their suppliers, and on a large number of these purchases respondents have received and accepted, and are now receiving and accepting, from said suppliers a commission, brokerage, or other compensation or an allowance or discount in lieu thereof, in connection therewith. For example, respondents make substantial purchases of citrus fruit from a number of packers or suppliers located in the State of Texas, and receive on said purchases a brokerage or commission, or a discount in lieu thereof, usually at the rate of 10 cents per 1⅗ bushel box, or equivalent. In many instances respondents receive a lower price from the supplier which reflects said commission or brokerage.

PAR. 5. The acts and practices of respondents in receiving and accepting a brokerage or a commission, or an allowance or discount in lieu thereof, on its own purchases, as above alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of subsection (c) of Section 2 of the Clayton Act, as amended, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent George C. Palmer Co., Inc., is a corporation organized on October 1, 1960, existing and doing business under and by virtue of the laws of the State of Minnesota with its office and principal place of business located at 4300–B West 36½ Street, Minneapolis, Minn.

Respondent Oscar Edward Johnson is President of said corporation and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondent George C. Palmer Co., Inc., a corporation, and its officers, and Oscar Edward Johnson, individually and as an officer of George C. Palmer Co., Inc., and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the purchase of citrus fruit or produce in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any purchase of citrus fruit or produce for respondents' own account, or where respondents are the agents, representatives, or other intermediaries acting for or in behalf, or are subject to the direct or indirect control, of any buyer.

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

IN THE MATTER OF

WESTINGHOUSE ELECTRIC CORPORATION ET AL.

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

Docket C–65. Complaint, Jan. 18, 1962—Decision, Jan. 18, 1962

Consent order requiring three corporations and the three individuals who participated directly in the illegal activities in their behalf, to cease engaging in a price-fixing conspiracy in the sale of polyethylene shielding material—sold principally to naval shipyards and used as radiation shields around atomic reactors on naval vessels—in the course of which, at meetings and otherwise, they agreed upon, fixed, and maintained prices, terms, and conditions of sale, and agreed upon the price they would bid on particular bids submissions requested by customers.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (38 Stat. 717, 15 U.S.C. Sec. 41, *et seq.*, 52 Stat. 111), and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Westinghouse Electric Corporation, a corporation; Daniel L Sweeney, individually and as Industrial Sales Manager, Micarta Division, Westinghouse Electric Corporation; St. Regis Paper Company, a corporation; The Garrett Corporation, a corporation; Walter L. Clark, individually and as Division Manager, Air Cruisers Division, The Garrett Corporation, and John M. Zeier, an individual, more particularly described and referred to hereinafter as respondent, have violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby names the previously mentioned corporations and individuals, each and all as respondents herein, and issues its complaint against each of the named parties stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Westinghouse Electric Corporation, hereinafter referred to as Westinghouse, is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office and place of business located at 3 Gateway Center (P.O. Box 2278), Pittsburgh 30, Pa.

Individual respondent Daniel L. Sweeney is the Industrial Sales Manager, Micarta Division, Westinghouse Electric Corporation. The Micarta Division of Westinghouse Electric Corporation is located in Hampton, S.C.

Respondent St. Regis Paper Company, hereinafter referred to as St. Regis, is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 150 East 42nd Street, New York 17, N.Y.

Respondent The Garrett Corporation, hereinafter referred to as Garrett, is a corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 9851–9951 Sepulveda Boulevard, Los Angeles, Calif.

Individual respondent Walter L. Clark is the Division Manager. Air Cruisers Division, The Garrett Corporation. The Air Cruisers Division of The Garrett Corporation is located in Belmar, N.J.

Individual respondent John M. Zeier was an Industrial Sales Manager, Panelyte Division, St. Regis Paper Company. The principal office of the Panelyte Division of the St. Regis Paper Company is located at the same address as respondent St. Regis Paper Company.

Said John M. Zeier is not presently an employee of respondent St. Regis Paper Company and has not been connected with St. Regis Paper Company since August 12, 1960. Said John M. Zeier resides at 157 Poe Road, Princeton, N.J.

PAR. 2. The corporate respondents hereinbefore named and described, through their operating divisions, are engaged in the manufacture, sale and distribution, or the sale and distribution of polyethylene shielding material. Each of the corporate respondents is engaged in selling and distributing polyethylene shielding material to customers located in states other than the state in which each corporate respondent respectively maintains production or processing facilities. There has been and is now a pattern and course of interstate commerce in said polyethylene shielding material by corporate respondents within the intent and meaning of the Federal Trade Commission Act. The volume of such business in commerce is substantial.

The individual respondents hereinbefore named and described were, at all times pertinent to this complaint, officials of the respective corporate respondents as hereinbefore described and participated directly in the acts, practices and methods on behalf of their respective corporations hereinafter charged in this complaint as being illegal.

PAR. 3. Each of the corporate respondents is in substantial competition with each of the other corporate respondents named herein in the manufacture, sale, processing and distribution of polyethylene shielding material in interstate commerce except to the extent that competition has been hindered, lessened or restricted and eliminated by the unfair methods of competition and unfair acts and practices hereinafter set forth.

PAR. 4. Polyethylene shielding material, manufactured and sold by the corporate respondents, is used as radiation shields around atomic reactors aboard naval vessels, such as submarines, cruisers, and merchant ships, where considerations of weight make it impractical to use the concrete and lead shielding used for land-based atomic reactors. Corporate respondents purchase pellets of polyethylene from primary manufacturers and process them into sheets of the required size and specifications by means of either extrusion or compression molding.

Polyethylene shielding is manufactured and sold for the purpose described above in several sizes, the most frequently used of which are 4 feet by 8 feet and 3 feet by 5 feet. The thickness of the polyethylene shielding generally ranges from $\frac{1}{8}$ inch to $1\frac{1}{2}$ inches. Polyethylene shielding is manufactured and sold in two forms, virgin and borated. The principal customers for polyethylene shielding material are naval shipyards engaged in installing atomic reactors in various types

of ships. These naval shipyards are those operated by the United States Government or by private shipyards working under Government contracts. Nearly every sale of polyethylene shielding material to these shipyards is the result of awards on bids made by one or more of the respondents in response to requests for secret bids by these customers. All polyethylene shielding material sold for this type of defense work must meet the requirements of military specification No. MIL–P–19336 C (ships). While the volume of total polyethylene shielding sales is comparatively small, being $1,596,000 during the year 1959, it is a very essential material to the defense of the United States and to the atomic energy program. Furthermore, it is very likely that many more uses of polyethylene shielding material will be developed in the future.

PAR. 5. During the years 1958 and 1959 each and all of the respondents named herein have engaged in unfair methods of competition and unfair acts and practices in commerce in the manufacture, sale and distribution of polyethylene shielding material in that they have, through conspiracy, combination, agreement, and planned common courses of action, and as a part thereof, done and performed the following:

(a) Fixed prices;

(b) Fixed and maintained prices, terms and conditions of sale;

(c) Attended meetings at which the prices at which polyethylene shielding material would be listed on the various respondent's price lists was agreed upon;

(d) Used agreed upon prices in submitting bids for polyethylene shielding material to various customers requesting such bids;

(e) Held meetings and agreed upon the price which the respondents would bid on particular bids submissions requested by customers.

PAR. 6. The acts and practices of the respondents, as herein alleged, have had and do have the effect of hindering, lessening, restricting, restraining and eliminating competition in the sale of polyethylene shielding material; are all to the prejudice of customers of respondents and of the public; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy

of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Westinghouse Electric Corporation is a corporation organized and existing under the laws of the State of Pennsylvania, with its principal office and place of business located at 3 Gateway Center (P.O. Box 2278), Pittsburgh 30, Pa.

Daniel L. Sweeney is the Industrial Sales Manager, Micarta Division, Westinghouse Electric Corporation. The Micarta Division of Westinghouse Electric Corporation is located in Hampton, S.C.

St. Regis Paper Company is a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 150 East 42nd Street, New York 17, N.Y.

The Garrett Corporation is a corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 9851–9951 Sepulveda Boulevard, Los Angeles, Calif.

Walter L. Clark is the Division Manager, Air Cruisers Division, The Garrett Corporation. The Air Cruisers Division of The Garrett Corporation is located in Belmar, N.J.

John M. Zeier was an Industrial Sales Manager, Panelyte Division, St. Regis Paper Company. The principal office of the Panelyte Division of the St. Regis Paper Company is located at 150 E. 42nd Street, New York 17, N.Y. Said John M. Zeier has not been employed or in any way connected with respondent St. Regis Paper Company or its Panelyte Division since August 12, 1960. Said John M. Zeier now resides at 157 Poe Road, Princeton, N.J.

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

ORDER

It is ordered, That corporate respondents Westinghouse Electric Corporation, a corporation; St. Regis Paper Company, a corporation; The Garrett Corporation, a corporation, their respective officers, agents, representatives and employees, and individual respondents Daniel L. Sweeney, individually and as industrial sales manager, Micarta Division, Westinghouse Electric Corporation; Walter L. Clark, individually and as division manager, Air Cruisers Division, The Garrett Corporation; and John M. Zeier, individually, directly, indirectly or through any corporate or other device in connection with the manufacture, sale and distribution or sale and distribution in commerce between and among the several states of the United States and in the District of Columbia of polyethylene shielding material, do forthwith cease and desist from entering into, cooperating in, carrying out or continuing any conspiracy, planned common course of action, understanding, combination or agreement between any one or more of said respondents, or between any one or more of said respondents and any other person, persons or business entity not a party hereto, to do or perform any of the following acts, practices or things:

A. Fix or maintain prices, terms or conditions for the sale of polyethylene shielding material;

B. Fix or maintain prices, terms or conditions of sale to be used in submitting bids on polyethylene shielding material; and

C. Bid or quote, refrain from bidding or quoting, or causing another to bid or quote or refrain from bidding or quoting to any purchaser or prospective purchaser of polyethylene shielding material.

It is further ordered, That corporate respondents Westinghouse Electric Corporation, a corporation; St. Regis Paper Company, a corporation; The Garrett Corporation, a corporation, their respective officers, agents, representatives, employees, and individual respondents Daniel L. Sweeney, individually and as industrial sales manager, Micarta Division, Westinghouse Electric Corporation; Walter L. Clark, individually and as division manager, Air Cruisers Division, The Garrett Corporation; and John M. Zeier, individually, directly, indirectly or through any corporate or other device in connection with the manufacture, sale and distribution or sale and distribution in commerce between and among the several states of the United States and in the District of Columbia of polyethylene shielding material, do individually and independently forthwith cease and desist from:

A. Attending meetings at which any other respondent or respondents or manufacturers of polyethylene shielding material not a party

hereto are present, at which the prices, terms or conditions for the sale of polyethylene shielding material are discussed;

B. Attending meetings at which any other respondent or respondents or manufacturers of polyethylene shielding material not a party hereto are present, at which the prices, terms or conditions for the sale of polyethylene shielding material to be bid on particular bids are discussed;

C. Holding or participating in any discussions by telephone or otherwise, with any competitor or competitors pertaining to prices, terms or conditions of sale of polyethylene shielding material;

D. Sending to, requesting from, or exchanging with any competitor or competitors any information written or oral pertaining to prices, terms or conditions of sale of polyethylene shielding material; and

E. Formulating or submitting any bid on polyethylene shielding material to a purchaser or prospective purchaser the prices or terms and conditions of sale of which are based in any way upon information obtained in a manner prohibited by (A), (B), (C) and (D) above.

It is further ordered, That corporate respondents Westinghouse Electric Corporation, a corporation; St. Regis Paper Company, a corporation; The Garrett Corporation, a corporation, shall, within sixty (60) days after the effective date of this order, each individually and independently:

A. Review its then prevailing prices for polyethylene shielding material;

B. Cancel existing price lists for polyethylene shielding material, and cancel existing prices for polyethylene shielding material not based on lawful considerations:

C. Determine prices for polyethylene shielding material based upon lawful considerations; and

D. Establish the prices determined under (C) above, which prices shall become effective not later than sixty (60) days from the date of service of this order, provided, however, that establishment of any new prices within said sixty (60) days shall not be construed as indicating that the former prices were in any way unlawful. Nothing contained herein shall prevent any respondent acting independently and for a lawful purpose from hereafter deviating from, modifying or otherwise changing prices established hereunder.

Provided, however, that:

(1) Nothing contained in this order shall prohibit any respondent or the officers, agents, representatives or employees of such respondent from communicating in any way with the officers, agents, representa-

tives or employees of such respondent in connection with the purchase or sale (by bid or otherwise) of polyethylene shielding material, or from negotiating or entering into with any other person, persons, or business entity any *bona fide* purchase or sale (by bid or otherwise) of polyethylene shielding material at prices, terms or conditions of sale independently offered or accepted in such transaction.

(2) Nothing contained in this order shall be construed as prohibiting any respondent from formulating or submitting a joint bid for polyethylene shielding material with any other person, persons or business entity to any governmental unit or agency or in connection with any contract to be performed for any governmental unit or agency if such joint bid is expressly requested by the purchaser or if such joint bid is expressly made known to the purchaser by the time of the official opening of the bid or the date of contract of sale, whichever is earlier, providing that, for a period of five (5) years from the effective date of this order any respondent submitting such a joint bid for polyethylene shielding material notify the Federal Trade Commission of each such joint bid within thirty (30) days after the official opening of the bid or the date of contract of sale, whichever is earlier.

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

IN THE MATTER OF

GEORGE'S RADIO AND TELEVISION COMPANY, INC., ET AL.

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

Docket 8134. Complaint, Oct. 7, 1960—Decision, Jan. 19, 1962

Order requiring retailers of electrical appliances and other merchandise in Washington, D.C., to cease representing falsely in newspaper advertising that a fictitiously high price or an excessive "Mfr's. Sug. List" was the usual retail price in the Washington area and that purchasers of merchandise at the advertised sale price would save the difference between the two.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal

Trade Commission, having reason to believe that George's Radio and Television Company, Inc., a corporation, and George Wasserman, individually and as an officer of the said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent George's Radio and Television Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its principal office and place of business at 2146—24th Place, Northeast, Washington, D.C.

Individual respondent George Wasserman is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of electrical appliances and other merchandise at retail to the public under the name "George's Warehouse Supermarts."

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their places of business in the States of Maryland and Virginia and in the District of Columbia to purchasers thereof located in States other than the States in which shipments originated, and in the District of Columbia, and maintain, and at all times mentioned herein have maintained a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, as aforesaid, and for the purpose of inducing the purchase of their merchandise in commerce, respondents have engaged in the practice of using fictitious retail prices in advertisements published in various newspapers. Among and typical of such practices, but not all inclusive thereof, are the following statements:

$429.95 Westinghouse Laundromat Washer Dryer Combination____$289
$269.95 Westinghouse Automatic Washer____$136
$669.95 16 Cu. Ft. Two Door Refrigerator Freezer—Westinghouse____$399
$549.95 Westinghouse 17.6 cu. ft. Upright Freezer____$288
$429.95 Westinghouse 14.8 cu. ft. Upright Freezer____$227
Mfr's. Sug. List $499.95 WESTINGHOUSE 12.1 cu. ft. 2 Door Refrigerator-Freezer____$249

PAR. 5. Through the use of the aforesaid statements and others similar thereto, not included herein, respondents represented, directly or by implication:

1. That the higher stated prices, when unaccompanied by any descriptive language, were the prices at which the merchandise advertised was usually and customarily sold at retail by the respondents in the recent regular course of business.

2. That the amount designated as "Mfr's. Sug. List" was the price at which the merchandise advertised was usually and customarily sold at retail in the trade area where the representations were made.

3. That purchasers of the products advertised were afforded savings of the differences between the higher stated prices unaccompanied by any descriptive language or the amount, designated "Mfr's. Sug. List", and the advertised sales price.

PAR. 6. The aforesaid statements and representations were false, misleading and deceptive. In truth and in fact:

1. The higher stated prices, unaccompanied by any descriptive language, were substantially in excess of the prices at which the advertised products were usually and customarily sold at retail by the respondents in the recent regular course of business.

2. The amount designated as "Mfr's. Sug. List" was substantially in excess of the price at which the advertised product was usually and customarily sold at retail in the trade area where the representation was made.

3. Purchasers of the advertised products were not afforded savings of the differences between the higher stated prices, unaccompanied by any descriptive language or the amounts designated "Mfr's. Sug. List" and the advertised sales prices.

PAR. 7. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition in commerce with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by the respondents.

PAR. 8. The use by respondents of the false, misleading and deceptive statements, representations and practices, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial amounts of respondents' merchandise by reason of said erroneous and mistaken belief. As a consequence thereof, substantial trade in commerce has been unfairly diverted to respondents from their competitors and substantial injury has thereby been and is being done to competition in commerce.

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

Mr. Anthony J. Kennedy, Jr., supporting the complaint.

Grossberg, Yochelson & Brill by *Mr. Irving B. Yochelson* of Washington, D.C., for respondents.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

This is a false and misleading advertising case involving the household appliance retail distribution field in the metropolitan area of Washington, D.C. It poses primarily the simple question whether or not a manufacturer's suggested retail price, higher than the price usually charged by respondents or in the trade area by similar establishments, may legally be advertised in juxtaposition with respondents' lower price. Claimed justification is that the suggested resale price of the manufacturer, whether identified as such, or not, is properly used as a means of identifying the product.

The complaint was issued October 7, 1960, under Section 5 of the Federal Trade Commission Act. In addition to the formal allegations identifying the respondents, describing the interstate character and effect of the acts on commerce, and competition and charging the violation; the complaint sets forth six typical examples of advertisements. Five of these set forth a price, a description of the article, and a second lower price. The sixth has the first price preceded by the words "Mfr's Sug. List." The complaint then charges that the prices without the statement, "manufacturer's suggested list," constitute false representations that respondents usually sold the article at the higher price, that the price with such designation constituted a representation that such price was the usual sales price in the trade area, and that the purchasers were afforded savings equal to the difference between the prices placed in juxtaposition.

Respondents in their answer deny that the prices are misrepresentations and claim that they are used solely to identify the items sold. They also allege abandonment and state that the public is not injured. They admit the formal allegations identifying the parties.

Following an informal conference with the hearing examiner, counsel stipulated substantially all of the facts alleged in the complaint except the allegations concerning the price level of the articles sold in the trade area and the conclusion of misrepresentation. Both

counsel are to be commended for their cooperative efforts which materially reduced the record and emphasized their respective positions by dispensing with unnecessary proof.

The Commission's case was introduced in two hearings held February 15 and 20, 1961, and the respondents' case was commenced March 29 and concluded March 30, 1961. Proposed findings of fact and conclusions of law were submitted May 26, 1961. Respondents made a motion to dismiss the complaint at the close of the Commission's case for lack of proof. Decision was then reserved under amended Rule 38(e). The motion is now denied.

All proposed findings of fact and conclusions of law not hereinafter specifically found or concluded are herewith rejected and on the basis of consideration of the entire record, the hearing examiner makes the following findings as to facts, conclusions drawn therefrom and order.

FINDINGS OF FACT

1. Respondent George's Radio and Television Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its principal office and place of business at 2146—24th Place, Northeast, Washington, D.C.

2. Individual respondent George Wasserman is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their places of business in the States of Maryland and Virginia and in the District of Columbia to purchasers thereof located in States other than the States in which shipments originated, and in the District of Columbia, and maintain, and at all times mentioned herein have maintained a substantial course of trade in said merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. George's Radio and Television Company, Inc., the corporate respondent in the subject case, currently doing business as "George's Warehouse Supermarts", has been incorporated for a period in excess of thirty (30) years.

5. George Wasserman, the individual respondent in the subject case, has been and still is President of the corporate respondent since its incorporation. The current officers of the corporate respondent are:

George Wasserman, *President and Treasurer*
Janice Wasserman, *Vice President*
Ruth Casdon, *Secretary*

6. George Wasserman is the sole stockholder of the corporate respondent and owns 100% of its stock.

7. The respondents placed the following advertisements in the Washington Post and Times Herald and the Evening Star, newspapers of general circulation in the Washington, D.C., Metropolitan area on the dates indicated, under the name of "George's Warehouse Supermarts":

(a) 429.95 Westinghouse Laundromat Washer Dryer Combination—$289.

was advertised in the Washington Post and Times Herald on September 16 and 23, 1959, and in the Evening Star on September 16, and September 23, 1959.

(b) $269.95 Westinghouse Automatic Washer—$136 or $134.

(The last amount depending on the date of the advertisement) was advertised in the Washington Post on July 23, 28, and 30, 1959, and on September 2, 4, 6, 9, 18, and 30, 1959, and in the Evening Star on August 8, 23, 26, 28, and 30, 1959, and September 2, 4, 6, 9, 18, 23, and 30, 1959.

(c) $669.95 16 cu. ft. Two Door Refrigerator Freezer—Westinghouse—$399.

in the Washington Post on September 30, 1959.

(d) $549.95 Westinghouse 17.6 cu. ft. Upright Freezer—$288 or $284.

(The last amount depending upon the date of the advertisement) was advertised in the Washington Post on September 2, 4, 6, 11, and 13, 1959, and in the Evening Star on September 4, 6, 9, and 11, 1959.

(e) $429.95 Westinghouse 14.8 cu. ft. Upright Freezer—$227 or $217.

(The last amount depending on the date of the advertisement) was advertised in the Washington Post on September 4 and 6, 1959, and in the Evening Star on September 4, 6, and 16, 1959.

(f) Mfr's Sug. List $499.95 Westinghouse 12.1 cu. ft. 2 Door Refrigerator-Freezer—$249.

was advertised in the Washington Post on September 9, 1959.

8. The Westinghouse Appliances described in the advertisements designated in finding No. 7, have been identified by the respondents with the following Westinghouse models:

	Model
(a) $429.95 Westinghouse Laundromat Washer Dryer Combination	WD-3V
(b) $269.95 Westinghouse Automatic Washers	L 113
(c) $669.95 16 Cu. ft. 2-Door Refrigerator Freezer	DCM 16
(d) $549.95 17.6 Cu ft. Upright Freezer	UM 18

(e) $429.95 14.8 Cu. ft. Upright Freezer ---------- UM 14
(f) $499.95 Westinghouse 12.1 Cu. ft. 2-Door Refrigerator-Freezer ---------- TDL 12

9. The higher stated prices in the advertisements described in finding No. 7, unaccompanied by any descriptive language, were substantially in excess of the prices at which the advertised products were usually and customarily sold at retail by the respondents in the recent regular course of business. Such advertised prices were, however, the manufacturers' suggested retail prices in the three instances where the price sheets identify the model.

10. Respondent corporation has made numerous sales of equipment described in finding No. 8 in commerce as "commerce" is defined in the Federal Trade Commission Act.

11. Numerous sales of equipment of the same general character have been made by others in commerce in the same trade area in which respondent sells equipment.

12. There has been substantial competition in commerce between respondent corporation and other persons, firms and corporations in the sale of merchandise of the same general kind and nature as that sold by respondent corporation.

13. The advertisements issued by respondents, read as a whole, convey to the reader an impression that the higher stated prices were prices at which the merchandise was usually and customarily sold at retail by the respondents in the recent regular course of business.

14. The twelve competitors called by counsel supporting the complaint, including discount houses, accessory shops and a department store, established that each of these competitors had a policy of making sales of merchandise, of the same kind and nature as that sold by respondent corporation, at prices substantially less than the manufacturer's suggested resale price. Said witnesses appeared to constitute a fair cross section of the competition in the field.

15. One competitor witness for the Commission stated that certain of his customers had told him of sales by others of the same type of merchandise at the manufacturer's suggested list price. His testimony, however, was confused and therefore, entitled to little weight. It is inferred from the testimony of the other competitors called by counsel supporting the complaint that rarely, if ever, were sales made at the manufacturer's suggested retail price. Sales were almost invariably made at prices below that figure, and it was the pricing policy of such competitors to price their goods generally below manufacturer's suggested retail prices.

16. Testimony adduced by respondents failed to discredit the testimony offered by the Commission witnesses that there was little selling at the manufacturer's suggested retail price by competitors comparable to respondents. This testimony was that most sales by a few credit stores, or stores not specializing in the sale of appliances, were made at the suggested manufacturer's retail price or in one case some at higher prices. Neither party called witnesses from the manufacturer to testify how the suggested prices were established.

17. Miss Sandburg of Thompson Brothers Furniture testified that the major line of that company was furniture. When asked whether it was in competition with respect to the sale of appliances, she said that in the sense of selling something that someone else was selling it was "[B] (b)ut, as a major business endeavor I couldn't say that, no . . .". Asked further, the witness testified that she seldom advertised appliances, did no comparison shopping and did not even check the advertising of appliances by others.

18. Thomas Wolking of Cameo Appliance Company testified that "95 or 90 percent (of sales) would be at the manufacturer's retail price." On cross-examination, however, he admitted his firm was a credit house and that "if we sell something on terms we may charge the list price, when we sell something for cash we may give something off, a larger trade or discount. . . ." As to cash sales his testimony was: "Well, we get our manufacturer's list price on a cash proposition occasionally."

19. David Franks, who was engaged in business selling "records, furniture, refrigerators, televisions and so forth," testified that his prices were "the list prices, and in some cases higher than the list prices." On cross-examination, he admitted that the principal criterion in establishing this higher price is the fact that he has to sell on credit.

20. Carl Mirman, an employee of respondent George's Radio and Television Company, Inc., who was formerly employed by Slattery's as a store manager on Naylor Road in Southeast Washington, testified that the merchandise sold by that store was "ticketed by manufacturer's name, model number, and manufacturer's suggested list price." On cross-examination, however, Mirman admitted that the manufacturer's list price was by far the exceptional retail price at Slattery's. He said it was used "when we took a trade-in", and referring to a hypothetical case of trading in a TV, testified that they would definitely not get the allowed price when selling an article turned in; that the allowance was "inflated, but it is based on the manufacturer's price to give it that inflated appearance."

21. Testimony adduced by respondent failed to lay the factual basis for respondents' claim that the manufacturer's suggested retail price was used for identification only and that the use of such prices was voluntarily discontinued under circumstances rendering the case moot.

22. William G. Hills, Executive Director of Electric Institute of Washington, described a display of appliances maintained by his "non-profit organization" which was organized "to promote the sale of products and services and to keep the public informed and educated on new developments in the industry and new uses of the products of the industry". The display on the ground floor of Potomac Electric Power Building in Washington contains a "representative line of practically all types of electrical products for the home". Each item is tagged to show: a description, the capacity, the manufacturer or suggested list price and a list of the association member retailers where the item may be purchased. If one of the 90,000 to 95,000 odd yearly visitors expresses an interest in an item, the hostess demonstrates it and gives the visitor a tag showing a place or places in the visitor's vicinity where the item may be purchased and the model number of the item. When asked whether the price was put on the tag handed to the visitor, Hills testified he did not know, and that the Institute was not interested in the price. The price might be placed on the tag attached to the appliance by either the manufacturer or a distributor depending on whose exhibit it was. Hills testified he had no knowledge of the actual selling price and that no study had been made of prices. Under such circumstances, the *manufacturer's* suggested list price seems to have little value as an identification of the item demonstrated.

23. David Galford who has been advertising manager of respondent George's Radio & Television Co., Inc., since September 8, 1959, testified that respondents had voluntarily ceased advertising a comparative price in October of 1960. On cross-examination, he stated that he had been instructed by respondent George Wasserman to withdraw an advertisement prepared to show such comparative prices on Friday, October 21, 1960. Galford was not aware that the complaint had been mailed October 18, 1960, (as shown by the Commission's records) and could not say whether the action of the company was voluntary except that Mr. Wasserman had told him that "inasmuch as a meeting had been held of some sort that he did not want any trouble".

24. The manufacturer's suggested retail prices are substantially higher than the prices at which stores of the same general character as respondents' in the Washington trade area have usually and

customarily sold Westinghouse appliances for cash at retail in the recent regular course of business.

25. The use, without designation as such, of the manufacturer's suggested retail price in advertising in juxtaposition with lower price, tends to lead readers of such advertising to believe that the higher price is the price at which the merchandise is usually and customarily sold by the advertiser in the recent regular course of business.

26. The use with the designation "manufacturer's suggested list" price in advertising in juxtaposition with a lower price tends to lead readers of such advertising to believe that the higher price is the price at which the merchandise is usually and customarily sold in the trade area by stores comparable to that of the advertiser and that a saving will be made of the difference between the two prices.

27. There was no reliable proof that the use of the manufacturer's suggested retail price was solely for the purpose of identifying the type of appliance.

28. The use of the manufacturer's suggested retail price is not an effective or the usual manner of identifying a product which has other means of identification.

29. The fact that distributors as well as manufacturers suggested retail prices were placed on items in the Electric Institute of Washington display, makes the claim that the manufacturer's suggested retail prices were used by George's Radio & Television Company, Inc., to identify to prospective customers appliances observed at such display untenable.

30. There was no reliable evidence of voluntary discontinuance of the practice of advertising in the manner described in preceding findings prior to the issuance of the complaint.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter and of the persons of respondents.

2. This proceeding is in the public interest, and the facts found were established by reliable, probative and substantial evidence.

3. The use of a manufacturer's suggested retail price in advertising in commerce when such price is placed in juxtaposition with a lower price, constitutes an unfair or deceptive act or practice where such suggested retail price is neither the usual and customary price at which the advertiser sold in the recent regular course of business nor the usual and customary price of a fair cross section of other comparable stores in the same trade area. Contrary to respondents' contention, a written advertisement requires no public testimony as to its meaning.

The examiner in the first instance, and the Commission, should it disagree, are quite capable of determining what a reader might understand from the words and figures in the advertisements here under consideration. Even though the "trade" might not be confused, *Winsted Hosiery* v. *F.T.C.*, 258 U. S. 483 (1922), the Federal Trade Commission is empowered to prevent advertising calculated to mislead the public, *Zenith Radio Corporation* v. *F.T.C.*, 143 F. 2d 29 (C.A. 7 1944). The use of a manufacturer's suggested resale price in the free price area of Washington, where many buyers come from states which make the manufacturers price mandatory, is particularly susceptible of misconstruction. A young bride newly arrived from a state permitting rigid manufacturer price control might very well suppose that the usual price was that suggested by the manufacturer. She would thus prefer the advertiser comparing that price with his own, in the first instance, and would pass by another store offering the same merchandise at the same price because she was led by the advertisement to enter the store offering a "bargain". It has long been clear that if the first contact is procured by misleading, it makes no difference if the consumer is later informed of the truth. *F.T.C.* v. *Standard Education Society*, 302 U.S. 112. *Carter Products, Inc.* v. *F.T.C.*, 186 F. 2d 821, 824 (C.A. 7, 1951). It is equally clear that the Commission is as zealous of the rights of the unwary as of the sophisticated buyer. *Charles of the Ritz Distributors Corp.* v. *F.T.C.*, 143 F. 2d 676 (C.A. 2, 1944). *Bantam Books Inc. v. F.T.C.*, 275 F. 2d 680 (C.A. 2, 1960). Further, contrary to respondents' contention, it was not necessary to establish actual deception or to measure the trade deviation caused by the respondents' advertising, *In the Matter of Lafayette Brass Manufacturing Co.*, Docket No. 6671, September 27, 1960. *In the Matter of Main Street Furniture Inc.*, Docket No. 7786, Nov. 16, 1960. *In the Matter of the Baltimore Luggage Company, et al.*, Docket No. 7683, March 15, 1961.

Whatever the situation may be with respect to automobile pricing, Congress limited its enactment to remedying the abuses there found. Such remedy has no application here.

4. The use of a manufacturer's suggested retail price, without designation as such, in advertising in commerce, when such price is placed in juxtaposition with a lower price, constitutes an unfair or deceptive act or practice where the advertiser's usual and customary price made in the recent regular course of business has been less than the higher price.

5. The use of a manufacturer's suggested retail price, designated as such, in advertising in commerce when placed in juxtaposition with

a lower price constitutes an unfair or deceptive act or practice where the manufacturer's suggested retail price bears little relation to the usual and customary price of comparable stores in the same trade area. As the Commission recently pointed out in *The Baltimore Luggage Company, et al.*, Docket No. 7683, March 15, 1961, it is the trade area in which respondent operates that concerns the consumer. He wants to know that he is obtaining a bargain in the area in which he shops—not some other area.

6. Respondents use of the manufacturer's suggested retail price in advertising was not calculated to identify particular appliances, but rather to emphasize that respondents engaged in selling below a theoretical base price.

7. The case is not moot. The dismissal of complaints in abandonment cases is not the usual procedure and while the Commission is vested with discretion to determine whether or not a practice is surely stopped, where, as here, the practice continued until after the filing of the complaint and the respondents claim the right to continue, dismissal should not be ordered. *In the Matter of Arnold Constable Corporation*, Docket No. 7657, January 12, 1961, and cases cited therein. *In the Matter of Damar Products, et al.*, Docket No. 7769, May 3, 1961; *Art National Manufacturers Distributing Co., Inc., et al.*, Docket No. 7286, May 10, 1961; *Ward Baking Company* v. *F.T.C.*, 54 F.T.C., 1919 (1958).

8. Respondents have engaged in unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act through the use of manufacturer's suggested retail prices placed in juxtaposition in advertising with respondents' lower current prices.

9. The use of such acts and practices have had and now have the capacity and tendency to mislead members of the purchasing public into the erroneous belief that the lower prices quoted represent a saving in cost and thus into the purchase of appliances from respondents. As a consequence, substantial commerce may be diverted to respondents from their competitors causing them and the public substantial injury.

ORDER

It is ordered, That respondents, George's Radio and Television Company, Inc., a corporation, and its officers and George Wasserman, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly, or as George's Warehouse Supermarts, or through any corporate or other device, in connection with the offering for sale, sale and distribution of electrical

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

1. Representing, directly or by implication:

(a) Through the use of the term "Manufacturer's Suggested List" or any other term of the same import, or in any other manner, that any amount is the price of merchandise in respondents' trade area when it is in excess of the price at which merchandise is usually and customarily sold at retail in said trade area.

(b) That any price, when accompanied or unaccompanied by any descriptive language, was the price at which the merchandise advertised was usually and customarily sold at retail by the respondents unless such advertised merchandise was in fact usually and customarily sold at retail at such price by the respondents in the recent past.

(c) That any saving is offered in the purchase of merchandise from the respondents' price or the price in the respondents' trade area unless the price at which the merchandise is offered constitutes a reduction from the price at which said merchandise is usually and customarily sold at retail by the respondent or at which said merchandise is usually and customarily sold at retail in said trade area.

2. Misrepresenting, in any manner, the amount of savings available to purchasers of respondents' merchandise or the amount by which the price of said merchandise has been reduced from the price at which it is usually and customarily sold at retail by the respondents or in the trade area or areas where the representations are made.

OPINION OF THE COMMISSION

By Dixon, *Commissioner:*

Respondents were charged by the complaint in this proceeding with false representations as to price in violation of Section 5 of the Federal Trade Commission Act. The hearing examiner in his initial decision filed June 29, 1961, found that the charges were sustained by the record and ordered respondents to cease and desist the challenged practices. Respondents have appealed, raising questions as to the sufficiency of the evidence and as to certain conclusions drawn by the examiner.

There is no dispute about the essential facts in this case except with reference to the usual and customary prices of the advertised products in the Washington trade area, a point to be further discussed hereafter. Respondents are engaged in the advertising, offering for sale and sale of electrical appliances and other merchandise at retail to the

public under the name "George's Warehouse Supermarts" (hereinafter referred to as George's). In the course of their business, respondents advertised in the Washington Post and Times Herald and the Evening Star newspapers in Washington, D.C., at various times in 1959, making the following representations:

429.95 Westinghouse Laudromat Washer Dryer Combination—$289.
269.95 Westinghouse Automatic Washer—$136 or $134.
669.95 16 cu. ft. Two Door Refrigerator Freezer—Westinghouse—$399.
549.95 Westinghouse 17.6 cu. ft. Upright Freezer—$288 or $284.
429.95 Westinghouse 14.8 cu. ft. Upright Freezer—$227 or $217.
Mfr's Sug. List $499.95 Westinghouse 12.1 cu. ft. 2 Door Refrigerator-Freezer—$249.

The complaint alleged that through the use of these and other similar statements, respondents represented:

1. That the higher stated prices, when unaccompanied by any descriptive language, were the prices at which the merchandise advertised was usually and customarily sold at retail by the respondents in the recent regular course of business.

2. That the amount designated as "Mfr's. Sug. List" was the price at which the merchandise advertised was usually and customarily sold at retail in the trade area where the representations were made.

3. That purchasers of the products advertised were afforded savings of the differences between the higher stated prices unaccompanied by a descriptive language or the amount, designated "Mfr's. Sug. List," and the advertised sales prices.

It was further alleged that such statements and representations were false, misleading and deceptive because the higher prices were substantially in excess of what they were represented to be and purchasers were not afforded the savings represented.

The hearing examiner found in part that the use of the manufacturer's suggested retail price with the designation "manufacturer's suggested list" (abbreviated "Mfr's Sug. List") in advertising in juxtaposition with a lower price tends to lead readers of such advertising to believe that the higher price is the price at which the merchandise is usually and customarily sold in the trade area by stores comparable to that of the advertiser when in fact such price is substantially higher than the prices at which stores of the same general character as respondents' in the Washington trade area have usually and customarily sold Westinghouse appliances for cash at retail in the recent regular course of business.

While this holding is essentially sound, we think it unduly restrictive in one minor respect. That is, it should not have been limited only to stores "comparable" to George's. The representation "Mfr's.

Sug. List" creates the impression that there is a usual and customary retail price for the product in the trade area, and that that price is the specified "Mfr's. Sug. List" price. The soundness of this interpretation is settled law. See *Clinton Watch Co.* v. *Federal Trade Commission*, 291 F. 2d 838 (7th Cir. 1961); *Baltimore Luggage Co.* v. *Federal Trade Commission*, 296 F. 2d 608 (4th Cir. 1961). Substantial probative evidence in the record here shows that the products in question were being widely sold in the trade area at a variety of retail prices significantly lower than the higher comparative prices advertised by respondents. It is clear from the record that the instances in which certain retailers sold at or above the manufacturer's suggested prices were exceptions rather than the general rule. The hearing examiner found to this effect and we agree. We therefore reject respondents' contentions as to the sufficiency of the evidence and the conclusions to be drawn therefrom on this question. The initial decision will be modified to conform to our views.

We additionally note that the hearing examiner has not clearly found that respondents represented in their advertising a saving to purchasers in those instances in which the higher price was not designated as manufacturer's suggested list. Furthermore, he has failed to clearly find that the savings represented in all cases would not be realized by purchasers of the products. The initial decision will also be modified to correct these deficiencies.

Misrepresentation as to the usual and customary retail prices of articles and the savings to be obtained over such usual prices by those selling to the ultimate consumer has been challenged and prohibited by the Commission in a number of cases.

In *Macher Watch & Jewelry Co., etc.*, 32 F.T.C. 763 (1941), the Commission prohibited, *inter alia*, representations that respondents' prices represent any substantial discount from the customary retail prices of such merchandise. In *Plaza Luggage & Supply Co., Inc., et al.*, 44 F.T.C. 443 (1948), the Commission in prohibiting price misrepresentation held that respondents' so-called catalog or list prices were not prices at all but arbitrarily fixed amounts which, when reduced by the stated discounts, were approximately the regular and customary prices. Using the term "List Price" or any other term of similar import or meaning to refer to prices not the bona fide regular established selling prices of tires and tubes advertised and offered for sale, as established by the usual and customary sales in the normal course of business was ordered prohibited by the Commission in the following cases: *The Firestone Tire & Rubber Co., et al.*, 33 F.T.C. 282 (1941); *The Goodyear Tire & Rubber Co., et al.*, 33 F.T.C. 298

(1941); *The B. F. Goodrich Company*, 33 F.T.C. 312 (1941); and *Sears, Roebuck & Co.*, 33 F.T.C. 334 (1941). Additional Commission cases involving the use of fictitious prices or price misrepresentation include *Maxwell Distributing Co., Inc., et al.*, 54 F.T.C. 260 (1957); *Hutchinson Chemical Corp., et al.*, 55 F.T.C. 1942 (1959); *Bond Stores, Inc.*, Docket No. 6789 (January 7, 1960); *Arnold Constable Corporation*, Docket No. 7657 (January 12, 1961); *Art National Manufacturers Distributing Co., Inc., et al.*, Docket No. 7286 (May 10, 1961); and many others.

The courts have upheld the Commission orders banning fictitious pricing practices and the making of false savings claims. *L. & C. Mayers Co., Inc.* v. *Federal Trade Commission*, 97 F. 2d 365 (2nd Cir. 1938); *Consumers Home Equipment Co., et al.* v. *Federal Trade Commission*, 164 F. 2d 972 (6th Cir. 1947); *Niresk Industries, Inc., et al.* v. *Federal Trade Commission*, 278 F. 2d 337 (7th Cir. 1960), *cert. denied* 364 U.S. 883 (1960); *Kalwajtys, et al.* v. *Federal Trade Commission*, 237 F. 2d 654 (7th Cir. 1956), *cert. denied* 352 U.S. 1025 (1957); *Progress Tailoring Co.* v. *Federal Trade Commission*, 153 F. 2d 103 (7th Cir. 1946); *Clinton Watch Company, et al.* v. *Federal Trade Commission, supra.*

The use by the respondents in this case of manufacturers' suggested list prices and other higher prices in comparison with lower advertised sales prices were misrepresentations as to usual and customary prices and as to savings afforded purchasers and were unfair acts or practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. See *Clinton Watch Company, et al.* v. *Federal Trade Commission*, 291 F. 2d 838 (7th Cir. 1961), where the court, at page 840, stated that misrepresentation as to the retail value of merchandise by means of an attached fictitious price and deception as to savings afforded by the purchase of the product at a substantially lower price than that indicated thereon constitute unfair methods of competition.

The argument to the effect that the Automobile Information Disclosure Act, Public Law 85–506, 72 Stat. 325 (1958), indicates Congressional approval of the type of practice here engaged in is rejected. See *The Baltimore Luggage Company, et al.* v. *Federal Trade Commission, supra.*

Respondents' appeal is denied. The hearing examiner's initial decision, except as modified to conform to the views of the Commission herein expressed, will be adopted as the decision of the Commission. An appropriate order will be entered.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having rendered its decision denying respondents' appeal and directing that the initial decision, except as modified to conform to the Commission's views therein expressed, be adopted as the decision of the Commission:

It is ordered, That paragraphs 13 and 24 of the findings of fact in the initial decision be, and they hereby are, stricken.

It is further ordered, That paragraphs 25 and 26 of the findings of fact in the initial decision be, and they hereby are, redesignated 24 and 25, respectively, and modified to read as follows:

"24. The use, without designation as such, of the manufacturer's suggested retail price in advertising in juxtaposition with a lower price, represents and tends to lead readers of such advertising to believe that the higher price is the price at which the merchandise is usually and customarily sold by the advertiser in the recent regular course of business and that a saving will be made of the difference between the two prices.

"25. The use with the designation "Mfrs. Sug. List" or "Manufacturer's Suggested List" price in advertising in juxtaposition with a lower price represents and tends to lead readers of such advertising to believe that the higher price is the price at which the merchandise is usually and customarily sold in the Washington trade area and that a saving will be made of the difference between the two prices."

It is further ordered, That a new paragraph, designated 26, be, and it hereby is, inserted in the findings of fact in the initial decision immediately following redesignated paragraph 25, as follows:

26. The "Manufacturer's Suggested List" prices of Westinghouse, including those contained in the advertisements set out in Finding No. 7, whether so designated or not, are substantially higher than the prices at which stores in the Washington trade area have usually and customarily sold the Westinghouse appliances to which they refer. Purchasers of the advertised products were not afforded savings of the differences between the higher stated prices, unaccompanied by any descriptive language, or the amount designated "Mfrs. Sug. List" and the advertised lower sales prices.

It is further ordered, That the first sentence of the first subparagraph of paragraph 3 of the conclusions in the initial decision be, and it hereby is, modified to read as follows:

The use of a manufacturer's suggested retail price, so designated, in advertising in commerce when such price is placed in juxtaposition with a lower price, constitutes an unfair or deceptive act or practice where such suggested retail price is not in fact the price at which the merchandise is usually and customarily sold in the trade area. The use of such a price, without designation, constitutes an unfair or deceptive act or practice where such price is not the usual and customary price at which the advertiser sold in the recent regular course of business.

It is further ordered, That the first sentence of paragraph 5 of the conclusions in the initial decision be, and it hereby is, modified by striking therefrom the word "comparable".

It is further ordered, That paragraph 9 of the conclusions in the initial decision be, and it hereby is, modified by inserting at the end the following new sentence: Respondents, therefore, have also engaged in unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

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

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

IN THE MATTER OF

SHREVEPORT MACARONI MANUFACTURING COMPANY, INC.

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

Docket 7719. Complaint, Jan. 5, 1960—Decision, Jan. 24, 1962

Order requiring a Shreveport, La., manufacturer of a wide variety of noodles, spaghetti, macaroni, and related items sold to retail chains, independent grocery stores and wholesalers, many doing business in neighboring States, to cease discriminating in price in violation of Sec. 2(d) of the Clayton Act by such practices as paying as compensation for advertising its products $1883 in 1958 and $1130 in 1959, to Childs Big Chain, a division of the Kroger Co., and $212 in 1958 and $214 in 1959 to J. Weingarten, Inc., chain stores—in both cases, though making deliveries only to Louisiana locations, doing business across state lines—while not making proportional payments available to competitors of the favored customers.

COMPLAINT

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

PARAGRAPH 1. Respondent, Shreveport Macaroni Manufacturing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana, with its office and principal place of business located at 102 Common Street, Shreveport, La.

PAR. 2. Respondent is now and has been engaged in the business of manufacturing and selling a wide variety of noodles, spaghetti, macaroni and related items to retail chain store organizations, independent grocery stores, and wholesalers in the States of Louisiana, Texas, Arkansas, Mississippi, Tennessee and Oklahoma. Respondent's sales are substantial and exceeded $240,000 during the year 1958.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from the respondent's principal place of business, located in Louisiana, to customers located in other states of the United States.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 5. For example, during the year 1958 respondent contracted to pay and did pay to Childs Big Chain of Shreveport, Louisiana, a division of The Kroger Company, $1,900 as compensation or as an allowance for advertising or other services or facilities furnished by or through Childs Big Chain in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowance was not offered or otherwise made available on proportionally equal terms to all other customers competing with Childs Big Chain in the sale and distribution of products of like grade and quality purchased from respondent.

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PAR. 6. The acts and practices of respondent, as alleged above, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Andrew C. Goodhope for the Commission.

Mr. Robert G. Pugh and *Mr. John L. Schober, Jr.*, of *Pugh & Schober*, of Shreveport, La., for respondent.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint, the respondent is charged with having made discriminatory payments to some of its customers in violation of Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13).

The case of the Commission was put in at a one-day hearing held at Washington, D.C., and subsequent thereto the hearing examiner denied a motion of the respondent to dismiss the complaint. The respondent elected not to put in any testimony and the proceeding was closed for the receipt of evidence.

The hearing examiner has given consideration to the proposed findings filed by the parties hereto, and all findings of fact and conclusions not hereinafter specifically found or concluded are herewith rejected.

Upon consideration of the entire record herein, the hearing examiner makes the following findings of fact:

Respondent, Shreveport Macaroni Manufacturing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Louisiana, with its office and principal place of business located at 104 Common Street, Shreveport, La.

Respondent is now and has been engaged in the business of manufacturing and selling a wide variety of noodles, spaghetti, macaroni and related items to retail chain store organizations, independent grocery stores, and wholesalers in the States of Louisiana, Texas, Arkansas, Mississippi, Tennessee and Oklahoma. Respondent's sales are substantial and exceeded $240,000 during the year 1958. All of its products are sold under the brand name "Banquet."

In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from the respondent's principal place of business, located in Louisiana, to customers located in other states of the United States.

In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in considera-

tion for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

Childs Big Chain, a division of the Kroger Company, operates 33 stores located in 12 cities in Texas, four cities in Louisiana, two cities in Arkansas and Texarkana which it lists as U.S.A. (Texarkana—twin cities on Arkansas-Texas border.) Its general office is located at Shreveport, Louisiana. Effective as of January 1, 1958, and until further notice, respondent, by letter, agreed to pay Childs an advertising allowance of 10¢ a case on certain of its products based on yearly purchases of 9,000 cases or more. The letter recites that "This offer is available to all similiar buyers of Banquet Brand, who purchase 9,000 cases or more annually," but one of respondent's officials testified that respondent did not have any customers, other than Childs, in Shreveport, Lake Charles, Houston, Beaumont, Galveston or any of those areas, who buy 9,000 cases or more a year of their products. Pursuant to the agreement respondent paid to Childs the sum of $996.10 in 1958 and $649.70 in 1959. The record shows that an additional $176.10 is due Childs by reason of purchases made by it from October 1 to December 31, 1959. In 1958, the respondent paid to Childs the sum of $887 for its participation in an anniversary sale conducted by Childs and in 1959 made four payments of $120.00 each, or a total of $480.00, in connection with a "Television Package Deal." Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with Childs Big Chain in the sale and distribution of products of like grade and quality purchased from respondents.

J. Weingarten, Inc., operates a large chain of retail grocery stores located in the States of Texas, Louisiana, and Tennessee and its principal place of business is in Houston, Texas. During the year 1958 respondent paid the total sum of $212.02, and in 1959 the total of $213.52, as compensation or as an allowance for advertising or other services or facilities furnished by or through J. Weingarten, Inc., in connection with its offering for sale or sale of products sold to it by respondent. Such compensation or allowances were not offered or otherwise made available on proportionally equal terms to all other customers competing with J. Weingarten, Inc., in the sale and distribution of products of like grade and quality purchased from respondent.

It is urged by respondent that there is no showing that respondent granted any allowances or benefits in commerce to any customer who was in competition with any other customer.

The complaint is based upon subsection (d) of Section 2 of the Clayton Act, as amended, which reads:

(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities. (U.S.C. Title 15, Sec. 13(d).)

This statute in part requires the person charged with a violation thereof to be one "engaged in commerce" and then such person pay something of value "to or for the benefit of a customer of such person in the *course of such commerce.*" (Italics supplied.)

There is no dispute as to the respondent being engaged in commerce, but the principal issue in this proceeding is whether or not the payments made by the respondent were in the course of such commerce. The hearing examiner finds they were.

The circumstances surrounding the payments to Childs Big Chain which confirm such a conclusion will be discussed. Childs by letter dated March 3, 1958, solicitated the respondent to participate in its "Anniversary Sale" starting May 1, 1958. Suppliers were given the opportunity to select one of five proposals ranging in cost from $76.00 to $887.00. Respondent, at a cost of $887.00, elected to participate in Proposal No. 5 which reads:

Proposal No. 5

This is a special all-out promotion.

On 7 successive days we will run a 4-Column Inch Ad in all 7 major papers May 1st through May 9th. We will feature your product on 4 Radio Spots every day for 7 consecutive days and Feature your Product on one of our major Television Shows. This plus a display in all 33 stores.

Cost of Proposal No. 5—$887.00.

The Secretary-Treasurer of the respondent corporation who was subpenaed by counsel in support of the complaint testified that for the $887.00 they got all that Childs proposed to give them. The "special all-out promotion" included advertisements of respondent's products in seven major newspapers, four of which were in the State of Louisiana, two in Texas, and one in Texarkana. Respondent's products were to be displayed in 33 stores of Childs located in the

States of Texas, Louisiana, and Arkansas. The record does not show the names or location of the radio and television stations on which respondent's products were to be featured.

The invoices and supporting affidavits attached thereto which were submitted by Childs to the respondent for four payments of $120.00 each in the year 1959 in connection with the "Television Package Deal" show that respondent's products were advertised on certain programs sponsored by Childs during the months of September, October, and November 1959 over station KLTV, Channel 7, located at Tyler, Texas.

The conclusion that the payments made by the respondent to J. Weingarten, Inc., were "in the course of such commerce" is established by the following facts in the record.

By letter which originated in Houston, Texas, and was sent to respondent at Shreveport, Louisiana, J. Weingarten, Inc., invited respondent to participate in its 57th Anniversary Sale in which "thirty-nine great big units are taking part." Attached to the letter was a sheet setting forth the different prices for participation in five sections in the States of Texas and Louisiana. Enclosed was a postal card addressed to Weingarten at Houston, Texas, for respondent to indicate its intentions. Respondent sent the postal card noting participation in "Section in Shreveport Times-Journal." J. Weingarten, Inc., from Houston, Texas, submitted its invoice dated March 4, 1958, to respondent at Shreveport, Louisiana, "For Your Participation in Our 57th Anniversary Sale—106.01." Respondent remitted payment on March 22, 1958.

The same general procedures were used in connection with respondent's participation in Weingarten's "20th Texas Products Sale" for which respondent remitted $106.01 on December 1, 1958; the "58th Anniversary Sale" for which it paid $106.01 on April 3, 1959, and the "21st Louisiana Products Sale" in the sum of $107.51 paid on November 10, 1959.

The record includes copies of three invoices issued by respondent at Shreveport, Louisiana, during the month of February 1958 for its products "Sold To: J. Weingarten, Inc., Houston, Texas." for delivery to Weingarten's stores at Shreveport, Louisiana.

The respondent further urges as a defense the "de minimus" rule. The hearing examiner does not regard the payments made by the respondent or the sales made by it in interstate commerce as negligible or inconsequential, and therefore finds there is no merit to such defense.

CONCLUSIONS

The evidence of record supports the following conclusions:

(a) The respondent in 1958 and 1959 paid to two of its customers something of value as compensation or in consideration for services furnished by such customers in connection with their offering for sale or sale of products sold to them by respondent and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of products purchased from respondent.

(b) The acts and practices of respondent as proved are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

ORDER

It is ordered, That respondent, Shreveport Macaroni Manufacturing Company, Inc., a corporation, its officers, employees, agents or representatives, directly or through any corporate or other device in or in connection with the sale in commerce, as "commerce" is defined in the Clayton Act, as amended, of noodle, spaghetti, macaroni or other food products, do forthwith cease and desist from:

Making or contracting to make to or for the benefit of J. Weingarten, Inc., or Childs Big Chain, or any other customer, any payment of anything of value as compensation or in consideration for advertising or other services or facilities furnished by or through such customer in connection with the handling, offering for resale, or resale, of respondent's products unless such payment is made available on proportionally equal terms to all other customers competing in the distribution or resale of such products.

OPINION OF THE COMMISSION

By MacIntyre, *Commissioner:*

Respondent has appealed from the hearing examiner's initial decision of August 23, 1961, in which decision the examiner found that respondent had engaged in practices in violation of Section 2(d) of the Clayton Act, as amended, and ordered the discontinuance of such practices. Respondent raises two main issues: (1) whether the payments made involved interstate commerce within the meaning of Section 2(d), and (2) whether the matter falls within the rule of "*de minimis*".

Shreveport Macaroni Manufacturing Company, Inc., the respondent herein, is a Louisiana Corporation with offices at 102 Common Street, Shreveport, Louisiana. It is engaged in the business of manu-

facturing and selling a wide variety of noodles, spaghetti, macaroni, and related items to retail chain organizations, independent grocery stores, and wholesalers in Louisiana, Texas, Arkansas, Mississippi, Tennessee and Oklahoma. Its sales in 1958 exceeded $240,000.

Payments for advertising or other services or facilities were made by respondents to two chain organizations in 1958 and 1959, as follows: Childs Big Chain, a division of Kroger Company (referred to hereafter as Childs Big Chain), 1958—$1,883.10; 1959—$1,129.70 or more; J. Weingarten, Inc. (referred to hereafter as Weingarten), 1958—$212.02; 1959—$213.52. Such payments or allowances were not made available on proportionally equal terms to all other customers competing with the favored chains in the distribution of respondent's products of like grade and quality.

Respondent is engaged in interstate commerce. It so admits in its answer. This is also clear from the record. Among other things, respondent has made sales and shipped its products to customers located in Texas and other states, and it has contracted and paid for promotions of its products conducted in states other than Louisiana. Accordingly, we need only inquire whether the alleged discriminatory payments made by respondent were made "in the course of such commerce", as required under Section 2(d).

Weingarten, one of the favored chain stores, is engaged in business in three states. In September 1959, it operated 42 retail outlets. The principal offices of this organization are located in Houston, Texas, and while deliveries of respondent's products were made only to its locations in Louisiana, it otherwise did business with respondent from the Houston offices. For instance, the record shows that purchases were invoiced to J. Weingarten, Inc., Houston, Texas, and solicitations to engage in promotions and billings for such services came from Houston.

Childs Big Chain, the other favored customer, even apart from its significant status as a division of the Kroger Company, is a large chain organization extending over a number of states. It has thirty-three stores in Texas, Louisiana and Arkansas. Childs Big Chain received direct delivery of respondent's products only in the State of Louisiana.

Moreover, these large chain store organizations, as favored customers of the respondent, are constantly in direct general competition with respondent's smaller non-favored customers in Louisiana and Texas.

The promotions conducted by these two favored organizations in which respondent participated were generally of an interstate charac-

ter, and in one instance, at least, the promotion, so far as the record shows, was conducted entirely outside of Louisiana. One of the Weingarten promotions for which respondent made payment was its "57th Anniversary Sale" in which thirty-nine units in several states took part. Other Weingarten promotions in which respondent participated included the "20th Texas Products Sale" and the "Texas Louisiana Products Sale". A Childs Big Chain promotion in 1958 in which respondent participated featured newspaper advertisements in seven major newspapers, four of which were in Louisiana, two in Texas and one in Texarkana, a Texas-Arkansas border city. It also included radio spot commercials, a mention on a television show, and a display in 33 stores located in several states. In 1959, respondent participated with Childs Big Chain in a Television Package Deal promotion in which respondent's products were advertised over television station KLTV, Tyler, Texas.

There is no evidence that respondent shipped any of its products to the favored customers directly to locations outside of the State of Louisiana. However, respondent admits that Childs Big Chain shipped or transferred respondent's products out of its warehouses in Shreveport, Louisiana, to Tyler, Texas. The stream of commerce in such a case would extend to the place the goods came to rest in Texas. The promotion of respondent's products for a number of months by Childs Big Chain over KLTV in Tyler, Texas, suggests that considerable traffic in such merchandise occurred across the border of Louisiana into Texas.

Respondent argues that such facts do not prove a violation of Section 2(d). It contends in part that there is no evidence of a disfavored customer in commerce. We find nothing in the authorities cited which would require such a showing in a Section 2(d) matter. Respondent, moreover, can gain no comfort from *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954). In that case, the Court held that the Clayton Act was violated, in a price discrimination matter, where the victim was a local concern and the beneficiary, an interstate business.

In *J. H. Filbert, Inc.*, 54 F.T.C. 359 (1957), the Commission had the same issue before it as it has in this case, and there held that the discriminatory payments were made in the course of interstate commerce in violation of Section 2(d). The fact that the sales to unfavored customers competing in the distribution of the products with the favored customer in the Baltimore area were in intrastate commerce did not bar the finding of a violation. See also *Sun Cosmetic Shoppe* v. *Elizabeth Arden Sales Corp.*, 178 F. 2d 150 (2nd Cir. 1949). There the court, in an opinion by Judge Learned Hand, held that it

was an actionable wrong under Section 2(e) of the Act, to deny the plaintiff, whose business was altogether intrastate, a favor which the defendant granted to "agencies" in other states.

In the instant case, as previously indicated, respondent was engaged in interstate commerce involving a number of states. This commerce included the sale and delivery of its products over state lines and the engaging in transactions and promotions conducted over state lines. Included in such commerce were the goods received by Childs Big Chain in Tyler, Texas, and the promotion by Childs Big Chain in which respondent participated of respondent's goods over Station KLTV in Tyler, Texas. It was in the course of such commerce that respondent made the payments here challenged which were not made available on proportionally equal terms to other customers, specifically those located in the area of Shreveport, Louisiana, competing in the distribution of the goods. Accordingly, respondent's arguments on this question of commerce are rejected.

Respondent also contends that the activities here complained of were so insignificant and negligible that the complaint should be dismissed under the rule of "*de minimis*". Two cases are cited: *Skinner* v. *United States Steel Corporation*, 233 F. 2d 762 (5th Cir. 1956), and *E. Edelmann & Company* v. *Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956). The facts in the former case, involving private litigation, are so different from those herein that it would not constitute a precedent for this case. As for the *Edelmann* case, the court there held it is implicit in the Act (Section 2(a)) that discriminations which are negligible and which at best have a remote effect on competition are not within its prohibitions. To the extent that this case offers a guide to the discriminations in price which are negligible, and the court there upheld the violation, it can provide little help in this Section 2(d) matter.

We believe the examiner's finding that respondent's challenged activities were not negligible is correct. Respondent made a number of payments in the years covered by the complaint to two large chains which totaled substantial amounts, particularly when compared with the purchases made by these chains. Respondent's contention that this matter comes under the "*de minimis*" rule is, therefore, rejected.

Respondent's appeal is denied and the initial decision is adopted as the decision of the Commission. An appropriate order will be entered.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon

briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and adopting the initial decision:

It is ordered, That respondent, Shreveport Macaroni Manufacturing Company, Inc., a corporation, 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.

IN THE MATTER OF

EUSTIS FRUIT COMPANY, INC.

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

Docket C-66. Complaint, Jan. 24, 1962—Decision, Jan. 24, 1962

Consent order requiring a Eustis, Fla., packer of citrus fruit, selling its products both directly to purchasers and through brokers, to cease violating Sec. 2(c) of the Clayton Act by paying a commission or other compensation in lieu thereof to brokers and direct buyers purchasing for their own accounts for resale.

COMPLAINT

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

PARAGRAPH 1. Respondent Eustis Fruit Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 114 Lemon Street, Eustis, Florida, with mailing address as P.O. Box 988, Eustis, Fla.

PAR. 2. Respondent is now and for the past several years has been engaged in the the business of packing, selling and distributing citrus fruit, such as oranges, tangerines and grapefruit, all of which are hereinafter sometimes referred to as citrus fruit or fruit products. Respondent sells and distributes its citrus fruit directly, and in many instances through brokers, to buyers located in various sections of the United States. When brokers are utilized in making sales, respondent pays said brokers for their services a brokerage or commission,

usually at the rate of 5 cents per carton or 10 cents per 1⅗ bushel box or equivalent. Respondent's annual volume of business in the sale and distribution of citrus fruits is substantial.

PAR. 3. In the course and conduct of its business over the past several years, respondent has sold and distributed and is now selling and distributing citrus fruit, in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, to buyers located in the several states of the United States other than the State of Florida in which respondent is located. Respondent transports, or causes such citrus fruit, when sold, to be transported from its place of business or packing plant in the State of Florida, or from other places within said state, to such buyers or to the buyers' customers located in various other states of the United States. Thus there has been, at all times mentioned herein, a continuous course of trade in commerce in citrus fruit across state lines between said respondent and the respective buyers thereof.

PAR. 4. In the course and conduct of its business, as aforesaid, respondent has been and is now making substantial sales of citrus fruit to some, but not all, of its brokers and direct buyers purchasing for their own account for resale, and on a large number of these sales respondent paid, granted or allowed, and is now paying, granting or allowing to these brokers and other direct buyers on their purchases, a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, in connection therewith.

PAR. 5. The acts and practices of respondent in paying, granting or allowing to brokers and direct buyers a commission, brokerage or other compensation, or an allowance or discount in lieu thereof, on their own purchases, as above alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of subsection (c) of Section 2 of the Clayton Act, as amended, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by re-

spondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

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

1. Respondent Eustis Fruit Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 114 Lemon Street, Eustis, Fla., with mailing address as Post Office Box 988, Eustis, Fla.

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

ORDER

It is ordered, That the respondent Eustis Fruit Company, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of citrus fruit, or fruit products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

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, 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 citrus fruit or fruit products to such buyer for his own account.

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

IN THE MATTER OF

ALAMO FRUIT & VEGETABLE CO., INC.

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

Docket C-67. Complaint, Jan. 24, 1962—Decision, Jan. 24, 1962

Consent order requiring an Alamo, Tex., packer of citrus fruit to cease violating Sec. 2(c) of the Clayton Act by paying brokerage or discounts to some brokers and direct buyers on purchases for their own accounts for resale.

COMPLAINT

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

PARAGRAPH 1. Respondent Alamo Fruit & Vegetable Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its offices and principal place of business located in Alamo, Tex., with mailing address as Post Office Box 666, Alamo, Tex.

PAR. 2. Respondent is now and for the past several years has been engaged in the business of packing, selling and distributing citrus fruit, such as oranges, tangerines and grapefruit, all of which are hereinafter referred to as citrus fruit or fruit products. Respondent sells and distributes its citrus fruit through company salesmen, brokers and wholesalers, as well as direct, to customers located in many sections of the United States. When brokers are utilized in making sales for it, respondent pays them for their services a brokerage or commission, usually at the rate of 5 cents per carton or 10 cents per 1⅗ bushel box, or equivalent. Respondent's annual volume of business in the sale and distribution of citrus fruit is substantial.

PAR. 3. In the course and conduct of its business over the past several years, respondent has sold and distributed and is now selling and distributing its citrus fruit in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, to buyers located in the several states of the United States other than the State of Texas in which respondent is located. Respondent transports, or causes such citrus fruit, when sold, to be transported from its place of business or packing plant in the State of Texas, or from other places within the State, to such buyers or to the buyers' customers located in various other states of the United States. Thus there has been, at all times mentioned herein, a continuous course of trade in commerce in such citrus fruit across state lines between said respondent and the respective buyers of such fruit.

PAR. 4. In the course and conduct of its business as aforesaid, respondent has been and is now making substantial sales of citrus fruit to some, but not all, of its brokers and direct buyers purchasing for their own account for resale, and on a large number of these sales respondent paid, granted or allowed, and is now paying, granting or allowing to these brokers and other direct buyers on their purchases,

a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, in connection therewith.

PAR. 5. The acts and practices of respondent in paying, granting or allowing to brokers and direct buyers a commission, brokerage or other compensation, or an allowance or discount in lieu thereof, on their own purchases, as above alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C. Title 15, Sec. 13).

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of subsection (c) of Section 2 of the Clayton Act, as amended, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent Alamo Fruit & Vegetable Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas with its offices and principal place of business located in Alamo, Tex., with mailing address as Post Office Box 666, Alamo, Tex.

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

ORDER

It is ordered, That the respondent Alamo Fruit & Vegetable Co., Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of citrus fruit, or fruit products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

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, 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 citrus fruit or fruit products to such buyer for his own account.

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

IN THE MATTER OF

THE NATIONAL SUGAR REFINING COMPANY

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

Docket 6852. Complaint, July 25, 1957—Decision, Feb. 1, 1962

Consent order requiring the nation's second largest domestic sugar refiner to sell within six months and so as to restore the former competitive standing, the assets including refinery and sugar mill at Reserve, La., of the seventh largest—fifth largest east of the Mississippi River—refiner, which it acquired in June 1956 for approximately $6 million for the fixed assets and about $8 million for accounts receivable, inventories, and manufacturing supplies.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated and is now violating the provisions of Section 7 of the Clayton Act (15 U.S.C. Title 15, Sec. 18), as amended, and approved December 29, 1950, hereby issues its complaint, charging as follows:

PARAGRAPH 1. Respondent, The National Sugar Refining Co. (hereinafter sometimes referred to as "respondent National"), is a corporation doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 100 Wall Street, New York, N.Y.

The present company was organized under the laws of the State of New Jersey on June 2, 1900, under the corporate name of The National Sugar Refining Company of New Jersey. In 1939 its corporate name was changed to its present form.

Upon its organization the respondent National acquired the stock of the New York Sugar Refining Company, Mollenhauer Sugar Re-