tive, employee, or agent of, or otherwise, directly or indirectly, connected with, or under the control or influence of, respondent.

It is further ordered, That, in said divestiture, respondent shall not sell or transfer, directly or indirectly, any of the stock, assets, properties, rights or privileges, tangible or intangible, to any corporation, or to anyone, who, at the time of said divestiture, is an officer, director, employee or agent of such corporation, which, at the time of such sale or transfer, is a substantial factor in the dairy products industry, if the effect of such sale or transfer might be to substantially lessen competition or tend to create a monopoly or oligopoly in any one of the said dairy products, in any section of the country.

It is further ordered, That the charges contained in paragraph 7 of the complaint be, and they hereby are, dismissed.

It is further ordered, That respondent, Foremost Dairies, Inc., shall, within three months from the date of service upon it of this order, submit in writing for the consideration and approval of the Federal Trade Commission, its plan for carrying out the provisions of this order, such plan to include the date within which full compliance may be effected.

It is further ordered, That the hearing examiner's initial decision, as modified and supplemented by the accompanying opinion, be, and it hereby is, adopted as the decision of the Commission.

Commissioner Elman dissenting in part and Commissioner MacIntyre not participating.

IN THE MATTER OF

SIMPLIFIED TAX RECORDS, INC., ET AL.

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

Docket 8361. Complaint, Apr. 17, 1961—Decision, May 8, 1962

Consent order requiring a New York City seller of business record-keeping systems, including its "Master Edition", "DeLuxe Edition", and "Standard Edition" systems, to franchised distributors to sell to small business men—who were then entitled to receive various consultation and advisory services as well as sets of forms for recording receipts, expenditures, assets, and other data and, in the case of those purchasing the "Master" and "DeLuxe" systems, to have their tax returns prepared by the company—to cease representing falsely in newspaper advertising and other promotional material the income and profits that purchasers of its distributorships would receive, as well as making a variety of other deceptive claims, 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 Simplified Tax Records, Inc., a corporation, and William Frankel, also known as William B. Foster and W. F. Foster, 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 Simplified Tax Records, Inc., is a New York corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 170 Varick Street in the city of New York, State of New York.

Respondent William Frankel, also known as William B. Foster and as W. F. Foster, 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.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the sale and distribution of products consisting of business recordkeeping systems to distributors who re-sell them to owners and operators of small businesses. The said systems, designated by respondents as "Master Edition", "DeLuxe Edition" and "Standard Edition", when purchased from distributors by owners and operators of small businesses, variously entitle the businessmen purchasers thereof to sets of forms used for the recording of their receipts and expenditures and equipment, property, tax and payroll records.

Purchase of respondents' "Master Edition" of forms entitles the businessman to receive a quantity of forms sufficient to last him one year and entitles him, at the end of each year on submission of properly prepared business data summaries to respondents, to preparation of his tax returns by respondents. Additionally, the businessman may avail himself of a "business consultation service" during the year he uses respondents' "Master Edition". Respondents' distributors sell respondents' "Master Edition" and services to businessmen for $120.00.

Purchase of respondents' "DeLuxe Edition" of forms entitles the businessman to receive a quantity of forms sufficient to last him two years and entitles him, at the end of each year on submission of

properly prepared business data summaries to respondents, to preparation of his tax returns by respondents. Additionally, the businessman may avail himself of a consultation and advisory service on tax matters during the two years he uses respondents' "DeLuxe Edition". Respondents' distributors sell respondents' two-year "DeLuxe Edition" and services to businessmen for $99.50.

Purchase of respondents' "Standard Edition" of forms entitles the businessman to receive a quantity of forms sufficient to last him two years and entitles him to use of respondents' consultation and advisory service on tax matters during the two years he uses respondents' "Standard Edition," but does not entitle him to preparation of any tax returns by respondents. Respondents' distributors sell respondents' two-year "Standard Edition" and services to businessmen for $79.50.

PAR. 3. In the course and conduct of their business, as aforesaid, respondents cause, and have caused, their products, when sold, to be transported from their place of business in the State of New York to distributors and purchasers thereof located in various other states of the United States. Respondents maintain, and at all times mentioned herein have 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 their business as aforesaid, respondents have been and are in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of products and services of the same general kind and nature as those sold by respondents.

PAR. 5. In the course and conduct of their business as aforesaid, and for the purpose of inducing the sale of their products and services, respondents have engaged, and now are engaged, in the sale of territorial distributorships to persons desirous of being respondents' distributors in the sale of respondents' products and services to businessmen. In furtherance of the course and conduct of their business as aforesaid, respondents have made various statements and representations to prospective distributors concerning the nature and value of distributorships offered for sale and methods of conducting their said business. Such statements and representations have been and are made by means of advertisements published in The New York Times, The Wall Street Journal, The Baltimore Sun, The Richmond Times-Dispatch, The Atlanta Constitution, The Cleveland Plain Dealer, The Detroit News, The Chicago Tribune, The Omaha World Herald, The St. Louis Post Dispatch, The Dallas News, The Rocky Mountain News,

The Salt Lake City Tribune, the Seattle Post and other newspapers of general circulation throughout the country too numerous to set out herein, all of which newspapers are circulated in areas where respondents do business, and by means of letters, brochures and other promotional and other advertising literature mailed and circulated throughout the country to prospective distributors.

Among and typical, and illustrative, but not all-inclusive, of the statements and representations made, circulated and disseminated to prospective distributors as aforesaid are the following:

1. (By newspaper advertisements):

IF YOU ARE CONSIDERING A BUSINESS OF YOUR OWN AND ARE seeking

- real financial security
- a business of your own with a good steady, high income
- an opportunity to recoup your investment within 6 to 8 months
- a successful business established over 25 years
- a steady renewal business that grows year after year
- freedom from traveling, overhead, labor, credit or warehousing headaches
- the prestige of bank, trade association, and user endorsement
- a business that requires no previous experience

* * * then here is a highly respected, essential business that should provide you with everything you want, including an unusually high income starting the very first year.

If you can qualify with selling, executive, or business experience, can devote full time to your business, and make an inventory investment of $9,500 to $14,500 depending on territory, you will be eligible to own outright a prime, highly desirable franchise in a choice area.

We will give you thorough field and home office training at our expense, and assure your success by continuing support.

Please consider this carefully before applying: we want only substantial, dedicated individuals seeking a lifetime career opportunity. Write stating background, address, phone number, and territory preference. If you qualify, a personal interview will be arranged with the company executive covering your territory.

Choice territories available in Milwaukee, Wis. (first time in 5 years); Peoria, Springfield, Ill.; Wichita, Kans.; Cleveland, Toledo, Columbus, Ohio; Detroit, Mich. areas, and various other sections of Illinois, Indiana, Iowa, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, No. and So. Dakota, Ohio, Wisconsin and Wyoming. Some with a substantial number of repeat active accounts.

Write att. President, Box CL-209, The Wall Street Journal. June 7, 1960.

If You Had Your Pick
Of Any Business . . .
Wouldn't It Be One That:

REQUIRED no experience, no complicated details, no traveling.

EARNED an excellent income at all times regardless of economic conditions.

HAD a repeat business feature that provided a semi-retirement income.

WAS dignified and highly endorsed by government and industry, and established over 25 years.

SUPPLIED a very necessary product and service . . . vital to its users year after year.

INCLUDED proven successful sales and business aids plus company-paid home-office and field training.

GAVE you an available exclusive territory.

MADE no physical demands upon you.

HERE IS A VALUABLE
BUSINESS OF YOUR OWN
That Meets Each and Every
One of These Requirements
IN ATLANTA AND
SURROUNDING AREA

* * * AND all it requires is ambition with an investment of $9,500 to $14,500 (normally recouped within 6 to 8 months). Find out more about this unusual full-time business that has everything you could ask for. Write us today, with a brief resume about yourself, including phone number.

WRITE BB, 269, Journal-Constitution. January 10, 1960.

A BUSINESS OF YOUR OWN With Unusual Repeat Features . . .

We have a highly respected essential business that should provide you with unusually high income the first year. A business that can earn a semi-retirement income in renewals alone in 2 to 3 years. Not seasonal, not dependent on economic conditions. Endorsed by banks, trade associations, thousands of users. No overhead, warehousing, credit or labor costs. A trouble-free business that yields exceptional income year after year. Established over 25 years.

We give you the benefit of a thorough field training as well as training at our home office (expenses paid by us) and keep a continuing supervisory interest in your operation.

If you have a spark of salesmanship and/or executive ability an investment of $9,500 to $14,500 (usually recouped in 6 to 8 months) will place you in a position to own outright a prime highly desirable franchise in a choice area. PLEASE CONSIDER THIS CAREFULLY BEFORE APPLYING: This is no gimmick or gadget operation, but a dignified business, highly endorsed. We want only dedicated individuals who can and are willing to devote full time to the success of their franchises. While stating background, give address and phone number and territory preference. If qualified, a personal interview at our home office (expenses paid by us) will be arranged.

Choice territories available in Dallas, San Antonio, Austin, Tyler and other choice areas in Texas, Oklahoma, Louisiana, several with a substantial number of repeat active accounts. Write Box 114-C, Dallas News. January 31, 1960.

Let 300 Successful
Businessmen Tell You
How You, Too, Can Own
This High-Income
Business

From Maine to California, for over 25 years, owners of this successful business have been earning five-figure incomes—plus enjoying additional semi-retirement income. We'll be glad to have you talk to them direct—let them be the ones to explain to you how you may join their ranks as an independent, respected, prosperous business distributor.

None of them had previous experience in this field, but our company-paid home office and field training and continuing support has assured their success. The business is unaffected by economic conditions and has the enthusiastic approval of government and industry. It has the further advantages of requiring no labor or overhead costs, and no physical exertion or traveling. All you need is your executive or sales ability, and your full time devotion to its success.

Your investment cost is $9,500, depending on territory. This may be recouped within 6 to 8 months. * * * Rocky Mountain News, March 13, 1960.

Here Is An Exceptional Business Opportunity

This opportunity is for men of courage, foresight, diligence and intelligence in one of the most profitable and fastest growing fields in America—with net profit the first year usually exceeding investment. A trouble-free business that also yields exceptional income year after year from repeat business alone. No travelling, warehousing or labor costs. * * *
The Wall Street Journal, May 26, 1959.

VALUABLE
DISTRIBUTORSHIP
CHOICE AREAS
AVAILABLE

JACKSONVILLE & SURROUNDING AREAS

Available to high calibre men with unquestionable integrity to handle products and service indorsed by banks, credit men's associations, C of C's throughout nation. Largest company of its kind in the world. Established over 24 years. Those accepted will own an exclusive territory and become part of our nationwide organization. Continued access to our many departments and staff. You avoid all overhead. Applicants must be able to make cash investment of $9,500 covered by inventory and be prepared to start 10 day training period within 60 days. Full time basis only. Not suitable to add to other lines. Five figure earnings first year. If you are serious about seeking a fine highly productive headache-free repeat business of your own, write giving as much information as possible about yourself. Include phone number. You will be granted interview by a member of our executive staff. Write, Attention President, Box A–38, Times-Union & Journal.

The (Jacksonville) Florida Times-Union, October 4, 1959.

* * * over 300 Distributors in 49 states. * * *

Richmond Times-Dispatch, March 27, 1960.

* * * PLEASE CONSIDER THIS CAREFULLY BEFORE APPLYING: This is no gimmick or gadget operation, but a dignified business, highly endorsed, with over 300 successful distributors nationally * * *.

The Wall Street Journal, April 19, 1960.

CHOICE AREAS
Available
MEMPHIS

* * *.

The Memphis Commercial Appeal, September 13, 1959.

* * * earn a substantial, ever-increasing income, year after year.

* * *

Repeat business * * * assures a valuable equity growth and builds a semi-retirement income in as few as 2 to 3 years.

The Wall Street Journal, June 14, 1960.

* * * You can realize high earnings the very first year and enjoy a greatly increased semi-retirement income from renewals alone within 2 years. * * *

The New York Times, September 13, 1959.

* * * recommended by * * * government agencies.

The Wall Street Journal, January 21, 1960.

2. (By form letter):

* * * Tax preparation and business advisory services are performed at the Home Office. Our Distributors function is to sell Systems * * *.

Exclusive Territory protected by a negotiable Sales Franchise agreement. * * * Every territory allocated is large enough to permit the Distributor to profit from the efforts of one or more sub-distributors working under him. * * *

* * * this is a valuable permanent business affiliation * * *.

3. (By personal letter):

* * * It has been our experience with all men that their investment had been recovered in approximately six to seven months. * * *

4. (By brochure):

SIMPLIFIED TAX RECORDS
offers its subscribers a
guaranteed comprehensive
program, called the
MASTER PLAN
A TROUBLE-FREE BUSINESS

No * * * financing, no accounts receivable, no delinquent credit * * *.

IT'S NON-COMPETITIVE * * * You have no competition.

Once you have made the sale and introduced the subscriber to our services, practically all your work is ended. You are free to spend time building new business. Everything else is taken care of by the PARENT ORGANIZATION!

* * *

WHEN YOU MAKE A SALE, YOU SIMPLY SHOW THE SUBSCRIBER HOW TO USE THE SYSTEM . . .

ACTUAL TAX PREPARATION AND TAX QUESTIONS ARE HANDLED DIRECT, FROM THE PARENT COMPANY . . . * * *.

THE GROWTH POTENTIAL
of a Simplified distributorship

A CONSTANTLY EXPANDING BUSINESS

In a few years it can start working "for you" and give you a lucrative ever-increasing income. The growth possibilities are extraordinary. You establish for yourself hundreds of friendly subscribers, who create for you a permanent, ever-increasing, steady income through the renewal of our System Service every twelve months. It is a constantly increasing income, since you are continually adding new Subscribers, who in turn keep renewing.

* * *

SCHEDULE OF COST AND POTENTIAL PROFIT

(Based on new Simplified MASTER PLAN program)

These figures are based on a conservative 50% renewals. However many of our Distributors report up to 82% renewals.

Distributor's Profit From Personal Sales for each subscription---------- $58

Distributor's Override from Sub-Distributors for each subscription---------- $15

Cost to subscriber for 1 year---------- $120

	From Personal Sales		From Sub-Distributor Over-Ride for each sub-distributor working for you		Your Yearly Total Income
First year	200 new sales @ $58 profit ea.	$11,600	200 new sales @ $15 each over-ride	$3,000	$14,600
Second year	200 new sales @ $58	$11,600	200 new sales @ $15	$3,000	
	100 renewals @ $58	5,800	100 renewals @ $15	1,500	
	TOTAL FROM PERSONAL SALES	$17,400	TOTAL FROM OVER-RIDE	$4,500	$21,900
Third year	200 new sales @ $58	$11,600	200 new sales @ $15	$3,000	
	100 renewals (1st Yr.) @ $58	5,800	100 renewals (1st Yr.) @ $15	1,500	
	100 renewals (2nd Yr.) @ $58	5,800	100 renewals (2nd Yr.) @ $15	1,500	
	TOTAL FROM PERSONAL SALES	$23,200	TOTAL FROM PERSONAL SALES	$6,000	$29,200

SECURITY

You are the boss * * * free from the fear of being discharged because of employers' whims, relatives, cut-downs, personality conflicts or lack of appreciation of your efforts. * * *

In response to inquiries induced by such advertisements, letters and literature, respondents or their employees, agents or representatives call upon members of the public initiating such inquiries, and then make oral representations repetitive or elaborative of and in addition to those contained in the aforementioned printed materials.

PAR. 6. Through the use of the aforesaid statements and representations set out and referred to in paragraph 5, above, respondents have represented, directly or by implication to the purchasing public:

1. That they were selling valuable distributorships which enabled the purchasers thereof to earn a substantial income that increased yearly.

2. That respondents had over three hundred (300) successful distributors.

3. That the sale of distributorships by respondents conferred outright ownership thereof on the purchasing distributors and created permanent business affiliations between respondents and distributors.

4. That the purchase price of distributorships would be recovered by distributors in six (6) to eight (8) months.

5. That protection against loss of the purchase price or any part of the purchase price of distributorships was provided by the inventory of record-keeping systems furnished with said distributorships.

6. That no less than ten thousand dollars ($10,000) would be earned by the purchasers of distributorships in the first year of their operation, and that the typical net profits earned in the first year by respondents' other distributors had exceeded the amount of the distributorship purchase prices.

7. That the potential of sales of respondents' record-keeping systems and services by franchised distributors to purchasers thereof warranted such distributors' employing subdistributors; that the additional net income derived by each of such distributors from such subdistributor sales would likely be three thousand dollars ($3,000) the first year of operation, four thousand five hundred dollars ($4,500) the second year, and six thousand dollars ($6,000) the third year; and that the total net profit to the distributor, when combining the profit made through his own sales efforts with that resulting from sub-distributor sales, would likely amount to fourteen thousand, six hundred dollars ($14,600) in the first year of operation, twenty-one thousand, nine hundred dollars ($21,900) the second year, and twenty-nine thousand, two hundred dollars ($29,200) the third year.

8. That distributors were assured of the growth of valuable equities in their businesses, which would provide semi-retirement income in two (2) to three (3) years.

9. That distributors could devote their time exclusively to making sales, with respondents attending to all other phases of operations.

10. That distributors incurred no costs in connection with the extension of credit to purchasers of respondents' record-keeping systems and services.

11. That the sale of respondents' systems and services entailed no financing and no holding of accounts receivable by distributors.

12. That distributors would encounter no competition in the sale of respondents' record-keeping systems and services.

13. That the successful operation of distributorships required no travel on the part of distributors.

14. That respondents' record-keeping systems and services had the enthusiastic approval of, and were highly endorsed and recommended by the federal and state governments.

PAR. 7. The aforesaid statements and representations were and are false, misleading and deceptive. In truth and in fact:

1. The distributorships which respondents have sold have been of little value to many purchasers thereof, the income earned therefrom by a great many distributors being insubstantial and in many instances insignificant in comparison with the distributors' investments.

and many of the distributorships sold failed to provide incomes to purchasers thereof that increased yearly.

2. Respondents did not and do not have as many as three hundred (300) distributors, and all of the actual number of distributors have not been and are not successful in selling respondents' record-keeping systems and services.

3. By the terms of the contracts negotiated by respondents and their distributors, respondents could, and can, absolutely cancel and terminate the distributorship agreements with the purchasers thereof seven (7) months after the beginning dates of the said distributorships for failure to meet sales quotas contractually required, and in any event all distributorships sold were terminated or will terminate two (2) years after said beginning dates subject to renewal for additional two (2) year periods on respondents' own terms. The business affiliations between respondents and their distributors have been and are of an impermanent nature, only a small minority of all current distributors having maintained affiliation with respondents for longer than three (3) years.

4. Many purchasers of respondents' distributorships have not recovered the purchase price of their distributorships in six (6) to eight (8) months, or in any longer period of time that they performed as distributors for respondents.

5. Distributors of respondents' systems have not been and are not now protected from the loss of substantial proportions of the purchase prices paid to respondents in the event distributors should be unsuccessful in selling all of the inventory of systems furnished with distributorships, or in the event that because of illness or for other reason distributors should wish to terminate their relationships with respondents, or in the event that respondents should elect, as they have numerous times, to cancel distributorships before inventories were sold out. It has been and is now respondents' practice, in the occurrence of such events, to buy back systems inventories at prices that have not and will not equal the amounts paid by distributors for their distributorships.

6. Ten thousand dollars ($10,000) has not been earned in the first year of their operations by distributors of respondents' systems, and such an amount is not typical of first year earnings by distributors. Seldom, if at all in recent years, has any distributor of respondents' systems earned net profits in the first year of his operations in an amount which exceeded the amount paid by him to respondents for his distributorship.

7. Sales records established by numerous distributors demonstrate that the claimed potential for employment of sub-distributors was not warranted, and many distributors have found and are now finding that the employment of sub-distributors was and is economically not feasible; distributors' earnings have not been and are not typically augmented by income derived from sub-distributor sales in the amounts of three thousand dollars ($3,000) in the first year of operation, four thousand five hundred dollars ($4,500) in the second year, and six thousand dollars ($6,000) in the third year; and seldom, if ever, has any distributor earned net profits, through his own efforts combined with those of subdistributors, which amounted to fourteen thousand, six hundred dollars ($14,600) in the first year of operation, twenty-one thousand, nine hundred dollars ($21,900) the second year, and twenty-nine thousand, two hundred dollars ($29,200) the third year.

8. Distributors have not been and are not now assured of the growth if equities which would provide semi-retirement income in two (2) to three (3) years. In many cases where distributorships have been cancelled by respondents, respondents required distributors to sign releases discharging respondents from all claims the said distributors might have had against respondents.

9. Distributors have been and are now required as part of their responsibilities as distributors to perform many services of a time-consuming nature for their customers to whom they have sold respondents' systems and services, and such distributors as a result thereof have been and now are unable to devote their time exclusively to attempting to make sales.

10. Many of respondents' systems and services have been and now are sold by distributors to purchasers thereof on an installment plan of purchase. For distributors to utilize such plan a cost has been and is imposed on them as the result of an arrangement made by respondents with a financing agency which assumes the responsibility of making collections from distributors' customers.

11. In order to make sales of some types of respondents' record-keeping systems, many distributors have found that it has been necessary for them to finance such sales by extending credit to customers, resulting in distributors' holding accounts receivable amounting, in some instances, to thousands of dollars.

12. Distributors have encountered and now encounter competition in the sale of respondents' systems and services, from dealers in similar systems and services, and from bookkeepers and accountants located in the communities where distributors have attempted to make sales.

13. Distributorships may, and often do, embrace an area of several counties. Sales to prospective customers cannot be accomplished under such circumstances without travel on the part of distributors.

14. Respondents' systems and services have not been and are not now approved, endorsed or recommended by the federal or state governments or any agencies thereof.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead prospective distributors into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial numbers of respondents' distributorships and systems. As a consequence thereof, substantial trade in commerce has been, and is being, 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.

DECISION AND ORDER

This matter having come on to be heard by the Commission upon a record consisting of the Commission's complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and an agreement by and between respondent Simplified Tax Records, Inc., a corporation, and its attorney, and counsel supporting the complaint, which agreement contains an order to cease and desist, an admission by said respondent of all the jurisdictional facts alleged in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission that it has violated the law as alleged in the complaint, and waivers and provisions as required by the Commission's rules; and which agreement, among other things, further provides for dismissal of this proceeding as to respondent William Frankel, deceased; and

The Commission having considered said agreement and the affidavits made a part of such agreement; and the Commission having determined that the agreement provides an adequate basis for appropriate disposition of the proceeding, the agreement is hereby accepted, the

following jurisdictional findings are made, and the following order is entered:

1. Respondent Simplified Tax Records, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 170 Varick Street, in the city of New York, State of New York.

2. The Federal Trade Commission has jurisdiction herein and this proceeding is in the public interest.

ORDER

It is ordered, That respondent Simplified Tax Records, Inc., a corporation, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of business record-keeping systems in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist representing, directly or indirectly, to prospective distributors of such systems:

1. That purchasers of respondent's distributorships are assured of earning substantial incomes that will increase yearly.

2. That respondent has any specified number of distributors not in accordance with fact, or that any number of distributors are successful not in accordance with fact.

3. That the sale of distributorships confers permanent ownership thereof on the purchasers or that a permanent business affiliation between the parties is created by such sale, without disclosing that the permanency of such ownership or affiliation is dependent on purchasers' complying with requirements set out in franchise agreements.

4. That distributors are assured of recovering the purchase price of distributorships in six (6) months, eight (8) months, or any other specified period of time.

5. That the net profit of a new distributor in his first year of operation will exceed the amount paid by him to respondent for his distributorship, or that any distributor is assured of earnings amounting to ten thousand dollars ($10,000) in his first year of operation.

6. (a) That distributors customarily or typically employ subdistributors.

(b) That distributors employing sub-distributors are assured of deriving additional net income in the amount of three thousand dollars ($3,000) during the first year of operation, four thousand five

hundred dollars ($4,500) the second year, or six thousand dollars ($6,000) the third year.

(c) That distributors employing sub-distributors will realize a combined profit through their own sales efforts with that resulting from sub-distributors' sales of fourteen thousand six hundred dollars ($14,600) in the first year of operation, twenty-one thousand nine hundred dollars ($21,900) the second year, or twenty-nine thousand two hundred dollars ($29,200) the third year.

7. That profits or earnings to be realized by distributors or to be derived by distributors from sales by sub-distributors will be any amounts in excess of the average earnings or profits in fact being realized or derived by all of respondent's distributors similarly engaged in selling respondent's systems and services; provided, however, that nothing herein shall prohibit the respondent from representing that qualified persons may, during given periods of time, realize or derive earnings or net profits at levels or in amounts exceeding those typically realized or derived by respondent's distributors, if such higher stated levels or amounts in fact have been realized or derived by distributors of respondent in the regular course of business during similar periods of time, and respondent clearly and conspicuously discloses in immediate conjunction therewith the average earnings or profits in fact being realized or derived by all of respondent's distributors similarly engaged in selling respondent's systems and services.

8. That distributors are assured of the growth of valuable equities in their distributorships, or that semi-retirement income will be provided by said distributorships in two (2) to three (3) years.

9. That distributors will be able to devote their time exclusively to making sales.

10. That distributors incur no costs in connection with the extension of credit to purchasers of respondent's systems and services.

11. That the sale of respondent's systems and services will entail no financing or holding of accounts receivable by distributors.

12. That distributors will encounter no competition in the sale of respondent's systems and services; provided, however, that nothing herein shall prohibit respondent from representing that it is the only one in its field which furnishes a business advisory service to customers, if such be the fact.

13. That the operation of distributorships will require no travel on the part of distributors; provided, however, that nothing herein shall prohibit respondent from representing that no overnight travel is required.

14. That respondent's systems or services are approved, endorsed or recommended by the federal government or a state government, or any agency thereof; provided, however, that nothing herein shall prohibit respondent from stating, when such is the fact, that employees of state governments or agencies thereof have approved, endorsed or recommended the same in their individual capacities.

It is further ordered, That the allegations of the complaint insofar as they relate to respondent William Frankel, deceased, be, and the same hereby are, dismissed.

It is further ordered, That paragraph six (5) of the complaint be, and the same hereby is, dismissed.

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

IN THE MATTER OF

DORMEYER CORPORATION ET AL.

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

Docket 8457. Complaint, Jan. 5, 1962—Decision, May 8, 1962

Consent order requiring a Chicago manufacturer of household electrical appliances and its advertising agency to cease representing falsely, in trade journals of national circulation, that Dormeyer products had been featured as gifts or shown on each of 12 "give-away" shows named, and that arrangements had been made to continue such featuring and for respondent manufacturer to sponsor the shows.

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 Dormeyer Corporation, a corporation, and North Advertising Incorporated, a corporation, hereinafter referred to as respondents, have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Dormeyer Corporation is a corporation organized, existing and doing business under and by virtue of the

laws of the State of Illinois, with its principal office and place of business located at 700 North Kingsbury Avenue, Chicago 10, Ill.

Respondent North Advertising Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at Merchandise Mart, Chicago 54, Ill.

PAR. 2. Respondent Dormeyer Corporation is now, and for some time last past has been engaged in the manufacture, advertising, offering for sale, sale and distribution of household electrical appliances to distributors, and to retailers for resale to the public.

Respondent North Advertising Incorporated is an advertising agency and is now and for some time past has been the advertising representative of respondent Dormeyer Corporation. As such it prepares and places, and for some time last past has prepared and placed advertising material used by Dormeyer Corporation, including that herinafter referred to, to promote the sale of Dormeyer Corporation's home electrical appliances.

PAR. 3. In the course and conduct of its business, respondent Dormeyer Corporation now causes, and for some time last past has caused, its said home electrical appliances when sold, to be shipped from its factory or plant in the State of Illinois to purchasers thereof located in various other states of the United States and in the District of Columbia, and maintains, and at all times mentioned herein 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 conduct of its business at all times mentioned herein, respondent Dormeyer Corporation has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of household electrical appliances.

In the conduct of its business at all times mentioned herein, respondent North Advertising Incorporated has been in substantial competition in commerce, with other corporations, firms and individuals in the advertising business.

The respondents have acted in cooperation and conjunction with each other in the performance of the acts and practices herein set forth.

PAR. 5. In the course and conduct of its business and for the purpose of inducing the purchase of its household electrical appliances in commerce, respondent Dormeyer Corporation has advertised said products

in trade magazines of national circulation. Among and typical of such advertisements is the following:

DORMEYER'S BIG TV PUSH

(Pictures and names of the masters of ceremonies of twelve daytime TV network "give-away" shows, including the names of the shows and the network over which each is broadcast.)

As seen on all 12 Daytime Quiz Shows—on NBC–TV, CBS–TV, ABC–TV.

SELLS DORMEYER'S HOT NEW LINE

(Pictures of twelve individual electrical appliances with the name and an identification number of each.

More than 350 million TV impressions during the 7-biggest selling weeks before Christmas! Stock up now! Call your Dormeyer distributor today!

PAR. 6. By means of the aforesaid advertisements and the statements and representations contained therein, respondents have represented, directly or by implication, that:

(1) Dormeyer Corporation's products have been featured as gifts or shown on each of the said twelve "give-away" shows named in the advertisement.

(2) Arrangements have been made whereby Dormeyer Corporation's products will be featured as gifts or shown on each of the said twelve "give-away" shows, or whereby Dormeyer Corporation will sponsor said shows.

PAR. 7. The aforesaid advertisements, and the statements and representations contained therein, were, and are, false, misleading and deceptive. In truth and in fact,

(1) Dormeyer Corporation's products have not been featured as gifts or shown on each of the said twelve "give-away" shows named in the advertisement.

(2) Arrangements have not been made whereby Dormeyer Corporation's products will be featured as gifts or be shown on each of the said twelve "give-away" shows, nor have arrangements been made whereby Dormeyer Corporation will sponsor said shows.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive representations has had, and now has, the capacity and tendency to mislead distributors and retailers of household electrical appliances into the erroneous and mistaken belief that the said representations were, and are, true and into the purchase of substantial quantities of respondent Dormeyer Corporation's products by reason of said erroneous and mistaken beliefs.

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 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

This matter having come on to be heard by the Commission upon a record consisting of the Commission's complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and an agreement by and between respondents and counsel supporting the complaint, which agreement contains an order to cease and desist, an admission by the respondents of all the jurisdictional facts alleged 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 they have violated the law as alleged in the complaint, and waivers and provisions as required by the Commission's rules; and

The Commission having considered the agreement and order contained therein and being of the opinion that the agreement provides an adequate basis for appropriate disposition of the proceeding, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent Dormeyer Corporation 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 700 North Kingsbury Avenue, Chicago 10, Ill.

Respondent North Advertising Incorporated 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 Merchandise Mart, Chicago, Ill.

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 respondent Dormeyer Corporation, a corporation, its successors and assigns, and respondent North Advertising Incorporated, a corporation, and their officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of household electrical appliances, or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

1. Representing that such household electrical appliances or any other products have been exhibited, featured, or advertised to any extent, or in any manner, which is contrary to the fact.

2. Representing that any such electrical household appliances or any other products will be advertised or promoted to any extent or in any specified manner and then failing to advertise or promote such products to the extent or in the manner represented.

3. Falsely representing that contracts have been entered into or arrangements or commitments made for the sponsorship of any radio or television show or program, or whereby any such electrical household appliances or any other products will be exhibited, featured or advertised on any radio or television show or program or in any other specified manner.

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

EDINBURG CITRUS ASSOCIATION

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

Docket C-131. Complaint, May 8, 1962—Decision, May 8, 1962

Consent order requiring an Edinburg, Tex., packer of citrus fruit to cease violating Sec. 2(c) of the Clayton Act by paying commissions to its brokers and other direct buyers purchasing for their own account 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 Edinburg Citrus Association is a corporation organized, existing and doing business under and by virtue of the laws of the state of Texas, with its office and principal place of business located in Edinburg, Tex., with mailing address as P.O. Box 127, Edinburg, 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 sometimes referred to as citrus fruit or fruit products. Respondent sells and distributes its citrus fruit through brokers, retailers, commission merchants 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 usually at the rate of 10 cents per 1⅗ bushel box, or the 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, or other places within the State of Texas, 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 said citrus fruit across state lines between respondent and the respective buyers of such citrus fruit.

PAR. 4. In the course and conduct of its business as aforesaid, respondent has been and is now making substantial sales to some, but not all, of its brokers and other 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 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 Edinburg Citrus Association is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located in Edinburg, Tex., with mailing address as P. O. Box 127, Edinburg, 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 Edinburg Citrus Association, 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.

Complaint

IN THE MATTER OF

MERIT MANUFACTURING COMPANY, INC., ET AL.

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

Docket C-132. Complaint, May 8, 1962—Decision, May 8, 1962

Consent order requiring distributors of sunglasses, with place of business in Central Falls, R.I., to cease representing falsely in advertising that lenses of their glasses were "6 base", "Tested and Approved" and "Safe Tested and Approved . . . for Children", gave "Safe Protection from the Most Powerful Rays of the Sun", and were "Guaranteed for Life"; and to disclose the foreign origin of lenses they imported from Japan.

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 Merit Manufacturing Company, Inc., a corporation, and Lionel Rabb, 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 Merit Manufacturing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its main office and principal place of business located at 12 Cross Street, Central Falls, R.I.

Respondent Lionel Rabb 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.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of sunglasses.

PAR. 3. In the course and conduct of their business, respondents cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of Rhode Island to purchasers thereof located in various other states of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have 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 their business, and for the purpose of inducing the sale of their sunglasses, respondents have made certain statements in advertisements, of which the following are typical but not all inclusive:

6 base lenses
Safe Tested and Approved Lenses for Children
Tested and Approved Lenses
Safe Protection from the Most Powerful Rays of the Sun
Lenses Guaranteed for Life

PAR. 5. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents have represented, and are now representing, directly and by implication, that:

1. Said sunglasses are equipped with lenses with a plus six diopter curve and a minus six diopter curve.

2. Said sunglasses have been tested and approved by an independent and disinterested optometric authority as being safe for children and adults to wear.

3. Said sunglasses protect the wearer from the harmful rays of the sun.

4. Said sunglasses are guaranteed by respondents in every respect.

PAR. 6. The said advertisements were, and are, false, misleading and deceptive. In truth and in fact:

1. The curvature of the lenses in said sunglasses varies significantly from a curve of 6 diopters plus and 6 diopters minus.

2. No independent and disinterested optometric authority has tested and approved said sunglasses.

3. Said sunglasses do not completely bar all such harmful rays from the eyes and complete protection accordingly is not afforded.

4. Said sunglasses are not guaranteed in every respect; moreover, a service charge is required for repairs, which fact is not disclosed by respondents.

PAR. 7. Certain of respondents' sunglasses are manufactured in Japan and imported into the United States. Said sunglasses are marked in such an indistinct manner as not to constitute adequate disclosure of the country of origin. Certain of respondents' sunglasses contain lenses manufactured in Japan. The fact that said sunglasses contain Japanese lenses is not disclosed by respondents.

PAR. 8. In the absence of an adequate disclosure that a product, including sunglasses, is of foreign origin, the public believes and understands that it is of domestic origin. A substantial number of the

purchasing public prefer domestic products over foreign products, including sunglasses.

PAR. 9. The failure of respondents to disclose, or adequately disclose, the foreign origin of their products has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said products are of domestic manufacture.

PAR. 10. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of sunglasses of the same kind and general nature as those sold by respondents.

PAR. 11. The use by respondents 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 respondents' products by reason of said erroneous and mistaken belief.

PAR. 12. 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 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 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 Merit Manufacturing Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its office and principal place of business located at 12 Cross Street, in the city of Central Falls, State of Rhode Island.

Respondent Lionel Rabb is an officer 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, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Merit Manufacturing Company, Inc., a corporation, and its officers, and Lionel Rabb, 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 and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of sunglasses, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) Lenses of their sunglasses have a given diopter curve unless such is the fact; provided, however, that in the case of ground and polished sunglass lenses a tolerance not to exceed minus or plus $\frac{1}{16}$th diopter in any meridian and a difference in power between any two meridians not to exceed $\frac{1}{16}$th diopter and a prismatic effect not to exceed $\frac{1}{8}$th diopter shall be allowed.

(b) Said sunglasses have been tested and approved, unless in fact they have been tested and approved by an independent and disinterested optometric authority.

(c) Said sunglasses will completely protect the eyes of the wearer from the harmful rays of the sun.

(d) The sunglasses offered for sale or sold by respondents are guaranteed, unless the terms, conditions and extent to which such guarantee applies and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

2. Offering for sale or selling any product which is in whole or substantial part of foreign origin, without clearly and conspicuously disclosing on such product or in immediate connection therewith, and,

if such product is enclosed in a package or container, on the package or container, in such a manner that it will not be hidden or readily obliterated, the country of origin of the product or part thereof.

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

ADVANCE JUNIOR, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket C-133. Complaint, May 8, 1962—Decision, May 8, 1962

Consent order requiring New York City importers to cease violating the Flammable Fabrics Act by importing, manufacturing, or selling in commerce dresses which were so highly flammable as to be dangerous when worn, and by furnishing their customers with a false guaranty that the dresses were not dangerously flammable.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that the Advance Junior, Inc., a corporation, and Nat Berger and Beatrice Kittas, individually and as officers of said corporation, hereinafter refered to as respondents, have violated the provisions of said Acts, and the Rules and Regulations promulgated under the flammable Fabrics Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues it complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Advance Junior, Inc., is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York. Respondents Nat Berger and Beatrice Kittas are President and Secretary, respectively, of Advance Junior, Inc. The individual respondents formulate, direct and control the policies, acts and practices of the said corporate respondent. The business address of all respondents is 1400 Broadway, New York, N.Y.

PAR. 2. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have manufactured for sale, sold and offered for sale, in commerce; have imported into the United States; and have introduced, delivered for introduction, transported and caused to be transported, in commerce; and have transported and caused to be transported for the purpose of sale or delivery after sale in commerce; as "commerce" is defined in the Flammable Fabrics Act, articles of wearing apparel, as the term "article of wearing apparel" is defined therein, which articles of wearing apparel were, under Section 4 of the Flammable Fabrics Act, as amended, so highly flammable as to be dangerous when worn by individuals.

Among the articles of wearing apparel mentioned above were dresses.

PAR. 3. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have manufactured for sale, sold and offered for sale, articles of wearing apparel made of fabric which was under Section 4 of the Act, as amended, so highly flammable as to be dangerous when worn by individuals, and which fabric, as the term "fabric" is defined in the Flammable Fabrics Act, had been shipped and received in commerce.

Among the articles of wearing apparel mentioned above were dresses.

PAR. 4. Respondents, subsequent to July 1, 1954, have furnished their customers with a guaranty with respect to the articles of wearing apparel mentioned in Paragraphs Two and Three hereof, to the effect that reasonable and representative tests made under the procedure provided in Section 4 of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder, show that such articles of wearing apparel are not, in the form delivered by respondents, so highly flammable under the provisions of the Flammable Fabrics Act as to be dangerous when worn by individuals. There was reason for respondents to believe that the articles of wearing apparel covered by such guaranty might be introduced, sold or transported in commerce.

Said guaranty was false in that in respect to said articles of wearing apparel reasonable and representative tests had not been made.

PAR. 5. The acts and practices of respondents herein alleged were and are in violation of the Flammable Fabrics Act and the Rules and Regulations promulgated thereunder and as such constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION 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 Flammable Fabrics 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 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, Advance Junior, Inc., is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondents Nat Berger and Beatrice Kittas are President and Secretary, respectively, of Advance Junior, Inc. The business address of all proposed respondents is 1400 Broadway, New York, N.Y.

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 respondent Advance Junior, Inc., a corporation, and its officers, and respondents Nat Berger and Beatrice Kittas, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

1. (a) Importing into the United States; or

(b) Manufacturing for sale, selling, offering for sale, introducing, delivering for introduction, transporting or causing to be transported, in commerce, as "commerce" is defined in the Flammable Fabrics Act; or

(c) Transporting or causing to be transported, for the purpose of sale or delivery after sale in commerce;

any article of wearing apparel which, under the provisions of Section 4 of the Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

2. Manufacturing for sale, selling, or offering for sale any article of wearing apparel made of fabric, which fabric has been shipped or received in commerce, and which, under Section 4 of the Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

3. Furnishing to any person a guaranty with respect to any article of wearing apparel or fabric which respondents, or any of them, have reason to believe may be introduced, sold or transported in commerce, which guaranty represents, contrary to fact, that reasonable and representative tests made under the procedures provided in Section 4 of the Flammable Fabrics Act, as amended, and the Rules and Regulations thereunder, show and will show that the article of wearing apparel, or the fabric used or contained therein, covered by the guaranty, is not, in the form delivered or to be delivered by the guarantor, so highly flammable under the provisions of the Flammable Fabrics Act as to be dangerous when worn by individuals, provided, however, that this prohibition shall not be applicable to a guaranty furnished on the basis of, and in reliance upon, a guaranty to the same effect received by respondents in good faith signed by and containing the name and address of the person by whom the article of wearing apparel or fabric was manufactured or from whom it was received.

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

S. G. L. MFG. CORP. ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FLAMMABLE FABRICS ACTS

Docket C-134. Complaint, May 8, 1962—Decision, May 8, 1962

Consent order requiring New York City manufacturers to cease violating the Flammable Fabrics Act by manufacturing and selling in commerce dresses made of fabric so highly flammable as to be dangerous when worn, and furnishing their customers with a false guaranty that tests had been made and showed that the dresses were not dangerously flammable.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that S. G. L. Mfg. Corp., a corporation, and Nancy Greer, Inc., a corporation, and Sidney Lippman and Sol Greenfield, individually and as officers of both corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Flammable Fabrics 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. Respondents S. G. L. Mfg. Corp. and Nancy Greer, Inc., are corporations, duly organized, existing and doing business under and by virtue of the laws of the State of New York. Respondents Sidney Lippman and Sol Greenfield are officers of both corporate respondents, and formulate, direct and control the policies, acts and practices of said corporate respondents. The business address of corporate respondent Nancy Greer, Inc., and all individual respondents is 1400 Broadway, New York, N.Y. The business address of corporate respondent S. G. L. Mfg. Corp. is 214 West 39th Street, New York, N.Y.

PAR. 2. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have manufactured for sale, sold and offered for sale, in commerce; have imported into the United States; and have introduced, delivered for introduction, transported and caused to be transported, in commerce; and have transported and caused to be transported for the purpose of sale or delivery after sale in commerce; as "commerce" is defined in the Flammable Fabrics Act, articles of wearing apparel, as the term "article of wearing apparel" is defined therein, which articles of wearing apparel were, under Section 4 of the Flammable Fabrics Act, as amended, so highly flammable as to be dangerous when worn by individuals.

Among the articles of wearing apparel mentioned above were dresses.

PAR. 3. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have manufactured for sale, sold and offered for sale, articles of wearing apparel made of fabric which was, under Section 4 of the Act, as amended, so highly flammable as to be dangerous when worn by individuals, and which fabric had been shipped and received in commerce, as the terms "article of wear-

ing apparel," "fabric" and "commerce" are defined in the Flammable Fabrics Act.

Among the articles of wearing apparel mentioned above were dresses.

PAR. 4. Respondents have furnished their customers with a guaranty with respect to the articles of wearing apparel mentioned in Paragraphs Two and Three hereof, to the effect that reasonable and representative tests made under the procedures provided in Section 4 of the Flammable Fabrics Act, as amended, and the Rules and Regulations promulgated thereunder, show that said articles of wearing apparel are not, in the form delivered by respondents, so highly flammable as to be dangerous when worn by individuals. There was reason for respondents to believe that the articles of wearing apparel covered by such guaranty might be introduced, sold, or transported in commerce.

Said guaranty was false in that in respect to said articles of wearing apparel reasonable and representative tests had not been made.

PAR. 5. The acts and practices of respondents herein alleged were and are in violation of the Flammable Fabrics Act and the Rules and Regulations promulgated thereunder and as such constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

DECISION 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 Flammable Fabrics 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 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. Respondents S. G. L. Mfg. Corp. and Nancy Greer, Inc., are corporations, duly organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondents Sidney Lippman and Sol Greenfield are officers of both corporate respondents. The business address of said Nancy Greer, Inc., and all individual respondents is 1400 Broadway, New York, N.Y. The business address of said S. G. L. Mfg. Corp. is 214 West 39th Street, New York, N.Y.

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 S. G. L. Mfg. Corp., a corporation, and its officers, and Nancy Greer, Inc., a corporation, and its officers, and Sidney Lippman and Sol Greenfield individually and as officers of both corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from:

1. (a) Importing into the United States; or

(b) Manufacturing for sale, selling, offering for sale, introducing, delivering for introduction, transporting or causing to be transported, in commerce, as "commerce" is defined in the Flammable Fabrics Act; or

(c) Transporting or causing to be transported, for the purpose of sale or delivery after sale in commerce;

any article of wearing apparel which, under the provisions of Section 4 of the Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

2. Manufacturing for sale, selling, or offering for sale any article of wearing apparel made of fabric, which fabric has been shipped or received in commerce, and which, under Section 4 of the Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

3. Furnishing to any person a guaranty with respect to any article of wearing apparel or fabric which respondents, or any of them, have reason to believe may be introduced, sold or transported in commerce, which guaranty respresents, contrary to fact, that reasonable and representative tests made under the procedures provided in Section 4 of the Flammable Fabrics Act, as amended, and the Rules and Regulations thereunder, show and will show that the article of wearing apparel, or the fabric used or contained therein, covered by the

guaranty, is not, in the form delivered or to be delivered by the guarantor, so highly flammable under the provisions of the Flammable Fabrics Act as to be dangerous when worn by individuals, provided, however, that this prohibition shall not be applicable to a guaranty furnished on the basis of, and in reliance upon, a guaranty to the same effect received by respondents in good faith signed by and containing the name and address of the person by whom the article of wearing apparel or fabric was manufactured or from whom it was received.

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

TRI-VALLEY PACKING ASSOCIATION*

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

Dockets 7225 and 7496. Complaints, Aug. 6, 1958, and May 15, 1959—Decision, May 10, 1962

Order in two consolidated proceedings requiring a San Francisco canner of fruits and vegetables to cease violating Secs. 2(a) and 2(d) of the Clayton Act by such practices as charging large grocery chains who maintained buying agencies in the San Francisco or "California Street" market, from 2% to 5% less per case than other customers, and granting allowances in specially tailored or negotiated deals involving promotional activities initiated by certain purchasers without making them available on proportionally equal terms to the latters' competitors.

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, Section 2(a) of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, approved June 19, 1936, hereby issues its complaint stating its charges with respect thereto as follows:

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*Incorrectly named in the complaint in docket 7225 as Tri-Valley Packing Association, Inc.

†Docket No. 7225.

PARAGRAPH 1. Respondent, Tri-Valley Packing Association, Inc., is a non-profit, cooperative corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 240 Battery Street, San Francisco, Calif.

PAR. 2. Respondent is now and has been engaged in the business of selling and distributing canned fruits and vegetables of many varieties, all of which it processes and cans at its plants in Modesto, San Jose and Stockton, California. Respondent sells and distributes its canned fruits and vegetables under the private labels or brands of its purchasers, and also under its own labels or brands.

Respondent sells its products of like grade and quality to a large number of customers located throughout the United States for use, consumption, or resale therein, including wholesalers, retailers, chain stores and associations. Respondent's sales of its products are substantial, amounting in the fiscal year ending January 31, 1956, to $19,698,531.00.

PAR. 3. In the course and conduct of its business, respondent has engaged in commerce, as "commerce" is defined in the Clayton Act, in that respondent ships its products, or causes them to be shipped, from its places of business to purchasers located in States other than the State of California.

PAR. 4. In the course and conduct of its business, respondent is in substantial competition with other corporations, partnerships, individuals, and firms engaged in the canning, sale and distribution of canned fruits and vegetables, in commerce.

Many of respondent's purchasers are likewise directly or indirectly in competition with each other in the resale of respondent's products within the same trading areas.

PAR. 5. In the course and conduct of its business, respondent has been and is now discriminating in price between different purchasers of its products, by selling said products to some of its purchasers at higher prices than it sells its products of like grade and quality to other purchasers who are competitively engaged in the resale of said products, within the United States, with customers paying the higher prices.

PAR. 6. Some specific illustrations of representative discriminations in price for certain products of like grade and quality sold by respondent during the year 1957 to its competing favored and non-favored buyers are as follows:

Respondent sold canned apricots 24/2½ to The Regent Canfood Company, Denver, Colorado, at a price of $5.30 per case, while respondent, during the same approximate period of time, sold similar

products of like grade and quality to a competing purchaser, Associated Grocers of Colorado, Denver, Colorado, at $5.70 per case.

Respondent sold canned spinach 24/303 to First National Stores, East Hartford, Connecticut, at a price of $2.00 per case, while respondent, during the same approximate period of time, sold similar products of like grade and quality to John Bozzuto & Sons, Inc., Waterbury, Connecticut, a wholesaler, at $2.15 per case. That company has resold said products to retail stores who are in competition in the resale of said products with store units of First National Stores.

Respondent sold canned peaches 48/8 to American Stores, Newark, New Jersey, at a price of $4.40 per case, while respondent, during the same approximate period of time, sold similar products of like grade and quality to a competing purchaser, The Grand Union Co., East Paterson, New Jersey, at $4.70 per case.

Respondent sold canned peaches 48/8 to The Great Atlantic & Pacific Tea Company, Paterson, New Jersey, at a price of $4.40 per case, while respondent, during the same approximate period of time, sold similar products of like grade and quality to a competing purchaser, The Grand Union Co., East Paterson, New Jersey, at $4.70 per case.

Respondent sold canned peaches 24/2½ to The Great Atlantic & Pacific Tea Company, Portland, Maine, at a price of $4.90 per case, while respondent, during the same approximate period of time, sold similar products of like grade and quality to a competing purchaser, Hannaford Bros. Co., Portland, Maine, at $5.30 per case.

Respondent sold canned peaches 24/2½ to The Great Atlantic & Pacific Tea Company, East Peoria, Illinois, at a price of $4.70 per case, while respondent, during the same approximate period of time, sold similar products of like grade and quality to a competing purchaser, Oakford Co., Peoria, Illinois, at $5.05 per case.

PAR. 7. The effect of such discriminations in price made by respondent, as hereinbefore set forth, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and its purchasers are respectively engaged, or to injure, destroy, or prevent competition with respondent and with purchasers from respondent who receive the benefit of such discriminations.

PAR. 8. The discriminations in price, as hereinbefore alleged, are in violation of the provisions of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.

COMPLAINT*

The Federal Trade Commission, having reason to believe that the above-named respondent has violated, and is now violating, Section 2(d) of the amended Clayton Act (15 U.S.C., Sec. 13), hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent is a non-profit cooperative corporation, organized and existing under the laws of the State of California, with its principal office and place of business located at 240 Battery Street, San Francisco, Calif.

PAR. 2. Respondent is now, and has been, engaged in the business of selling and distributing canned fruits and vegetables of many varieties, all of which it processes and cans at its plants in Modesto, San Jose, and Stockton, California. Respondent sells and distributes its canned fruits and vegetables under the private labels or brands of its purchasers and also under its own labels and brands.

Respondent sells its products to a large number of customers located throughout the United States for use, consumption, and resale therein, including wholesalers, retailers, chain stores, and associations. Respondent's sales of its products exceeded $19,000,000 in the fiscal year ending January 31, 1956.

PAR. 3. In the course and conduct of its business, respondent has engaged in commerce, as "commerce" is defined in the amended Clayton Act in that respondent ships its products, or cause them to be shipped, from its places of business to customers located in states other than the State of California.

PAR. 4. In the course and conduct of its business in commerce, respondent is in substantial competition with other corporations, partnerships, individuals, and firms engaged in the canning, sale, and distribution of canned fruits and vegetables.

Many of respondent's customers are likewise engaged, directly or indirectly, in competition with each other in the resale of respondent's products within the same trading area.

PAR. 5. In the course and conduct of its business in commerce, respondent has been, and is now, paying advertising and promotional allowances to certain favored customers without making the allowances available on proportionally equal terms to all other customers competing in the distribution of their products.

For example, respondent has participated in the periodic promotion plans of Fred Meyer, Inc., of Portland, Oregon, occurring annually for many years. In 1957 respondent paid $350 for participa-

*Docket No. 7496.

tion in a coupon book program occurring during September and October. In addition to this, respondent redeemed about 27,750 coupons at the September 1957 price of canned peaches, the net effect of which was to pay Fred Meyer, Inc., the value of one can of peaches for every two actually purchased.

Such allowances were not offered or made available on proportionally equal terms by respondent to all other customers competing in the resale of respondent's products with that customer receiving the allowances.

PAR. 6. The acts and practices of respondent, as alleged above, violate Section 2(d) of the amended Clayton Act (15 U.S.C. Sec. 13).

Mr. Franklin A. Snyder for the Commission.
Mr. Ricardo J. Hecht, of San Francisco, Calif., for respondent.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

On August 6, 1958, the Federal Trade Commission issued its complaint in this proceeding (Docket No. 7225)[1] against the respondent charging it with a violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.[2]

Respondent, as the allegations of the complaint assert is a California non-profit, cooperative organization engaged in the business of selling and distributing many varieties of canned fruits and vegetables, which it processes in three cities in California. Respondent, as these allegations also assert, sells its products to customers located throughout the United States, who purchase for use, consumption and resale therein. These allegations likewise assert that during the fiscal year ending January 31, 1956, respondent's sales amounted to $19,698,531.00, and that respondent in the course and conduct of its business ships its products from its places of business in California to purchasers located in states other than California. By these allegations it is also asserted that respondent is in competition with other persons engaged in the business of canning, selling and distributing fruits and vegetables, and that "many" of its purchasers are "directly or indirectly in competition with each other in the resale of respondent's product within the same trading areas."

[1] Respondent Tri-Valley Packing Association was erroneously referred to in the complaint as Tri-Valley Packing Association, Inc.

[2] By stipulation before Hearing Examiner Kolb, the proceeding identified under Docket No. 7496, which charges a violation of 2(d) of the amended Clayton Act, was made a part of the hearings in Docket No. 7225, the consolidation being agreed to by counsel. The complaint was issued in this case on May 15, 1959, charging the respondent with paying advertising and promotional allowances to certain favored customers. Respondent denies the substantive charges alleged.

Paragraph 5, the charging paragraph of the complaint, relative to the 2(a) violations asserted, alleges as follows:

In the course and conduct of its business, respondent has been and now is discriminating in price between different purchasers of its products by selling said products to some of its purchasers at higher prices than it sells its products of like grade and quality to other purchasers who are engaged competitively in the resale of said products within the United States, with customers paying the higher prices.

Paragraph 6 of said complaint sets forth six alleged "specific illustrations of representative discriminations in price for certain products of like grade and quality sold by respondent in 1957 to its competing favored and non-favored buyers."

In the first of these illustrations, the favored competing buyer is Safeway Stores Incorporated, Denver, Colorado, hereinafter called "Safeway," and the non-favored competing buyer is Associated Grocers Inc. of Colorado, Denver, Colorado, hereinafter called "Associated." [3]

In the second of these illustrations the favored competing buyer is First National Stores, East Hartford, Connecticut, hereinafter called "First National," and the non-favored competing buyer is John Bozzuto & Sons, Inc., Waterbury, Connecticut, hereinafter called "Bozzuto," a wholesaler who resold the products involved to "retail stores who are in competition in the resale of said products with store units of First National."

In the third illustration the favored competing buyer is American Stores, Newark, New Jersey, hereinafter called "American," and the non-favored competing buyer is The Grand Union Co., East Paterson, New Jersey, hereinafter called "Grand Union."

In the fourth, fifth and sixth illustrations The Great Atlantic and Pacific Tea Company, hereinafter called "Great Atlantic" is the favored competing buyer, and Grand Union, Hannaford Bros. Co., Portland, Maine, hereinafter called "Hannaford," and Oakford Co., Peoria, Illinois, hereinafter called "Oakford" are the non-favored buyers.

Paragraph 7 of the complaint alleges that the "effect of such discriminations made by respondent may be substantially . . . to lessen competition or tend to create a monopoly in the lines of commerce in which respondent and its purchasers are respectively engaged, or to injure, destroy, or prevent competition with respondent and with

[3] "The Regent Canfood Company" is expressly named as the favored buyer, but respondent concedes that this is merely a trade name under which Safeway conducts its buying operations.

purchasers from respondent who receive the benefit of such discriminations."

Prior to answer, on or about September 19, 1958, respondent applied to Loren H. Laughlin, hearing examiner, for a bill of particulars. On September 25, 1958, counsel supporting the complaint filed an answer opposing the application. The application was denied by said examiner on October 2, 1960.

Respondent, after the denial of said application for a bill of particulars, filed its Answer.

Respondent's answer admits all the allegations of paragraph 1, and portions of paragraphs 2, 3, and 4 of the complaint, and denies all the allegations of paragraphs 5, 6, 7, and 8. The answer also sets up three defenses as follows:

> Without waiving any of the denials hereinabove set forth, respondent interposes the following further and separate defenses to the charges contained in said complaint:
>
> *FIRST DEFENSE:*
>
> The different prices, if any, charged by respondent to its purchasers competing in the resale of its goods of like grade and quality make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods and quantities in which such goods are to such purchasers sold and delivered.
>
> *SECOND DEFENSE:*
>
> The different prices, if any, charged by respondent to its purchasers competing in the resale of its goods of like grade and quality were in response to changing conditions affecting the market for or the marketability of said goods.
>
> *THIRD DEFENSE:*
>
> The lower prices, if any, charged by respondent to any purchaser or purchasers were made in good faith to meet the equally low price of a competitor or competitors.

After the filing of the answer, said examiner set the initial hearing for February 5, 1959. On January 6, 1959, said examiner issued a subpoena duces tecum directed to respondent. After the service of the subpoena on January 22, 1959, respondent filed a motion to quash and limit the same. The motion was opposed by answer filed by counsel supporting the complaint on January 28, 1959.

Respondent also filed a motion to make the application of the subpoena a part of the record. (Filed January 26, 1959.) This motion was also opposed by the attorney supporting the complaint. (Answer filed January 28, 1959.)

By order filed February 2, 1959, said hearing examiner granted the motion to make the application a part of the record. This order also denied, except in minor respects, respondent's motion to quash. By this order said examiner also cancelled the initial hearing.

On or about March 6, 1959, respondent appealed to the Commission from said examiner's order denying its motion. On or about March 19, 1959, counsel supporting the complaint filed his reply to respondent's appeal.

On or about May 11, 1959, the Commission made its order denying respondent's appeal.

On July 9, 1959, at the initial hearing of this matter, Earl J. Kolb, hearing examiner presiding, respondent refused to comply with certain of the specifications of said subpoena. Thereafter, on July 14, 1959, the Commission applied to the District Court of the United States for the Northern District of California, Southern Division, for an order enforcing said subpoena. On August 10, 1959, respondent filed its answer to said application. Thereafter, on August 12, 1959, respondent and the Commission stipulated to an order by said court, the material parts of which are as follows:

. . . respondent shall produce . . . for copying and inspection, the following:
1. Such books, records, and documents as will disclose:

(a) The addresses of five (5) customers of respondent engaged in the resale of its products, during each of the years 1956, 1957, and 1958; (The names of five (5) customers to be specified in the written notice above-mentioned.)

(b) The method of sale ("direct" or "indirect") to each of said customers mentioned in (a) and the name of the broker, if "indirect";

(c) The total volume of sales to each said customer mentioned (2), per year;

(d) The total amount of all rebates, discounts, or allowances, if any, paid or allowed per year to said customer mentioned in (a), indicating the type for each sum.

2. All invoices and credit memoranda for all sales during 1956, 1957, and 1958 for all customers engaged in the resale of respondent's products in the trade areas of Boston, Massachusetts; Waterbury, Connecticut; Denver-Pueblo, Colorado area; Portland, Maine; Peoria, Illinois; Philadelphia, Pennsylvania, and Pittsburgh, Pennsylvania; and Portland, Oregon.

For the purposes of this order the words "trade area" shall be given their commonly accepted definition as including not only the area of the cities named, but also contiguous suburbs which are included in that normal trading area.

Subsequent to the making of this stipulated order counsel supporting the complaint inspected the records of respondent described therein. While inspecting said records said counsel prepared therefrom certain tabulations which are in evidence as Commission's Exhibits Nos. 33 to 49.

In due course evidence was submitted in support of the complaint at hearings in San Francisco, California; Portland, Oregon; Denver, Colorado; Boston, Massachusetts; New York, New York; and Pittsburgh, Pennsylvania. At this last mentioned hearing, on March 10, 1960, counsel supporting the complaint closed his case in chief. At

hearings held in San Francisco, California, beginning on October 31, 1960, respondent presented its evidence in defense. Edgar A. Buttle, hearing examiner, presided at the last mentioned hearing pursuant to stipulation of counsel for both sides.

Proposed findings of fact and conclusions of law were thereafter filed by counsel for both sides. The hearing examiner has carefully reviewed and considered same. Proposed findings and conclusions which are not herein adopted, either in the form proposed or in substance are rejected as not supported by the record or as involving immaterial matters.

Upon the entire record in the case the hearing examiner makes the following:

Findings of Fact

1. Respondent, Tri-Valley Packing Association, is a non-profit, cooperative corporation organized and existing under the laws of the State of California, with its principal office and place of business located at 240 Battery Street, San Francisco, Calif.

2. Respondent is now and has been engaged in the business of selling and distributing canned fruits and vegetables of many varieties all of which it processes and cans at its plants in Modesto, San Jose and Stockton, California. Respondent sells and distributes its canned fruits and vegetables under the private labels or brands of its purchasers, and also under its own labels or brands.

3. Respondent sells its products of like grade and quality to a large number of customers located throughout the United States for use, consumption, or resale therein, including wholesalers, retailers, chain stores and associations.

4. Respondent's sales of its products are substantial, amounting in the fiscal year ending January 31, 1956, to $19,698,531.00.

5. In the course and conduct of its business, respondent has engaged in commerce, as "commerce" is defined in the amended Clayton Act in that respondent ships its products, or causes them to be shipped, from its place of business to customers located in states other than the State of California.

6. In the course and conduct of its business in commerce, respondent is in substantial competition with other corporations, partnerships, individuals, and firms engaged in the canning, sale and distribution of canned fruits and vegetables.

7. Many of respondent's customers are likewise engaged, directly or indirectly, in competition with each other in the resale of respondent's products within the same trading area.

8. In the course and conduct of its business, respondent sold its products to Hudson House, Inc., of Portland, Oregon, at higher prices than it sold its products of like grade and quality to Fred Meyer, Inc., and Regent Canfood (Safeway Stores) of Portland, Oregon. Further, at times, respondent sold its products to Fred Meyer, Inc., at higher prices than it sold its products of like grade and quality to Regent Canfood (Safeway Stores) of Portland, Oregon.[4]

9. Hudson House, Inc., of Portland, Oregon, is competitively engaged in the distribution and resale of respondent's products of like grade and quality, within the United States, with Fred Meyer, Inc., and Regent Canfood (Safeway Stores), also of Portland, Oregon.

10. The effect of such differentials in price made by respondent between Hudson House, Inc., Fred Meyer, Inc., and Regent Canfood (Safeway Stores), all of Portland, Oregon, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which Hudson House, Fred Meyer, Inc., and Regent Canfood (Safeway Stores), of Portland, Oregon, are engaged, or to injure, destroy or prevent competition with Fred Meyer, Inc., and Regent Canfood (Safeway Stores) of Portland, Oregon, who received the benefit of such price differentials.

11. In the course and conduct of its business, respondent sold its products to Central Grocery and Standard Grocery of Boston, Massachusetts, at higher prices than it sold products of like grade and quality to First National Stores and A & P of Boston, Massachusetts.[5]

12. Central Grocery and Standard Grocery of Boston, Massachusetts, are competitively engaged in the distribution and resale of respondent's products of like grade and quality, within the United States, with First National Stores and A & P also of Boston, Massachusetts.

13. The effect of such differentials in price made by respondent between Central Grocery, Standard Grocery, First National Stores and A & P, all of Boston, Massachusetts, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which Central Grocery, Standard Grocery, First National Stores and A & P of Boston, Massachusetts, are engaged, or to injure, destroy or prevent competition with First National Stores and A & P of Boston, Massachusetts, who received the benefit of such price differentials.

14. In the course and conduct of its business, respondent sold its products to Hannaford Bros. Co., of Portland, Maine, at higher prices

[4] See Appendix A, annexed, p. 1158.
[5] See Appendix B, annexed, *ib.*

than it sold its products of like grade and quality to A & P of Portland, Maine.[6]

15. Hannaford Bros. Co., of Portland, Maine, is competitively engaged in the distribution and resale of respondent's products of like grade and quality, within the United States, with A & P, also of Portland, Maine.

16. The effect of such differentials in price made by respondent between Hannaford Bros. Co. and A & P, both of Portland, Maine, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which Hannaford Bros. and A & P are engaged, or to injure, destroy or prevent competition with A & P, of Portland, Maine, who received the benefit of such price differentials.

17. In the course and conduct of its business, respondent sold its products to John Bozzuto & Sons of Waterbury, Connecticut, at higher prices than it sold its products of like grade and quality to First National Stores of Hartford, Connecticut, and A & P of Springfield, Connecticut.[7]

18. John Bozzuto & Sons of Waterbury, Connecticut, is competitively engaged in the distribution and resale of respondent's products of like grade and quality, within the United States, with First National Stores of Hartford, Connecticut, and A & P of Springfield, Connecticut.

19. The effect of such differentials in price made by respondent between John Bozzuto & Sons, First National Stores and A & P, of Waterbury, Connecticut, Hartford, Connecticut, and Springfield, Connecticut, respectively, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which John Bozzuto & Sons, First National Stores and A & P are engaged, or to injure, destroy or prevent competition with First National Stores and A & P of Hartford and Springfield, Connecticut, respectively, who received the benefit of such price differentials.

20. In the course and conduct of its business, respondent sold its products to Associated Grocers, Inc., Spiegel Bros., Star Markets, General Grocery, W. E. Osborn Co., and Pittsburgh Mercantile of the Pittsburgh, Pennsylvania area, at higher prices than it sold its products of like grade and quality to A & P of Pittsburgh (Homewood), Pennsylvania.[8]

21. Associated Grocers, Inc., Spiegel Bros., W. E. Osborn Co., Star Markets, General Grocery and Pittsburgh Mercantile of the Pitts-

[6] See Appendices C, D, and E, annexed, pp. 1158, 1160.
[7] See Appendices F, G, and H, annexed, pp. 1161, 1162.
[8] See Appendices I and J, annexed, p. 1163.

burgh, Pennsylvania area, are competitively engaged in the distribution and resale of respondent's products of like grade and quality, within the United States, with A & P, also of Pittsburgh, Pennsylvania.

22. The effect of such differentials in price made by respondent between W. E. Osborn of New Brighton and Associated Grocers, Inc., Spiegel Bros., Star Markets, General Grocery, Pittsburgh Mercantile and A & P, all of the Pittsburgh, Pennsylvania area, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which Associated Grocers, Inc., Spiegel Bros., Star Markets, General Grocery, W. E. Osborn Co., Pittsburgh Mercantile and A & P of Pittsburgh, Pennsylvania, are engaged, or to injure, destroy or prevent competition with A & P of Pittsburgh, Pennsylvania, who received the benefit of such price differentials.

23. In the course and conduct of its business, respondent sold its products to Walkay Grocery Co., Jersey City, New Jersey; Middendorf & Rhors, New York City; Grand Union, Paterson, New Jersey; Packard Bamberger, Hackensack, New Jersey; and Wakefern Foods, Cranford, New Jersey, at higher prices than it sold its products of like grade and quality to A & P, Paterson and Hawthorne, New Jersey, Regent Canfood (Safeway Stores), Kearney, New Jersey; and American Stores, Newark, New Jersey.[9]

24. Walkay Grocery Co., Middendorf & Rhors, Wakefern Food, Grand Union and Packard Bamberger, are competitively engaged in the distribution and resale of respondent's products of like grade and quality, within the United States, with A & P, Paterson and Hawthorne, New Jersey; Regent Canfood (Safeway Stores), Kearney, New Jersey; and American Stores, Newark, New Jersey.

25. The effect of such differentials in price made by respondent between Walkay Grocery Co., Jersey City, New Jersey; Middendorf & Rohrs, New York City; Grand Union, Paterson, New Jersey; Packard Bamberger, Hackensack, New Jersey; Wakefern Food, Cranford, New Jersey; A & P, Paterson and Hawthorne, New Jersey; Regent Canfood (Safeway Stores), Kearney, New Jersey; and American Stores, Newark, New Jersey, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which Walkay Grocery Co., Middendorf & Rohrs, Grand Union, Packard Bamberger, Wakefern Food, A & P, Regent Canfood (Safeway Stores), and American Stores are engaged, or to injure, destroy or prevent competition with A & P, Regent Canfood (Safeway Stores), and American Stores, who received the benefit of such price differentials.

[9] See Appendices K, L, M, N, and O, annexed, pp. 1164, 1165, 1166.

26. In the course and conduct of its business, respondent sold its products to Associated Grocers of Colorado, and H. A. Marr, of Denver-Pueblo, at higher prices than it sold its products of like grade and quality to Regent Canfood (Safeway Stores) of Denver.[10]

27. Associated Grocers of Colorado of Denver-Pueblo, Colorado, and H. A. Marr of Denver, Colorado, are and were competitively engaged, respectively, in the distribution and resale of respondent's products of like grade and quality, within the United States, with Regent Canfood (Safeway Stores) also of Denver, Colorado.

28. The effect of such differentials in price made by respondent between Associated Grocers, Inc., H. A. Marr, and Regent Canfood (Safeway Stores), all of Denver-Pueblo area, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which Associated Grocers, Inc., H. A. Marr, and Regent Canfood (Safeway Stores), of Denver, are or were engaged, or to injure, destroy or prevent competition with Regent Canfood (Safeway Stores), who received the benefit of such price differentials.

29. In the course and conduct of its business, respondent has been and is now discriminating in price between different purchasers of its products, by selling said products to some of its purchasers at higher prices than it sells its products of like grade and quality to other purchasers who are competitively engaged in the distribution and resale of said products, within the United States, with customers paying the higher prices.

30. The effect of such discriminations in price made by respondent, as hereinbefore set forth, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which respondent's purchasers are respectively engaged, or to injure, destroy, or prevent competition in such lines of commerce.

31. The price differentials as hereinabove found, are not justifiable in terms of savings to respondent in the cost of manufacturing, distribution or sale of the products to the purchasers involved, or market fluctuation.

32. The price differentials, as hereinabove found, were not made to meet the lawful price of a competitor in the sense of Section 2(b) of the amended Clayton Act.

33. The discriminations in price, as hereinabove found, are in violation of the provisions of Section 2(a) of the amended Clayton Act, as amended by the Robinson-Patman Act.

34. Respondent has participated in the periodic promotion plans of Fred Meyer, Inc., of Portland, Oregon, occurring annually for many

[10] See Appendices P, Q, and R, annexed, pp. 1167, 1168.

years. In 1957, respondent paid $350 for participation in a coupon book program occurring during September and October. In addition to this, respondent paid Central Grocers, of Boston, Massachusetts, $150 per year for advertising in its "order book." Such allowances were not offered or made available on proportionally equal terms by respondent to all other customers competing in the distribution of respondent's products with that customer receiving the allowances.

35. In the course and conduct of its business in commerce, respondent has been, and is now, paying advertising and promotional allowances to certain favored customers without making the allowances available on proportionally equal terms to all other customers competing in the distribution of its products in violation of Section 2(d) of the amended Clayton Act (15 U.S.C. Sec. 13).

DISCUSSION RELATIVE TO FINDINGS AND APPLICABLE TO LAW

The respondent urges that there is no evidence in the record that the effect of any conduct of respondent has or may result in injury generally to the industry in which it is engaged, or to the industry to which its customers belong, or to any considerable portion of such industry. Contrary to this assertion, the evidence does establish inferentially that a substantial segment of the industry to which the respondent's customers belong may be injured competitively as a result of the conduct of respondent. Although the evidence supporting the charged 2(a) violation of the Clayton Act does not disclose in what respects the proved discriminations in price did, in fact, adversely affect or cause injury to competition, it is well settled that Section 2(a) does not require a finding that the price discriminations have, in fact, adversely affected competition. The language of Section 2(a) is "may be substantially to lessen competition . . . or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." "The statute is designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." [11]

The meaning of the word "may" has been phrased in various ways. In the *Corn Products* case, the Supreme Court stated: ". . . The use of the word 'may' was not to prohibit discriminations having

[11] *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U.S. 726, 738, 742 (1945); *Federal Trade Commission* v. *Morton Salt Co.,* 334 U.S. 37, 46 (1948); cf. *Standard Fashion Co.* v. *Magrane-Houston Co.,* 258 U.S. 346, 356, 357 (1922); *Moog Industries, Inc.* v. *Federal Trade Commission,* 238 F. 2d 43, 51 (8th Cir. 1956); *Whitaker Cable Corp.* v. *Federal Trade Commission,* 239 F. 2d 253, 254 (7th Cir. 1956).

'the mere possibility' of those consequences, but to reach those which would probably have the defined effect on competition." [12] Later in the same case, the Court declared: [13] "As we have said, the statute does not require that the discrimination must, in fact, have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect." This statement was repeated in the *Morton Salt* case [14] with the qualification that it "is to be read also in the light of the *Corn Products* case." [15]

A key question under Section 2(a) is: What test is to be applied, and, correlatively, what kind of proof is required in determining whether a discrimination in price injures or may reasonably tend to injure competition? In other words, was Section 2(a) intended to reach discriminatory practices resulting merely in injury to one or several competitors, and is it enough to prove such individual injury, or must there be a showing of injury to competition in a particular market? Under what circumstances may injury to a competitor constitute a substantial lessening of competition in the relevant market? [16]

In *Samuel H. Moss, Inc.* v. *Federal Trade Commission* [17] the Second Circuit had held that proof of the bare fact of price differentials established a prima facie case of a violation of Section 2(a) and that respondent had the burden of proving absence of injury under Section 2(b).[18] This decision was contrary to earlier findings that the Federal Trade Commission had the burden of proving that there was competitive injury as required by Section 2(a), whereupon the respondent could invoke the defenses allowed under Section 2.[19]

However, in 1954, the widely disputed *Moss* doctrine was clearly rejected in the first *General Foods Corp.* case [20] which also stated a new Commission position as to the test for determining competitive injury under Section 2(a). Under this decision, the burden of proof

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[12] 324 U.S. at 738.

[13] Id., at 742.

[14] 334 U.S. at 46.

[15] Ibid., footnote 13.

[16] For a discussion, see Burns, *A Summary of a Study of the Antitrust Laws,* 1 ANTITRUST BULLETIN 695, 707–712 (1956).

[17] 148 F. 2d 378 (2 Cir. 1945).

[18] Section 2(b) provides that:

"Upon proof being made . . . that there has been discrimination . . ., the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this Section . . ."

[19] In *A. E. Staley Mfg. Co.* v. *Federal Trade Commission,* 135 F. 2d 453, 455 (7th Cir. 1943), the court held: "There must be . . . a finding . . . that the discrimination had the effect substantially to lessen competition or tend to create a monopoly. Clearly, Congress meant something besides the mere showing of discrimination itself."

[20] F.T.C. Docket No. 5675 (April 27, 1954). The view expressed in this case is in accord with *Purex Corp., Ltd.,* F.T.C. Docket No. 6008, at 7–16 (initial decision April 16, 1954, adopted by the Commission September 15, 1954). See also *The Yale And Towne Mfg. Co.,* F.T.C. Docket No. 6232, at 3–5 (June 28, 1956).

to establish injury to competition is with the complainant. A prima facie case of violation of law requires proof of all three of the following elements: (1) discrimination in price between different purchasers of commodities of like grade and quality; (2) certain jurisdictional facts; and (3) competitive injury. Differences in price without competitive injury are not illegal. "The standard for determining the unlawfulness of an unjustified price discrimination, namely, the substantiality of the effects reasonably probable, is the same whether the competitive injury occurs at the seller level or at the customer level. The fact of injury is to be determined in all cases by a consideration of all the competent and relevant evidence and inferences which may be reasonably drawn therefrom." [21]

In recent cases involving impairment of competition on the customer level rather than among the seller and its rivals, the leading case is *Moog Industries, Inc.*[22] Respondent, a manufacturer of automobile spare and repair parts, granted to its customers, at the end of each annual period, a retroactive volume rebate consisting of a flat, graded percentage of the aggregate dollar volume of their respective purchases in the preceding year. This rebate plan resulted in price differentials among its customers, which were held unlawful under Section 2 of the Robinson-Patman Act.

The Federal Trade Commission stated: [23]

> The substantiality of respondent's price differences and the probability of injury to competition can best be shown by comparing it with the competitive effect of the amount represented by respondent's standard 2% discount for cash given to all customers. Distributors of respondent testified that they invariably took advantage of this 2% cash discount and that this discount was essential to the conduct of their respective businesses. Testimony in the record also indicates that the market in which these distributors compete is highly competitive with many dealers handling from 15 to 75 different lines of auto-

[21] Id., at 2. See *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948). The Attorney General's Committee approved the rationale of the first General Foods decision and recommended "that analysis of the statutory 'injury' center on the vigor of competition in the market rather than hardship to individual businessmen. For the essence of competition is a contest for trade among business rivals in which some must gain while others lose, to the ultimate benefit of the consuming public. See, e.g., *Balian Ice Cream Co.* v. *Ardens Farms Co.*, 104 F. Supp. 796, 801 (S.D. Cal. 1952). Incidental hardships on individual businessmen in the normal course of commercial events can be checked by a price discrimination statute only at the serious risk of stifling the competitive process itself.

"In some circumstances, to be sure, injury to even a single competitor should bring the Act into play. Predatory price cutting designed to eliminate a smaller business rival, for example, is a practice which inevitably frustrates competition by excluding competitors from the market or deliberately impairing their competitive strength." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 164–165 (1955).

[22] F.T.C. Docket No. 5723 (April 29, 1955), *affirmed, Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d 43 (8th Cir. 1956).

[23] F.T.C. Docket No. 5723, at 6–8.

motive products consisting of thousands of items, many of which sell for only a few cents. The dealers' financial life depends on the aggregate of small margins of profits made on a number of individual automotive items. One jobber in Dallas, Texas, ranking third or fourth in that area, testified that his overall net profit on automotive items ran less than 4%. With overall net profit so low, discounts to favored customers, ranging up to 19% could well mean the difference between commercial life and death if these discounts were extended to a sufficient number of items purchased by a distributor. Nor is it controlling that the items herein considered may constitute only a very small part of the dealers' total sales. . . . Respondent contends that the evidence in the record does not support the hearing examiner's finding that "the effect of such discriminations may be to substantially lessen, injure, destroy or prevent competition between customers receiving the benefit of said discriminations and customers who do not receive the benefit of such discriminations." This contention appears to be based largely on the fact that respondent's customers testified generally that they had not been injured by reason of the higher prices paid by them as compared with prices paid by their competitors in the same trading area.

On cross examination, however, these same witnesses admitted that their reasons for so testifying were due to the fact that both they and their competitors followed the suggested resale prices of the respondent and that there was no price competition in their particular trade areas. The adherence by respondent's customers to its suggested resale prices does not eliminate the question of injury to competition. As the Supreme Court said in the *Corn Products* case: [24]

"But it is asserted that there is no evidence that the allowances ever were reflected in the purchasers' resale prices. This argument loses sight of the statutory command. As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they "may" have such effect. We think that it was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition."

"The hearing examiner in his initial decision found that:

"Any saving or advantage in price obtained by one competitor as against another increases his margin of profit, permits additional services to be extended to customers, the use of additional salesmen, the carrying of larger and more varied stocks, and the establishment of branch houses for expansion of the business. While price competition among customers was more or less nonexistent, except in isolated instances, in the areas where testimony was taken, the possibility of price competition is ever present where lower prices to certain competing customers exist. . . ."

In support of the hearing examiner's finding of the requisite statutory injury, there is in the record reliable respectable probative evidence in the form of testimony that respondent's 2% discounts for cash were invariably taken by respondent's customers and that these customers considered this discount essential to the conduct of their business. Additionally, some witnesses testified that in order to expand their business, it would be necessary to hire additional

[24] *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726, 742 (1945).

salesmen, handle more lines, and provide additional services to customers which would only be effected through increased profits. We believe that the hearing examiner was justified in concluding that respondent's annual volume rebate plan in price discriminations violative of the Robinson-Patman Act.

A number of parallel cases have confirmed this approach.[25] In *Fruitvale Canning Co.*,[26] the Commission clearly indicated its present view on the rationale underlying the Robinson-Patman Act in such cases:[27]

> The pattern of respondent's pricing practices as established in this proceeding closely parallels those pricing practices uncovered by the Commission Chain Store Investigation of 1934.[28] Even casual reference to the legislative history makes it clear that these and similar harmful competitive practices provided the major impetus for the passage of the Robinson-Patman Act of 1936. Indeed, as we view it, the main thrust of the Robinson-Patman Act was to curb the predatory use of monopoly power by chain stores and mass buyers and to preserve the place of small business as well as to protect its competitive position. This record discloses substantial price differentials favoring large chain groups and large wholesalers of a type and character identical to those we conceive the Robinson-Patman Act was enacted to curb. The testimony of many witnesses called in support of the complaint as above outlined demonstrates the injurious competitive effect of such price differentials. Having concluded that respondent's special defenses were not sustained on the record, there exists no sound basis for overturning the initial decision of the hearing examiner.

And in *E. Edelmann & Co.* v. *Federal Trade Commission*, a court of appeals stated:[29]

> But it must be remembered that in enacting the Robinson-Patman Act . . ., Congress undertook to strengthen this phase of the Clayton Act which it thought had been too restrictive in practice by directing emphasis to individual competitive situations rather than competition in general.

From this recent trend, it can reasonably be concluded that[30] "the tests of competitive injury have hardened into rigidity. The 'injury' requirement has evolved into an almost automatic inference from the differential itself . . ." with an abandonment of the market

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[25] *P. Sorenson Mfg. Co., Inc.*, F.T.C. Docket No. 6052, at 5–7 (June 29, 1956), *affirmed per curiam, P. Sorenson Mfg. Co., Inc.*, v. *Federal Trade Commission*, 246 F. 2d 687 (D.C. Cir. 1957); *P. & D. Mfg. Co.*, F.T.C. Docket No. 5913, at 7–12 (April 26, 1956), *affirmed, P. & D. Mfg. Co.* v. *Federal Trade Commission*, 245 F. 2d 281 (7th Cir. 1957), *cert. denied*, 355 U.S. 884 (1957); *General Foods Corp.* (second case), F.T.C. Docket No. 6018, at 3–4 (Feb. 15, 1956); *E. Edelmann & Co.*, F.T.C. Docket No. 5770, at 3–6 (April 29, 1955), *affirmed, E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956), *cert. denied*, 78 S. Ct. 426 (1958); *Whitaker Cable Corp.*, F.T.C. Docket No. 5722, at 9–10 (April 29, 1955), *affirmed, Whitaker Cable Corp.* v. *Federal Trade Commission*, 239 F. 2d 253, (7th Cir. 1956).

[26] F.T.C. Docket No. 5989 (June 15, 1956).

[27] Id., at 4.

[28] Sen. Doc. No. 4, 7th Cong., 1st Sess.

[29] 239 F. 2d, 152, at 155 (7th Cir. 1957), *cert. denied*, 78 S. Ct. 426 (1958).

[30] Rowe, *Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act*, 66 YALE L.J. 1, 18, 20 (1956).

analysis concept and adherence to a projection of the *Morton Salt* case so as to condemn almost any price differential among rival customers as "injurious" per se, particularly as in the within case where the business (i.e., grocery business) is highly competitive and the mark up and margin of profit is small.

Counsel for respondent also points out that statements of counsel on the record clearly show that there is no issue as to whether the effect of the alleged discriminations in price had, or may have, the prohibitive effect on the first or primary line of competition. This is essentially correct. Counsel for the Commission has asserted that the theory of the Commission's case is premised on secondary line competition or at the customer level under the concept enunciated in the *Moog Industries* case, *supra.*

Respondent further contends that there is no evidence in the record showing respondent sold its products to some of its wholesale customers at higher prices than it sold its products of like grade and quality to other wholesale customers who were competitively engaged in the resale of said products. To the contrary, the evidence establishes that this position is without merit. As expressed by counsel supporting the complaint, the case in chief proceeded on the theory that if A, B, and C owned, operated or serviced retail grocery stores located in the same trade area of distribution, such as a metropolitan area, and goods of like grade and quality were purchased by A, B, and C and distributed to those retail grocery stores to be purchased simultaneously by consumers in the same trade area, then A, B, and C are in competition in the distribution and sale of products. (See *F.T.C.* v. *Fruitvale*, Docket No. 5989, 1956.)

The concept with regard to competition among respondent's wholesale customers and injury thereto as enunciated in the *Fruitvale* case, is equally applicable in the within case. The discrimination in price herein shown must be considered in the light of the fact that the grocery business which furnishes the outlet for respondent's products is highly competitive. The evidence discloses that competition in such business is so keen that the mark-up on so-called fast moving items, such as canned fruits or vegetables, is very small, sometimes as low as 2 or 3%. A very small difference in price, therefore, is sufficient to divert business from one seller to another, resulting in injury to competition. This issue, therefore, as to whether the effect of the alleged discrimination had, or may have, the prescribed effect on competition between respondent's wholesale customers cannot be disposed as arbitrarily as respondent would seem to suggest.

As regards respondent's separate defenses set forth in its answer, no evidence was introduced supporting cost justification and, in fact, counsel for respondent indicated on the record that he was not going to burden the record with the issue raised by this defense. Regarding market fluctuation, it is to be observed that Appendices A–R, herein, contain many instances where the non-favored purchaser paid higher prices both before and after the favored purchaser's transaction.[31] The respondent's position as asserted in his second defense that the different prices, if any, charged by the respondent to its purchasers competing in the resale of its goods of like grade and quality were in response to changing conditions affecting the market for or the marketability of said goods appears to be untenable.

As a third and separate defense, respondent also urges that the lower prices, if any, charged by respondent to any purchaser or purchasers were made in good faith to meet the equally low price of a competitor or competitors. This defense to a price discrimination charge under Section 2(a) is contained in Section 2(b) of the amended Clayton Act,[32] and is based on meeting competition in good faith.

The scope and legal effect of this defense were construed by the Supreme Court in *Standard Oil Co. of Indiana* v. *Federal Trade Commission.*[33] In its original decision, the Federal Trade Commission had held that the defense was available only to rebut a prima facie case established by a showing of price differentials without additional proof of competitive injury.[34] The Supreme Court, however, rejected this interpretation and construed the proviso as authorizing an "absolute" or complete defense irrespective of Commission findings as to competitive injury.[35]

Despite this controversial holding, the defense has been rather unsuccessful.[36] The subsequent history of the *Standard Oil* (*Indiana*) case and certain problems arising therefrom have rcently been considered in *Standard Oil Co.* v. *Brown:* [37]

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[31] See Appendix A under Product: Choice Heavy Halves Unpeeled Apricots 24/2½ and Appendix under Product: Choice Heavy Syrup Halves Pears 24/303.

[32] It reads:

"That nothing herein contained shall prevent a seller rebutting the *prima facie* case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith *to meet an equally low price* of a competitor, or the services or facilities furnished by a competitor." [Emphasis supplied.]

[33] 340 U.S. 231 (1951). See also *Federal Trade Commission* v. *A. E. Staley Mfg. Co.,* 324 U.S. 746 (1945).

[34] 41 F.T.C. 263 (1945).

[35] 340 U.S. 231, 247, 251 (1951). Cf. McGee, *Price Discrimination and Competitive Effect: The Standard Oil of Indiana Case,* 23 U. CHI. L. REV. 398 (1956).

[36] Kintner, *Revitalized Federal Trade Commission: A Two-Year Evaluation,* 30 N.Y.U. L. REV. 1143, 1165–1168 (1955).

[37] 238 F. 2d 54, at 57–58 (5th Cir. 1956).

The Supreme Court returned the case to the Federal Trade Commission to make its findings as to whether the Standard Oil Company had proven itself to come within § 2(b). The Commission reviewed the matter and failed to give full effect to the Supreme Court's opinion as to the availability of § 2(b) relief,[38] and the case was again appealed to the Court of Appeals for the 7th Circuit. That Court reversed the decision of the Commission [39] and there, for the first time, discussed the use of the word "lawful" in connection with "equally lower prices." As to this matter the court said:

"It is interesting and highly significant that the statute employes the language 'made in good faith to meet an equally low price of a competitor,' but that the Supreme Court in the instant case adds the word 'lawful,' so that is reads, 'made in good faith to meet a lawful and equally low price of a competitor,' 340 U.S. at pages 238 and 246. We do not know, of course, why the Supreme Court added the word 'lawful,' but we strongly suspect that it was for the purpose of giving emphasis to its previous decisions that a 'good faith' defense was not available to a seller who had met an unlawful price. In this connection, it is also pertinent to note that in the instant situation there is no finding, no contention, not even a suspicion but that the competing prices which petitioner met were lawful . . ." 233 F. 2d 649, 653.

"However, to us it appears that the Supreme Court may have used the word 'lawful' merely because it was dealing with a case in which the facts showed that an equally low price had been met and the record was silent, as to whether such competitor's price was illegal; the Court, under these circumstances, merely took the case as it stood and referred to the competitor's equally low prices as 'lawful' because there was nothing in the record to indicate that they were not lawful. The use of the word was not to establish a standard that must be met; it was rather a description of the facts presented in that case.

"Here, as in the *Standard Oil* case quoted from above, there is 'no finding, no contention, and not even a suspicion (in the record) but that the competing prices which petitioner met were lawful.' Appellee here contends that there is a burden on the seller to prove that the competing price was lawful. There is certainly no authority for this in either the Supreme Court or later Court of Appeals opinions in the case referred to at such length. The most, it seems to us, that could be made out of the use by the Supreme Court of the word 'lawful' is that if the seller discriminates in price to meet prices that he knows to be illegal or that are of such a nature as are inherently illegal, as was the basing point pricing system in the *Staley* case, *supra*, there is a failure to prove the 'good faith' requirement in § 2(b). There is nowhere a suggestion that the seller must carry the burden of proving the actual legality of the sales of its competitors in order to come within the protection of the proviso."

However, it is fundamental that the seller who seeks to rely upon a 2(b) defense bears the burden of establishing the defense, after the Commission has established a prima facie case. The present status of the law appears to indicate that the defense is applicable only when discriminatory prices are made to meet individual competitive situations [*F.T.C.* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945); *F.T.C.* v.

[38] 49 F.T.C. 923, 953–955 (1953).

[39] 233 F. 2d 649 (7th Cir. 1956), *affirmed*, 78 S. Ct. 369 (1958).

Standard Oil Co., 355 U.S. 396 (1958)] that good faith is not present where a seller adopts the discriminatory pricing system of a competitor [*F.T.C.* v. *A. E. Staley Mfg. Co.*, *supra; F.T.C.* v. *Standard Oil Co.*, *supra*]; that the defense is not available to justify particular lower prices on the basis of an inherently discriminatory system of pricing [*F.T.C.* v. *A. E. Staley Mfg. Co. supra; F.T.C.* v. *Cement Institute*, 333 U.S. 683 (1948); *F.T.C.* v. *National Lead Co.*, 352 U.S. 419 (1957)]; that good faith meeting of an equally low price of a competitor means an equally low price of a given quantity [*F.T.C.* v. *Standard Brands, Inc.*, 189 F. 2d 510 (2d Cir. 1951)] that in naming a lower discriminatory price the seller must have reasonable grounds for belief as to the existence of the competitor's price and what that price is [*F.T.C.* v. *A. E. Staley Mfg. Co.*, *supra*]; that good faith is not present where the seller acts on unsupported, unverified verbal statements [*F.T.C.* v. *A. E. Staley Mfg. Co.*, *supra*]; and that good faith is not present if the seller knew or had reason to know that the competitor's price was illegal, or if it was inherently illegal [*Standard Oil Co.* v. *Brown*, 238 F. 2d 54 (5th Cir. 1956); *F.T.C.* v. *A. E. Staley Mfg. Co.*, *supra; Automatic Canteen Co.* v. *F.T.C.*, 346 U.S. 61 (1953)].

Application of the foregoing concepts which must be considered in evaluating the validity of the respondent's 2(b) defense indicates an insufficiency of evidence to successfully establish such a defense. Of particular significance is the absence of evidence sufficiently establishing that the discriminatory prices were to meet individual competitive situations and the presence of evidence indicating respondent's pricing system in certain instances was inherently illegal.

With regard to one phase of respondent's discriminatory practices, testimony of the witness Snyder indicated that there were two "market prices" in respondent's business; one price represented by the "market price" to all large chain buyers having representatives on California Street in San Francisco, and another "market price" which applied to all other buyers not represented on California Street. The latter market price was the "list price" demonstrated by respondent's exhibits. These respondent's exhibits show that while a "list price" for a particular commodity extended to the non-favored purchasers, the favored purchasers were buying at the "market price" of California Street which was consistently and systematically lower than the list price. This "two-market system" within the same trade area does not comply with the requirement of "meeting a lawful price of a competitor in good faith" since expectably it may be injurious to competition and is inherently illegal.

The 2(b) defense as the cited cases indicate was established to meet individual competitive situations, that is, to depart from a lawful pricing system to meet an individual threat to business from a competitor on a shipment of a given quantity and for a particular price on a specific commodity. Respondent cannot under Section 2(a) engage in a discriminatory two market price system, which by its nature systematically injures or may injure competition between the nonfavored and favored purchasers. Such an inherently illegal system has no relation to meeting an individual competitive situation.

In regard to violations by the respondent of Section 2(d) of the amended Clayton Act (15 U.S.C. Sec. 13) [40] the evidence establishes specific instances in which the respondent made allowances to its customers for services or facilities furnished by the customer in connection with the offering for sale of respondent's products. The evidence further establishes that such payments were not made available on proportionally equal terms to all other customers of respondent competing in the distribution of these products. Injury to competition was not specifically proved as a result of these acts. However, in a 2(d) case proof of injury to competition is not essential. (*F.T.C.* v. *Simplicity Pattern Co.*, 360 U.S. 55; *United Cigar Whelan Stores, Corp.* v. *Weinreich Co.*, 107 F. Supp. 89, 91, 1952.) Proof that competition did exist between the customers involved is a requirement and has been established. (See *Atalanta* v. *F.T.C.*, 258 F. 2d 365, 1958.) It would appear that the defense of meeting competition may not be interposed under Section 2(d), as enunciated in Henry Rosenfeld, Inc., et al., Docket No. 6212, F.T.C., June 21, 1956 and *F.T.C.* v. *Exquisite Form Brassiere*, Docket No. 6966, Oct. 31, 1960. Nevertheless, the evidence itself is insufficiently supportive of such a defense.

Clearly the evidence reflects the Fred Meyer transaction and the Central Grocers transaction were arrangements negotiated with the customer on the customer's terms as opposed to extending advertising funds for services established by the seller of manufacturer. The resulting payments were allowances for services or facilities which were not "available" on proportionally equal terms or on any terms to customers competing in the distribution of the products since they involved separate and individual arrangements, which are surely within the proscription of the statute. Such individualized and preferential treatment was the very thing Section 2(d) was designed

[40] These charges are those encompassed by the complaint issued under Docket No. 7496 which was made a part of the hearing in Docket No. 7225. Prior discussion relates the issues encompassed by the complaint issued under Docket No. 7225.

to prevent (*Chestnut Farms-Chevy Chase Dairy*, F.T.C. Docket No. 6465, May 21, 1957).

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the acts and practices of the respondent in this proceeding.

2. Respondent has violated Section 2(a) of the amended Clayton Act, as hereinbefore set forth.

3. Respondent has violated Section 2(d) of the amended Clayton Act, as hereinbefore set forth.

It is concluded that this proceeding is in the public interest and that the following order shall issue:

ORDER

It is ordered, That respondent Tri-Valley Packing Association, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in, or in connection with, the sale of food products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

1. 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 to any other purchaser who, in fact, competes in the resale and distribution of respondent's products with the purchaser paying the higher price; and

2. Paying, or contracting for the payment of, anything of value to or for the benefit of, any customer of respondent as compensation, or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's products unless such payment or consideration is offered or otherwise affirmatively made available on proportionally equal terms to all other customers competing in the distribution and resale of such products with the favored customer.

It is further ordered, That the allegations of a substantial lessening of competition or tendency toward monopoly in the line of commerce in which the respondent is engaged be dismissed since the evidence does not establish that the acts of the respondent have impaired or may impair primary line competition (i.e., at the seller level).

APPENDIX A

TRADE AREA: PORTLAND, OREGON

CX No.	Date	Invoice No.	Buyer	Number of cases	Price	Differential	Percent of discrimination
Product: Std. Light Syrup Halves Unpeeled Apricots 24/303							
CX 34	9-24-57	9-24-18	Fred Meyer, Inc.	25	1.725 dozen.	0.125	7.8
	11-27-57	11-27-37	Regent Canfood (Safeway).	45	1.60		
Product: Fancy Leaf Spinach 24/2½							
CX 34	11-18-58		Fred Meyer, Inc.	32	3.50	0.15	4.5
	12-19-58		Regent Canfood (Safeway).	150	3.35		
Product: Choice Heavy Syrup Halves Unpeeled Apricots 48/8							
CX 34		172769	Regent Canfood (Safeway).	100	1.15		
		1-13124	Hudson House, Inc.	30	1.20	0.05	4.4
Product: Choice Heavy Halves Unpeeled Apricots 24/2½							
CX 34	2-11-57	2-11-11	Hudson House, Inc.	50	6.15	0.45	7.9
	2-12-57	2-12-48	Fred Meyer, Inc.	500	5.70		
	2-12-57	2-12-49	do	500	5.70		
	4- 7-57	4- 7-59	Hudson House, Inc.	60	6.15	0.45	7.9

APPENDIX B

TRADE AREA: BOSTON, MASS.

CX No.	Date	Invoice No.	Buyer	Number of cases	Price	Differential	Percent of discrimination
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/303							
CX 35	5-16-58	5-16-58	First National Stores	350	3.45		
	7-10-58	6-26-033	Central Grocery	50	3.70	0.25	7.2
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/303							
CX 35	8-29-58	8-11-075	Central Grocery	25	3.65	0.15	4.3
	9-19-58	8-25-171	First National Stores	650	3.50		
Product: Choice Heavy Syrup Halves Pears 24/303							
CX 35	8-29-58	8-11-075	Central Grocery	50	4.60	0.40	9.5
	9-22-58	8-28-069	A & P	75	4.20		
	10-17-58	9-25-096	do	50	4.20		
	11-11-58	10- 9-046	Central Grocery	50	4.60	.40	9.5

APPENDIX B—Continued

TRADE AREA: BOSTON, MASS.—Continued

CX No.	Date	Invoice No.	Buyer	Number of cases	Price	Differential	Percent of discrimination
Product: Choice Heavy Syrup Halves Pears 48/8							
CX 35	10-17-58	9-25-096	A & P	125	5.30		
	11-11-58	10- 9-046	Central Grocery	25	5.50	0.20	3.8
Product: Choice Heavy Syrup Halves Pears							
CX 35	9-22-58	8-28-069	A & P	150	6.50		
	11-11-58	10- 9-046	Central Grocery	25	7.00	0.50	8
Product: Corina Fancy Tomato Paste 96/6							
CX 45	4- 9-57	4-3400	A & P	350	5.90		
	4-16-57	4-3739	Standard Grocery	150	6.25	0.35	5.6

APPENDIXES C, D, AND E

TRADE AREA: PORTLAND, MAINE

CX No.	Date	Invoice No.	Buyer	Number of cases	Price	Differential	Percent of discrimination
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/303							
CX 46	11-14-57	10-31-61	A & P	40	3.45		
	11- 4-57	10-24-46	Hannaford Bros. Co	70	3.60 [1]	0.15	4.2
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/2½							
CX 46	11-14-57	10-31-61	A & P	55	4.90		
	11- 4-57	10-24-46	Hannaford Bros. Co	90	5.30 [2]	0.40	7.5
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/303							
CX 46	11-14-57	10-31-61	A & P	35	3.40		
	11- 4-57	10-24-46	Hannaford Bros. Co	50	3.55 [3]	0.15	4.2
Product: Choice Heavy Syrup Sliced Y.C. Peaches 48/8 vs. 24/8 [4]							
CX 36	7- 8-58	6-16-075	A & P	150	1.125 dozen		
	7-11-58	6-24-043	Hannaford Bros. Co	60	1.20 dozen	[5] 0.062	5.8
	9- 2-58	8-15-075	do	100	1.20 dozen	[5] .062	5.8
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/303							
CX 36	9-17-58	8-29-057	Hannaford Bros. Co	40	3.65		
	9-19-58	8-25-176	A & P	175	3.50		
	9-22-58	8-29-055	Hannaford Bros. Co	50	3.65	0.15	4.3
	11-11-58	10-21-029	do	60	3.85	.35	10.0

See footnotes at end of table, p. 1160.

APPENDIXES C, D, AND E—Continued

TRADE AREA: PORTLAND, MAINE—continued

CX No.	Date	Invoice No.	Buyer	Number of cases	Price	Differential	Percent of discrimination
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/2½							
CX 36	9-17-58	8-29-057	Hannaford Bros. Co.	80	5.20		
	9-19-58	8-25-176	A & P	225	5.10		
	9-22-58	8-29-055	Hannaford Bros. Co.	50	5.20	0.10	2.0
	1- 6-59	12-17-045	do	120	5.60	.50	9.8
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/303							
CX 36	9- 2-58	8-15-075	Hannaford Bros. Co.	50	3.65		
	9-19-58	8-25-176	A & P	135	3.50		
	9-22-58	8-29-055	Hannaford Bros. Co.	75	3.65	0.15	4.3
	1- 6-59	12-17-045	do	20	3.85 [6]	.35	10.0
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/2½							
CX 37	9-17-58	8-29-057	Hannaford Bros. Co.	50	5.20		
	9-19-58	8-25-176	A & P	150	5.10		
	9-22-58	8-29-055	Hannaford Bros. Co.	25	5.20	0.10	2.0
	11-11-58	10-21-029	do	30	5.60	.50	9.8
Product: Choice Heavy Syrup Halves Pears 24/303							
CX 37	9-22-58	9- 3-031	Hannaford Bros. Co.	60	4.60		
	9-26-58	9- 4-078	A & P	90	4.20		
	9-29-58	9- 3-032	Hannaford Bros. Co.	40	4.60	0.40	9.5
	10-21-58	9-26-034	A & P	35	4.20		
	11-11-58	10-21-029	Hannaford Bros. Co.	20	4.60	.40	9.5
Product: Choice Heavy Syrup Halves Pears 24/2½							
CX 37	9-22-58	9- 3-031	Hannaford Bros. Co.	25	7.00		
	9-26-58	9- 4-078	A & P	40	6.50		
	9-29-58	9- 3-032	Hannaford Bros. Co.	30	7.00	0.50	7.7

[1] RX 3(f) indicates 0.0372/case freight allowance was given on this shipment although A & P shipment is not clear on freight allowance; but see inventory number 10-3-66 dated 10-22-57 for 3 cases of same at 3.60—no freight allowance granted showing clear cut 4.2% differential;

[2] RX 3(g) indicates 0.40/case "count and recount" allowance was given on this shipment; but see inventory number12-17-19 dated 12-27-57 for 30 cases of same on which *no* count and recount was granted; demonstrating undisputed 7.5% differential;

[3] RX 3(c) indicates 0.0372/case freight allowance was given on this shipment; but see 10-22-57 inventory number 10-3-66 where Hannaford purchased 30 cases of same at 3.55, *no* freight allowance granted showing clear cut 4.2% differential;

[4] See presentation on RX 3(a) on justifiable cost savings on 48/8.

[5] This 0.013 computes half of the differential set by respondent on RX 3(a) subtracted from 0.075, the initial price differential.

[6] Includes 0.05/case special handling charge.

APPENDIXES F, G, AND H

TRADE AREA: EAST HARTFORD, WATERBURY, CONN.

CX No.	Date	Invoice No.	Buyer	Number of cases	Price	Differential	Percent of discrimination
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/2½							
CX 45	9-27-57	8-28- 64	First National Stores	400	4.90		
	9-25-57	8-26- 49	John Bozzuto & Sons	125	[1] 5.20	0.30	5.8
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/2½							
CX 45	9-27-57	8-28- 64	First National Stores	725	5.00		
	9-20-57	8-26- 49	John Bozzuto & Sons	125	[2] 5.30	0.30	5.7
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/303							
CX 45	8- 9-57	8-7939	First National Stores	500	3.40		
	8-19-57	7-2984	John Bozzuto & Sons	150	[3] 3.60	0.20	5.6
Product: Fancy Spinach 24/303							
CX 45	10-18-57	10-15- 15	First National Stores	250	2.00		
	10-17-57	10- 7- 73	John Bozzuto & Sons	25	[4] 2.15	0.15	7.5
Product: Fancy Spinach 24/2½							
CX 45	10-18-57	10-15- 15	First National Stores	200	2.70		
	10-17-57	10- 7- 73	John Bozzuto & Sons	25	[5] 2.90	0.20	6.9
Product: Cocktail Choice Heavy Syrup 24/2½							
RX 5(g)	10- 7-57	8-28- 61	First National Stores	1125	6.00		
	10-19-57	10- 7- 73	John Bozzuto & Sons	150	6.20	0.20	3.3
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/2½							
CX 38	12-12-58	11-24-094	John Bozzuto & Sons	50	5.60	0.20	3.8
	2- 6-59	1-26-079	A & P	375	5.40		
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/303							
CX 38	8- 1-58	7-17-002	John Bozzuto & Sons	100	3.60	0.10	2.8
	9-10-58	8-21-110	First National Stores	270	3.50		
	9-19-58	8-25-138	John Bozzuto & Sons	100	3.65	.15	4.3
	2- 5-59	1-19-038	do	100	3.85	.15	4.0
	2- 6-59	1-26-077	A & P	120	3.70		
Product: Fancy Leaf Spinach 24/2½							
CX 38	5- 9-58	5- 9-37	A & P	96	3.20		
	6-19-58	5-16-41	John Bozzuto & Sons	75	3.35	0.15	4.7
	8-13-58	7-24-044	A & P	64	3.20		
	12-12-58	11-24-094	John Bozzuto & Sons	75	3.50	.30	9.4

See footnotes at end of table, p. 1162.

APPENDIXES F, G, AND H—Continued

TRADE AREA: EAST HARTFORD, WATERBURY, CONN.—Continued

CX No.	Date	Invoice No.	Buyer	Number of cases	Price	Differential	Percent of discrimination
			Product: Fancy Leaf Spinach 24/303				
CX 38	8- 1-58	7-17-002	John Bozzuto & Sons	75	2.45	0.15	6.5
	8-13-58	7-24-004	A & P	60	2.30		
	12-12-58	11-24-094	John Bozzuto & Sons	25	2.45	.15	6.5
			Product: Fancy—26 Tomato Paste—96/6				
CX 38	10-13-58	9-12-075	A & P	320	6.00		
	12-12-58	11-24-094	John Bozzuto & Sons	200	6.25	0.25	4.2
	1-13-59	12-23-031	A & P	240	6.00		
	2- 5-59	1-19-038	John Bozzuto & Sons	300	6.25	.25	4.2

[1] Claim made on RX 5(c) for 0.10/case promotional allowance or net differential of 0.20 or about 4% differential; but see RX 5(c) for purchase by Bozzuto of same on Invoice No. 10-7-73 dated 10-19-57 of 100 cases at 5.20 for unrebutted 5.8% differential.

[2] Claim made on RX 5(e) for 0.10/case promotional allowance or net differential of 0.20 or about 4% differential; but see RX 5(f) for purchase by Bozzuto of same goods on Invoice No. 10-7-73 dated 10-19-57 of 200 cases at 5.30 for unrebutted 5.7% diffferential.

[3] Claim made on RX 5(e) for 0.10/case promotional allowance or net differential of 0.10 or about 2.8%; but see RX 5(e) for purchase by Bozzuto of same goods on Invoice No. 10-7-73 dated 10-19-57 for 75 cases at 3.60 for unrebutted 5.6% differential.

[4] Unrebutted by RX 5(a); in fact, RX 5(a) shows later purchase on Invoice No. 12-19-46 dated 1-13-58 showing 0.20 price differential with 0.10 promotional allowance, or 0.10 price differential on 2.10 net price or about 5% differential.

[5] Unrebutted by RX 5(b).

APPENDIXES I AND J

TRADE AREA: PITTSBURGH, PA.

CX No.	Date	Invoice No.	Buyer	Number of cases	Price	Differential	Percent of discrimination
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/303							
CX 49	11-15-57	11- 4-94	A & P	20	3.40		
	11- 4-57	8-19-52	Associated Grocers, Inc.	100	3.55	0.15	4.2
	11- 1-57	9-13-18	Spiegel Bros.	20	3.55	.15	4.2
	9-11-57	8-30-22	Star Markets	75	3.55	.15	4.2
	10-10-57	9- 3-44	W. E. Osborn Co.	24	3.55	.15	4.2
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/2½							
CX 49	11-15-57	11- 4-99	A & P	125	4.80		
	11- 4-57	8-19-52	Associated Grocers, Inc.	100	5.20	0.40	7.7
	10-10-57	9-23-38	General Grocery Co.	25	5.20	.40	7.7
	11- 1-57	9-13-18	Spiegel Bros.	60	5.20	.40	7.7
	10-10-57	9- 3-44	W. E. Osborn Co.	35	5.20	.40	7.7
Product: Fancy Spinach 24/2½							
CX 49	9-13-57	9- 4-52	A & P	50	2.70		
	8- 9-57	8- 1- 2	Pittsburgh Mercantile	25	2.90	0.20	6.9
	8-23-57	7-22-57	Spiegel Bros.	40	2.90	.20	6.9
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/2½							
CX 49	11-15-57	11- 4-94	A & P	75	4.90		
	10-10-57	9-23-38	General Grocery Co.	25	5.30	0.40	7.5
	10-10-57	9- 3-44	W. E. Osborn Co.	50	5.30	.40	7.5
	11- 1-57	9-13-18	Spiegel Bros.	100	5.30	.40	7.5
Product: Choice Heavy Syrup Halves Unpeeled Apricots 24/2½							
CX 49	9-13-57	9- 4-52	A & P	25	5.80		
	10-10-57	9-23-52	General Grocery Co.	25	6.15	0.35	5.7
Product: Fancy Spinach 24/303							
CX 49	9-13-57	9- 4-52	A & P	75	2.00		
	10- 5-57	9- 3-47	Pittsburgh Mercantile	25	2.15	0.15	7.5
	11- 1-57	9-13-18	Spiegel Bros.	40	2.15	.15	7.5
	8-23-57	7-22-57	do	100	2.15	.15	7.5
	10-10-57	9- 3-44	W. E. Osborn Co.	75	2.15	.15	7.5
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/303							
CX 49	11-15-57	11- 4-94	A & P	75	3.45		
	10-10-57	9- 3-44	W. E. Osborn Co.	24	3.60	0.15	4.2
	11- 1-57	9-13-18	Spiegel Bros.	100	3.60	.15	4.2
	9-11-57	8-30- 2	Star Markets	75	3.60	.15	4.2
Product: Choice Heavy Syrup Royal Anne Cherries 24/303							
CX 39	7-14-58	6-23-018	Star Markets	50	6.55	0.15	2.3
	9- 4-58	8-20-085	A & P	25	6.40		

APPENDIXES K, L, M, N, AND O

TRADE AREA: NEW YORK CITY–NEW JERSEY

CX No.	Date	Invoice No.	Buyer	Number of cases	Price	Differential	Percent of discrimination
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/2½							
CX 41	9–18–57	8–22–32	A & P, Paterson, N.J.	50	4.90		
	9–23–57	8–14– 7	Walkay Grocery Co., Jersey City.	25	5.20	0.30	5.8
	9–11–57	8–26–43	Middendorf & Rohrs, NYC.	100	[1] 5.20	.30	5.8
Product: Choice Heavy Syrup Sliced Y.C. Peaches 48/8							
CX 41	9–18–57	8–22–32	A & P, Paterson N.J.	100	4.40		
	9–23–57	8–14– 7	Walkay Grocery Co., Jersey City.	50	4.70	0.30	6.4
	9–11–57	8–26–43	Middendorf & Rohrs, NYC.	150	4.70	.30	6.4
	8–27–57	8– 5–60	Grand Union Co., East Paterson, N.J.	150	4.70	.30	6.4
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/303							
CX 41	9–18–57	8–22–32	A & P, Paterson, N.J.	50	3.40		
	9–23–57	8–14– 7	Walkay Grocery Co., Jersey City.	75	3.60	0.20	5.6
	9–11–57	8–26–43	Middendorf & Rohrs, NYC.	100	3.60	.20	5.6
	8–27–57	8– 5–60	Grand Union Co., East Paterson, N.J.	800	3.60	.20	5.6
Product: Standard Light Syrup Halves Unpeeled Apricots 24/2½							
CX 41	8–22–32	9–18–57	A & P, Paterson, N.J.	75	5.10		
	8–23– 8	9–10–57	Packard Bamberger Co., Hackensack, N.J.	15	5.30	0.20	3.8
Product: Standard Light Syrup Halves Y.C. Peaches 24/2½							
CX 41	9–18–57	8–22–32	A & P, Paterson, N.J.	75	4.70		
	10–12–57	9–26–70	Packard Bamberger, Hackensack, N.J.	20	4.95	0.25	5.1
	8–27–57	8– 5–60	Grand Union Co., East Paterson, N.J.	100	4.95	.25	5.1
Product: Standard Light Syrup Sliced Y.C. Peaches 24/2½							
CX 41	9–18–57	8–22–32	A & P, Paterson, N.J.	125	4.70		
	10–12–57	9–26–70	Packard Bamberger, Hackensack, N.J.	30	5.05	0.35	6.9
Product: Corina Fancy Tomato Paste 96/6							
CX 41	4–22–57	4–3855	A & P, Hawthorne, N.J.	75	5.90		
	4–22–57	5–4051	Middlesex Foods, New Brunswick, N.J.	100	6.25	0.35	5.6

See footnotes at end of table, p. 1166.

APPENDIXES K, L, M, N, AND O—Continued

TRADE AREA : NEW YORK CITY-NEW JERSEY—Continued

CX No.	Date	Invoice No.	Buyer	Number of cases	Price	Differential	Percent of discrimination
Product: Choice Heavy Syrup Bartlett Pears 24/2½							
CX 42	2-19-57	2- 946	Regent Canfood, Kearney, N.J.	50	6.80		
	3- 4-57	3-1669	do	50	6.80		
	3- 8-57	3-1878	Wakefern Foods Corp., Cranford, N.J.	1,000	7.00	0.20	2.9
	3-11-57	3-1874	Wakefern Foods, Cranford	1,000	7.00	.20	2.9
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/303							
CX 42	2-14-57	2-856	Regent Canfood Co., Kearney, N.J.	225	3.45		
	2-19-57	3-349	Grand Union Co., East Paterson, N.J.	150	3.60	0.15	4.2
Product: Choice Heavy Syrup Halves Unpeeled Apricots 48/8							
CX 42	2-19-57	2-946	Regent Canfood Co., Kearney, N.J.	40	4.60		
	2-19-57	3-349	Grand Union Co., East Paterson, N.J.	100	4.80	0.20	4.2
	2-26-57	3-1122	do	70	4.80	.20	4.2
Product: Standard Light Syrup Halves Y.C. Peaches 24/2½							
CX 42	2-26-57	3-1527	Regent Canfood Co., Kearney, N.J.	150	4.95		
	2-19-57	3-349	Grand Union Co., East Paterson, N.J.	100	5.15	0.20	3.9
	2-26-57	3-1122	do	125	5.15	.20	3.9
Product: Choice Heavy Syrup Halves Unpeeled Apricots 48/8							
CX 42	4-12-57	4-4046	Regent Canfood Co., Kearney, N.J.	40	4.60		
	4-18-57	4-4151	Grand Union Co., East Paterson, N.J.	130	4.80	0.20	4.2
	4-24-57	5-4426	do	100	4.80	.20	4.2
Product: Standard Light Syrup Halves Y.C. Peaches 24/2½							
CX 42	4-24-57	5-4422	Regent Canfood Co., Kearney, N.J.	50	4.95		
	4-18-57	4-4151	Grand Union Co., East Paterson, N.J.	175	5.15	0.20	3.9
Product: Choice Heavy Syrup Sliced Y.C. Peaches 48/8							
CX 42	5-29-57	5-21-46	Regent Canfood Co., Kearney, N.J.	80	4.70		
	6-17-57	5-14-54	Grand Union Co., East Paterson, N.J.	120	4.90	0.20	4.1

APPENDIXES K, L, M, N, AND O—Continued

TRADE AREA : NEW YORK CITY-NEW JERSEY—Continued

CX No.	Date	Invoice No.	Buyer	Number of cases	Price	Differential	Percent of discrimination
Product: Standard Light Syrup Sliced Y.C. Peaches 24/2½							
CX 42	6-28-57	6-25-58	Regent Canfood, Kearney, N.J.	350	4.80		
	6-17-57	5-14-54	Grand Union Co., East Paterson, N.J.	250	5.25	0.45	8.6
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/303							
CX 43	10-10-57	9-20-54	American Stores, Newark.	125	3.40		
	9-23-57	8-14-7	Walkay Grocery, Jersey City.	75	3.60	0.20	5.6
	11-21-57	10-30-6	do	75	3.60	.20	5.6
	9-11-57	8-26-43	Middendorf & Rohrs, NYC.	100	3.60	.20	5.6
Product: Choice Heavy Syrup Sliced Y.C. Peaches 48/8							
CX 43	10-10-57	9-20-54	American Stores, Newark.	125	4.40		
	9-23-57	8-14-7	Walkay Grocery, Jersey City.	50	4.70	0.30	6.4
	11-21-57	10-30-6	do	50	4.70	.30	6.4
	9-11-57	8-26-43	Middendorf & Rohrs, NYC.	150	4.70	.30	6.4
	10-30-57	10-10-25	Grand Union Co., Rutherford, N.J.	15	4.70	.30	6.4
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/303							
CX 43	11-13-57	11- 8-52	American Stores, Kearney.	200	3.45		
	11-21-57	10-30-6	Walkay Grocery, Jersey City.	75	3.60	0.15	4.2
Product: Choice Heavy Syrup Sliced Y.C. Peaches 48/8							
CX 43	11-13-57	11- 8-52	American Stores, Kearney.	200	4.50		
	11-21-57	10-30-6	Walkay Grocery, Jersey City.	50	4.70	0.20	4.3
	10-30-57	10-10-25	Grand Union, East Paterson.	15	4.70	.20	4.3
RX 12(d)	11-22-57	11-11-53	do	50	4.70	.20	4.3
Product: Choice Heavy Syrup Halves Unpeeled Apricots 48/8							
CX 43	9- 9-57 [See RX 12(a)]	8-22-39	American Stores, Newark.	125	4.50		
	8-27-57	8- 5-60	Grand Union, East Paterson.	75	4.60	0.10	2.2
Product: Choice Heavy Syrup Sliced Y.C. Peaches 48/8							
RX 12(d)	10-10-57	9-20-54	American Stores, Newark.	125	4.40		
	10-31-57	10-10-24	Grand Union, East Paterson.	15	4.70	0.30	6.5

[1] Respondent argues that *these* peaches came under RX 14 d-e; but if so, only *some;* and if so, to no other Middendorf transaction; only 2½ choice peach.

APPENDIXES P, Q, AND R

TRADE AREA: DENVER-PUEBLO

CX No.	Date	Invoice No.	Buyer	Number of cases	Price	Differential	Percent of discrimination
Product: Standard Light Syrup Pears 24/2½							
CX 44	2-15-57	2-779	Regent Canfood Co., Denver.	145	6.10		
	2-11-57	2-193	Associated Grocers, Denver.	300	[1] 6.50	0.40	6.2
	2-11-57	2-194	do	200	[1] 6.50	.40	6.2
	3-27-57	4-2699	do	150	[1] 6.50	.40	6.2
	3-27-57	4-2788	do	140	[1] 6.50	.40	6.2
Product: Standard Light Syrup Halves Unpeeled Apricots 24/2½							
CX 44	3-19-57	3-2474	Regent Canfood, Denver.	30	5.30		
	2-11-57	2-193	Associated Grocers, Denver.	200	[2] 5.70	0.40	7.0
	3-27-57	4-2699	do	150	[2] 5.70	.40	7.0
Product: Standard Light Syrup Sliced Y.C. Peaches 24/2½							
CX 44	3-19-57	3-2474	Regent Canfood, Denver.	110	4.90		
	3-11-57	3-162	H. A. Marr, Denver	321	5.05	0.15	3.0
Product: Choice Heavy Syrup Halves Y.C. Peaches 24/2½							
CX 44	3-19-57	3-2474	Regent Canfood, Denver.	105	5.20		
	3-11-57	3-162	H. A. Marr, Denver	80	5.45	0.25	4.6
Product: Choice Heavy Syrup Sliced Y.C. Peaches 24/2½							
CX 44	3-19-57	2-2474	Regent Canfood, Denver.	150	5.30		
	3-11-57	3-162	H. A. Marr, Denver	120	5.55	0.25	4.5
Product: Choice Heavy Syrup Halves Unpeeled Apricots 24/303							
CX 44	3-19-57	3-2474	Regent Canfood, Denver.	80	3.50		
	3-21-57	4-2882	H. A. Marr, Denver	40	3.60	0.10	2.8
Product: Choice Heavy Syrup Fruit Cocktail 24/303 [3]							
CX 44	9-27-57	4-4-45	Regent Canfood, Denver.	185	3.85		
	10- 4-57	10-86-53	Associated Grocers, Pueblo.	40	4.00	0.15	3.8
	10- 4-57	10-8654	Associated Grocers, Avondale.	10	4.00	.15	3.8
	10- 4-57	10-8655	Associated Grocers, Pueblo.	35	4.00	.15	3.8
	10- 4-57	10-8656	do	10	4.00	.15	3.8
	10- 4-57	10-8657	do	35	4.00	.15	3.8
	10- 4-57	10-8658	do	100	4.00	.15	3.8
	10- 4-57	10-8659	do	20	4.00	.15	3.8
	10- 4-57	10-8660	do	15	4.00	.15	3.8
	10- 4-57	10-8661	do	25	4.00	.15	3.8

See footnotes at end of table, p. 1168.

APPENDIXES P, Q, AND R—Continued

TRADE AREA: DENVER-PUEBLO—Continued

CX No.	Date	Invoice No.	Buyer	Number of cases	Price	Differential	Percent of discrimination
Product: Choice Heavy Syrup Fruit Cocktail 24/2½ [4]							
CX 44	9-27-57	9-4-45	Regent Canfood, Denver.	90	6.00		
	10- 4-57	10-8653	Associated Grocers, Pueblo.	15	6.20	0.20	3.2
	10- 4-57	10-8654	Associated Grocers, Avondale.	5	6.20	.20	3.2
	10- 4-57	10-8655	Associated Grocers, Pueblo.	20	6.20	.20	3.2
	10- 4-57	10-8656	-----do-----	15	6.20	.20	3.2
	10- 4-57	10-8657	-----do-----	15	6.20	.20	3.2
	10- 4-57	10-8658	-----do-----	50	6.20	.20	3.2
	10- 4-57	10-8659	-----do-----	10	6.20	.20	3.2
	10- 4-57	10-8660	-----do-----	10	6.20	.20	3.2
	10- 4-57	10-8661	-----do-----	15	6.20	.20	3.2

[1] Argument regarding count and recount allowance to Associated Grocers; [see Transcript 884-891;] Only on 1,450 of total 2,240 cases in brackets on RX 2(a); Consequently, at least to almost 50% of these pears, the 6.2% price discrimination applied.

[2] Argument regarding count and recount allowance, see RX 2(a) and argument Tr. 890, and under pears above;

However, RX 2(a) shows:

Date	Invoice No.	Buyer	Number of Cases	Price	Differential	Percent of discrimination
10-17-57	10-3-60	Regent Canfood	55	5.10		
12- 9-57	11-25-7	Associated Grocers	20	5.45	0.35 or 6.4% *	

* On respondents own tabulation; note "List Price" column on RX 2(a)

[3] See also RX 2(d).

[4] See also RX 2(e).

OPINION OF THE COMMISSION

By DIXON, *Commissioner:*

This matter is before the Commission on the appeal of respondent, Tri-Valley Packing Association,[1] from an initial decision of the hearing examiner holding that respondent had violated subsections (a) and (d) of Section 2 of the Clayton Act, as amended, and ordering respondent to cease and desist from the practices found to be unlawful.

We will consider first respondent's appeal from that part of the initial decision dealing with the charge of unlawful price discrimination. Respondent contends in this connection that the charge has not been sustained by the evidence and further contends that, even if a *prima facie* case had been proved, it has established that its lower prices to certain purchasers were made in good faith to meet the equally low prices of competitors.

[1] Incorrectly named in the complaint in Docket No. 7225 as Tri-Valley Packing Association, Inc.

Respondent is engaged in the business of processing and canning fruits and vegetables which it sells to customers located throughout the United States. Its sales of these products are substantial, amounting in the fiscal year ending January 31, 1959, to $22,329,877.

There is no dispute, and the record fully supports the finding, that respondent has discriminated in price in favor of certain large chain stores and against various wholesalers and retailers in the sale of canned fruits and vegetables of like grade and quality. The record also shows that the favored chains, purchasing through their own direct buying agencies in San Francisco, consistently paid lower prices for respondent's goods than wholesalers and retailers, including cooperative organizations, that purchased respondent's goods through brokers. Counsel supporting the complaint has shown numerous instances of such price discriminations throughout various "trade areas" where the favored chains were generally engaged in competition with nonfavored retailers and with customers of nonfavored wholesalers.

In almost every instance where price discriminations have been shown to have occurred, both the favored and nonfavored customers purchased respondent's products for resale under their own private labels. There is also evidence that these customers also purchased canned products from other packers for resale under the same labels. Consequently, respondent's products when received by their customers are usually commingled in the customer's warehouse with other products bearing the customer's label. They are thereafter shipped by the customer, either to its own stores for resale to the public, or, in the case of a wholesaler, to smaller independent retailers for resale to the public.

The principal argument made by respondent in this phase of its appeal is that counsel supporting the complaint has failed to prove that the aforementioned price discriminations have had the requisite adverse effect on competition. It contends in this connection that neither actual nor probable injury can be found to result from a price discrimination unless it is shown that actual competition existed between favored and nonfavored purchasers in the resale of the specific products involved in the discrimination. To support this argument, respondent points out that orders to cease and desist issued by the Commission in Section 2(a) cases ordinarily prohibit a seller from discriminating in price only between purchasers who, in fact, "compete in the resale and distribution" of the seller's products.

Relying primarily on the fact that its products lose their identity by being commingled with other products bearing identical labels, respondent states that there has been no showing of a single instance

where a retail outlet operated by a nonfavored retailer or customer of a nonfavored wholesaler has, in fact, competed with outlets of favored chain stores in the resale of respondent's products of like grade and quality. And respondent further contends that the facts do not support an inference that such competition exists since in any given trade area, as defined by counsel supporting the complaint, there are retail outlets of the favored chains that do not compete with any of the stores of nonfavored retailers or customers of nonfavored wholesalers and, in the same trade area, there are stores of nonfavored retailers and customers of nonfavored wholesalers that do not compete with any of the outlets of the favored chains. In view of this fact, respondent argues that although it is possible that there might be competition in the resale of respondent's products to the public, it is also possible that there is no competition. Respondent claims, therefore, that since counsel supporting the complaint has failed to prove real or existing competition in the resale of its products, there can be no finding of actual or probable injury to competition stemming from the price discriminations.

This argument must be rejected. First of all, we do not agree with respondent that the record does not support a finding that in some instances, at least, the recipients of respondent's discriminatory prices were competing in the resale and distribution of the products involved in such discriminations. The fact that respondent's goods cannot be identified on the shelves of individual stores operated by the purchasers does not mean that the purchasers are not competing in the distribution of such goods. There can be no doubt, in this connection, that respondent's goods have been purchased for resale under its customers' private labels. Since respondent's goods have been commingled with other products, the showing that favored and nonfavored purchasers have, in fact, competed in the sale of these private label goods would be sufficient in some instances to establish that they have competed in the resale of respondent's goods.

But more important, there is no substance to the contention that a violation of Section 2(a) must be predicated upon a showing of actual or probable injury to competition with the favored customer in the resale of the goods involved in the price discrimination. This contention confuses the element of price discrimination with the element of competitive injury and is obviously incorrect. In a case involving injury to competitors of the seller, for example, there may be no competition whatsoever between the recipients of the discriminatory prices in the resale of the seller's products. *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *Federal Trade Commission* v. *Anheuser-Busch*,

Inc., 363 U.S. 536 (1960). Nor is it necessary that such competition exist in cases involving injury to buyers. In *Corn Products Refining Company et al.* v. *Federal Trade Commission*, 324 U.S. 726 (1945), there was no competition between purchasers in the resale of the product sold by respondent, since in that case the purchasers were using the product involved in the discrimination, glucose, as an ingredient in candy which they manufactured. Nor is it necessary that the goods involved in a price discrimination be resold in any form since the Act specifically states "where such commodities are sold for *use*, *consumption*, or resale." [Italic supplied.] For example, discrimination in the price of gasoline sold to competing taxicab or truck fleets could have the effect of injuring competition with the purchaser receiving the lower price. Or injury could result from the difference in the price of machinery or other equipment sold to competing firms for use in the production of other goods.

As respondent has pointed out, Commission orders in Section 2(a) cases ordinarily prohibit a seller from discriminating in price between purchasers who, in fact, compete in the resale and distribution of the seller's products. This is due in part to the fact that in most price dicrimination cases coming before us, favored and nonfavored purchasers have, in fact, been competing in the resale of the seller's products. The orders were, therefore, drafted in a form deemed adequate in those factual situations to prohibit discriminations having the requisite effect on competition. The Commission has not always adhered to this form, however. In *Federal Trade Commission* v. *Morton Salt Company*, 334 U.S. 37 (1948), for example, there was a factual situation somewhat similar to that involved in this matter in that the respondent had discriminated in price between retailers and wholesalers. The order issued in that case contained a paragraph which prohibited the respondent from discriminating in the price of products of like grade and quality "By selling such products to any retailer at prices lower than prices charged wholesalers *whose customers compete with such retailer.*" [Italic supplied.] This inhibition was expressly approved by the Supreme Court.

In any case involving the effect of a price discrimination on competition between buyers, the requisite injury may be inferred from a showing that a purchaser paid substantially less than its competitor for goods of like grade and quality sold by the respondent (*Federal Trade Commission* v. *Morton Salt Company*, *supra*) ; and it has been held that such an inference is permissible despite testimony by the nonfavored purchaser that he had not been injured by the discrimination. *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F. 2d

43 (1956); *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152 (1956). Whether or not the differential in price is substantial must, of course, be determined from the facts in each case. As stated above, however, it is unnecessary to show that favored and nonfavored purchasers compete in the resale of the goods involved in the discrimination. And if such competition does exist, it is not necessary to show that the price differential was reflected in the price at which the goods were resold by the favored purchaser. *Corn Products Refining Company, et al., supra; Moog Industries, Inc.* v. *Federal Trade Commission, supra; E. Edelmann & Co.* v. *Federal Trade Commission, supra.*

The record in this case establishes the existence of competition between favored chains and nonfavored retailers in the sale of food and grocery products, including canned fruits and vegetables sold under each purchaser's private label. It may be true, as emphasized by respondent, that certain retail outlets operated by each of these purchasers did not compete with any outlets operated by the other purchaser. This is wholly irrelevant, however, since it is clear that the purchasers did compete through other outlets.

The record also establishes that the differences in the prices charged competing purchasers were substantial. These price differentials ranged from five cents to fifty cents, or from two per cent to ten per cent, per case. Respondent concedes that the grocery business is highly competitive, that markups at various levels of distribution are affected by competition, and that the percentage of return on large volume sales is small. The record also discloses that the net profit of some wholesalers does not exceed the customary two and one-half per cent cash discount accorded for prompt payment and that the net profit of certain retailers runs less than six per cent. There is also testimony that a price difference of only ten cents a case would be sufficient to cause a purchaser of canned fruit or vegetables to buy from one packer instead of another and that a difference of a cent or two a can could cause the loss of a sale at the retail level. Under these circumstances, we are of the opinion that the price differentials involved herein were sufficient to give the favored purchasers a substantial competitive advantage over retailers who purchased respondent's goods at the higher prices.

The record also supports the conclusion that respondent's price discriminations may have the effect of injuring competition between the favored chains and retailer customers of nonfavored wholesalers. Although there is no evidence that any of these independent retailers actually sold any of respondent's goods, there is ample evidence to

show that some of them sold a wholesaler's line of private label goods in competition with chain stores that had paid less for respondent's goods than had the wholesaler. Since respondent's goods were commingled with others under the wholesaler's private label, the higher price paid by the wholesaler for respondent's goods would necessarily be reflected in its cost of acquiring its private label line. In view of the small profit margin at the wholesale level, it may be reasonably inferred that this increased cost would be reflected in the price at which these products were sold by the wholesaler to its customers. Consequently, in those instances where it is shown that actual competition with favored chains did exist, we believe there is far more than a "remote possibility" that the competitive opportunities of the independent retailer were substantially injured as a result of the price discriminations.

Respondent next contends that the hearing examiner erred in holding that it had failed to justify its discriminatory pricing practices under the "meeting competition" defense contained in the Secton 2(b) proviso. In order to establish this defense, respondent has the affirmative duty of proving that it reduced its prices to certain customers in good faith to meet the equally low price of a competitor. The Supreme Court in *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231 (1951), clear indicated that the lower price which may be met by a seller under the proviso must be a "lawful" price. Certain it is, therefore, that as part of the good faith requirement of this defense, respondent must at least show the existence of circumstances which would lead a reasonable person to believe that the lower prices it was meeting were lawful prices.[2] This, however, respondent has not done. It has succeeded only in showing that a number of competitors, whose prices it claims to have met, had engaged in pricing practices whereby they had usually sold goods to certain favored customers at a "market price" which respondent admits was set by the buyer. The evidence offered by respondent does not indicate whether these prices could be cost justified or otherwise excused under any of the exceptions to the prohibitions of Section 2(a) or that respondent had reason to believe that they could be justified. We are of the opinion, therefore, that respondent has failed to establish the good faith requirement of the "meeting competition" defense and its argument on this point is rejected.

Respondent also takes issue with the hearing examiner's holding that it had violated Section 2(d) by granting allowances to certain

[2] *Standard Oil Co.* v. *Brown*, 238 F. 2d 54 (5th Cir. 1956).

customers for services rendered by them in connection with the sale of its products without making such allowances available on proportionally equal terms to other customers competing in the distribution of such products. Respondent concedes that it granted allowances to two retailers, Fred Meyer, Inc., and Central Grocers, Inc., but it contends that these allowances had not been granted as compensation or in consideration for merchandising services furnished by such retailers and that the retailers receiving the allowances were not competing with other purchasers in the distribution of respondent's products.

With respect to the first point, respondent makes the somewhat frivolous argument that the allowances were used to promote goods sold under the retailers' label and not to promote the sale of goods packed under respondent's label. There is nothing in the language of Section 2(d) which indicates that the services or facilities furnished by the purchaser must be in connection with the "processing, handling, sale or offering for sale" of products bearing the seller's label or brand. The language clearly refers to furnishing of such services or facilities with respect to "any products or commodities manufactured, sold, or offered for sale" by the seller. The evidence in this case shows that respondent sold to the favored retailers canned goods packed under the retailers' labels and that it granted allowances for merchandising services furnished by such retailers in the resale of these private label goods.

As to respondent's contention that the recipients of the allowances were not competing with other purchasers in the distribution of respondent's products, the record shows that canned goods sold by respondent to Fred Meyer, Inc., and Central Grocers, Inc., were resold by these firms at retail in their respective trade areas in competition with nonfavored retailers who were selling private label canned goods, some of which had been purchased from respondent. Respondent contends, however, that the nonfavored retailers also sold or distributed their private label lines outside of these areas of competition and that it was, therefore, possible that all of respondent's goods bearing the retailers' private labels were sold outside of these areas. In so arguing, respondent is in effect saying that there is some likelihood that hundreds or thousands of items which have been commingled with a greater or lesser number of like items could be segregated by accident or chance. It would not be an overstatement to say that it would be virtually impossible for this to happen once, and respondent would have us believe that it happened on several occasions. Consequently, we must reject respondent's contention that

there is insufficient evidence to support the finding that the aforementioned favored retailers do not compete with other purchasers in the distribution of respondent's products.

Although we are in general agreement with the conclusions reached by the hearing examiner in his initial decision, we are of the opinion that he has failed to make adequate findings of fact in support thereof. We are also of the opinion that that part of the hearing examiner's order to cease and desist relating to price discrimination is inadequate in two respects. In view of our holding that respondent's price discriminations may result in injury to competition regardless of whether there is actual competition in the resale and distribution of the products involved in the discriminations, we believe that the phrase "in the resale and distribution of respondent's products" unduly limits the scope of the order and should be deleted therefrom. Furthermore, the order is deficient in that it does not prohibit respondent from selling to retailers at prices lower than prices charged wholesalers whose customers compete with such retailers.

The appeal of respondent is denied. 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.

Commissioner Elman dissented to the decision herein.

DISSENTING OPINION

By ELMAN, *Commissioner:*

Most of the canned fruits and vegetables sold throughout the United States are produced and processed in California. Respondent, a farmer-owned and operated cooperative association, is one of a large number of canners which sell on the so-called "California Street" market in San Francisco. These canners sell most of their output in that market. Many large buyers, including retail grocery chains, wholesalers' groups, and institutional jobbers, maintain purchasing agents in the California Street market, and prices there tend to be lower than in other markets.

Trading in the California Street market, like other commodity exchanges, is free, open, and active, with frequent and sometimes very substantial price fluctuations occurring from one transaction to the next, resulting from the interaction of supply and demand and other competitive factors. The Commission's opinion suggests, however, that the market is controlled by the large buyers, which use their purchasing power to exact discriminatory and illegal price concessions from sellers there.

Respondent is the only seller in the California Street market which has been charged by the Commission with making price discriminations in violation of Section 2(a) of the Robinson-Patman Act. It has asserted as a defense that its lower prices to buyers in this market were made in good faith to meet equally low prices of competing sellers. The Commission rejects this defense, finding that respondent "did not adduce evidence to show that it had reason to believe that the lower prices of its competitors could have been cost justified or otherwise excused under Section 2(a). Since respondent has failed to prove that it had reason to believe that the prices of its competitors were lawful, it has not established on the record that it acted in good faith in meeting such prices." (Finding of Fact No. 9)

It seems to me that there are two main objections to the Commission's holding.

I

First of all, the lower prices of its competitors which respondent met were not unlawful under Section 2 merely because they were "discriminatory." Under the explicit provisions of the statute, those prices would be illegal only (1) if they had the proscribed effects on competition; (2) if the differences in price were not justified by differences in costs of manufacture, sale, or delivery; (3) if the lower prices were not in response to changing conditions affecting the market for or marketability of the goods concerned; and (4) if the lower prices were not offered in good faith to meet the equally low prices of competitors.

Where a seller in an active market meets the lower prices of other sellers and invokes the meeting-competition-in-good-faith defense allowed by Section 2(b), considerations of elementary fairness, effective administration of the statute, and the realities of a competitive market preclude imposition on him of a heavier burden than showing that he had no reason to suppose that the competitive lower prices he was meeting were unlawful. The law should not be construed as forcing a seller to compete at his peril. A "sales manager who is trying to compete * * * is not, of course, required to become a detective or a judge."[1] A businessman who must operate in the pressures of the marketplace cannot be expected to conduct a survey into his competitor's costs or to prophesy whether the competitor's lower price will later be held unlawful. Accordingly, if the statute is not to be made an impediment to free and fair price competition, the lower price met by a seller in good faith in a competitive situation should be deemed to

[1] Corwin D. Edwards, "The Price Discrimination Law" (1959), p. 567.

be lawful if the seller shows that he neither knew nor had reason to believe that it was unlawful, *and* if no counter-showing is made of facts known to the seller which would indicate to a reasonable and prudent businessman that the lower price was probably unlawful.[2]

There is no evidence here, and the Commission's opinion cites none, bearing upon the costs of competing sellers. That selling prices in the market were generally less than offering prices and were "satisfactory" to the buyers certainly does not make them illegal or show that they were not cost justified. Respondent presented evidence to show that price changes in the market were made in response to changing market conditions, competitive offers, inventory considerations, and other legitimate economic factors. The Commission's opinion refers to no specific evidence in rebuttal.

II

Secondly, assuming that this record does show that violations of the Robinson-Patman Act are known to be rampant in the California Street market, and for that reason respondent cannot rely on the meeting-competition-in-good-faith defense, why is it that, in the four years that have elapsed since this complaint was filed, the Commission has failed to bring price discrimination charges against any of respondent's competitors or the large buyers which allegedly have induced the widespread illegal price concessions? The Commission cannot have it both ways. If the record in this proceeding establishes that sellers in the California Street market are unlawfully discriminating in price, it has not been explained why, on these same facts, Commission proceedings have been brought only against one seller. If, as complaint counsel argues that the record proves, "respondent obviously knew that the 'California Street' marketing price system was being used by large retail purchasers as a gimmick to obtain favorable treatment" from sellers there, then the Commission, which has made this record, "obviously knew" the same facts.

If this market is indeed "rigged" in favor of large buyers for whose business many competing sellers must scramble, the remedy is for the Commission to proceed on a general basis and not to enter an order which would only have the effect of driving a single, relatively small

[2] Since the ultimate fact to be determined is the seller's subjective good faith *vel non*, it is neither necessary nor sufficient for the Commission to rebut the defense by presenting objective proof of the illegality of the competing seller's lower price. Apart from the inconclusiveness of such proof, it would introduce into the proceeding tangential issues that "would involve trying many cases instead of one; records would be gargantuan, and clarity wellnigh impossible." *E. Edelmann & Co.*, 51 F.T.C. 978, 997 (Initial Decision of Examiner Heir).

seller out of the market. The very domination of the market by the large buyers, which the Commission has found, will prevent respondent, and respondent alone, from being able to survive there. It is hard for me to see how such an order could serve the objectives which Congress sought to achieve in passing the Robinson-Patman Act.

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 August 6, 1958, 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 said complaint was filed on October 22, 1958. Thereafter, the Commission, pursuant to the provisions of the aforesaid Act, on May 15, 1959, issued and subsequently served upon respondent a second complaint, charging respondent with having violated subsection (d) of Section 2 of said Act. The respondent's answer to the second complaint was filed on June 29, 1959. By order of the hearing examiner filed October 2, 1959, the proceedings initiated by the aforesaid complaints were consolidated into one proceeding. Hearings were thereafter held before duly designated hearing examiners of the Commission and testimony and other evidence in support of and in opposition to the allegations of both complaints were received into the record. In an initial decision filed August 4, 1961, the hearing examiner found that, with the exception of one allegation, the charges had been sustained by the evidence and ordered respondent to cease and desist from the practices found to be unlawful.

The Commission having considered the appeal of respondent from the initial decision and the entire record in this proceeding and having determined that the appeal should be denied, and having further determined that the initial decision should be vacated and set aside, now makes this 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.

*Respondent Tri-Valley Packing Association was incorrectly named in the complaint in Docket No. 7225 as Tri-Valley Packing Association, Inc.

FINDINGS AS TO THE FACTS

1. Respondent, Tri-Valley Packing Association, is a nonprofit, cooperative corporation organized, existing and doing business under the laws of the State of California, with its principal office and place of business located at 240 Battery Street, San Francisco, Calif.

2. Respondent is engaged in the business of selling and distributing canned fruits and vegetables of many varieties, all of which it processes and cans at its plants in Modesto, San Jose and Stockton, California. Respondent sells and distributes its canned fruits and vegetables under the private labels or brands of its purchasers and also under its own labels or brands.

3. Respondent sells products of like grade and quality to a large number of customers located throughout the United States for use, consumption, or resale therein, including wholesalers, retailers, chain stores and associations. Respondent's sales of its products are substantial, amounting in the fiscal year ending January 31, 1959, to $22,329,877.

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 its products to retailers, such as chain stores and cooperative organizations, and to wholesalers who in turn sell to the retail trade. Certain of these customers, including some twelve to fifteen retail grocery chains, maintain buying agencies in San Francisco. In the course and conduct of its business, respondent has sold its products to these customers at lower prices than it has sold products of like grade and quality to customers who did not maintain their own buying agencies. Included in the latter group were retailers and wholesalers who sell to the retail trade. The difference in prices charged customers who maintained buying agencies and those who did not range from five cents to fifty cents, or from two per cent to ten per cent, per case of respondent's products.

6. Respondent's customers also purchase canned fruits and vegetables from other packers and the products sold by respondent under a customer's private label are frequently commingled in the customer's warehouse with like products bearing the same label. These products are thereafter shipped by the customer either to its own retail outlets for resale to the public, or, in the case of a wholesaler, to smaller retailers for resale to the public.

7. The Commission finds that there have been numerous instances of price discriminations by respondent in favor of certain large chain

stores and against wholesalers and retailers in the sale of canned fruits and vegetables of like grade and quality. The following are examples of such discriminations:

In February 1957, respondent sold products designated as Choice Heavy Halves Unpeeled Apricots to Fred Meyer, Inc., of Portland, Oregon, at $5.70 per case, and to Hudson House, Inc., of Portland, Oregon, at $6.15 per case.

In November 1957, respondent sold products designated as Choice Heavy Syrup Sliced Y. C. Peaches to A & P in Portland, Maine, at $4.90 per case, and to Hannaford Bros. Co., in Portland, Maine, at $5.30 per case.

In November 1957, respondent sold products designated as Choice Heavy Syrup Halves Y. C. Peaches to A & P in Pittsburgh, Pennsylvania, at $4.80 per case, and to Associated Grocers, Inc., in Pittsburgh, Pennsylvania, at $5.20 per case.

In February 1957, respondent sold products designated as Standard Light Syrup Pears to Safeway Stores in Denver, Colorado, at $6.10 per case, and to Associated Grocers in Denver, Colorado, at $6.50 per case.

In March 1957, respondent sold products designated as Choice Heavy Syrup Sliced Y. C. Peaches to Safeway Stores in Denver, Colorado, at $5.30 per case, and H. A. Marr in Denver, Colorado, at $5.55 per case.

In each instance of such price discrimination, the chain store receiving the benefit of the discrimination was engaged in competition with one or more nonfavored purchasers in the sale at retail of food and grocery products, including canned fruits and vegetables sold under each purchaser's private label.

The Commission also finds that certain of said chain stores receiving the benefit of respondent's price discriminations have also been engaged in competition in the sale of food and grocery products with independent retailers who were selling private label canned goods which they had purchased from nonfavored wholesalers. For example, respondent discriminated in favor of Safeway Stores, a retail chain, and against H. A. Marr, a wholesaler, in the sale of goods of like grade and quality shipped to the Denver, Colorado, warehouses of these purchasers. The record shows that Foodland Supermarkets and Preisser Grocery and Market, both of Denver, Colorado, and Piggly Wiggly No. 10, and CeBuzz, Inc., both of Littleton, Colorado, purchased canned goods from H. A. Marr and resold such products at retail in direct competition with retail outlets of Safeway Stores.

8. The Commission further finds that the grocery business is highly competitive, that markups at various levels of distribution are affected by competition, and that the percentage of return on large volume of sales is small. The net profit of some wholesalers does not exceed the customary two and one-half per cent cash discount accorded for prompt payment and the net profit of certain retailers runs less than six per cent. A price difference of only ten cents a case would in some instances be sufficient to cause a purchaser of canned fruit or vegetables to buy from one packer instead of another, and a difference of a cent or two a can could cause the loss of a sale at the retail level. Under these circumstances, a difference in the price of canned goods ranging from two per cent to ten per cent is sufficient to give the purchasers paying the lower price a substantial advantage over their competitors. The effect of respondent's price discriminations, therefore, may be substantially to injure, destroy or prevent competition between chain stores receiving the benefit of such discriminations and nonfavored retailers and retailer customers of nonfavored wholesalers.

9. Respondent claims that its lower prices to certain purchasers were made in good faith to meet the equally low prices of competitors. The competitors whose prices respondent claims to have met are those packers who maintain sales representatives in San Francisco and sell through such representatives to certain large purchasers, including favored chain stores, who maintain buying agents in that city. The market in which such sales are made is known as the San Francisco or "California Street" market. The buyers represented in this market, including said large chain stores, have usually paid less for the packers' products than buyers that purchase in other markets. Although the opening prices in the "California Street" market are ordinarily announced by the packers, the goods are not sold in appreciable volume unless the prices are satisfactory to the buyers.

Respondent has admitted that almost invariably the "market price" in this market is established below the range of opening prices. Although respondent was aware of all these facts and therefore knew, or should have known, that the lower prices of its competitors were discriminatory, it did not adduce evidence to show that it had reason to believe that such prices could have been cost justified or otherwise excused under Section 2(a). Since respondent has failed to prove that it had reason to believe that the prices of its competitors were lawful, it has not established on the record that it acted in good faith in meeting such prices.

10. On the basis of the record herein, the Commission finds that respondent has discriminated in price between different purchasers in

the sale of goods of like grade and quality 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; and that respondent has failed to establish a valid defense under Section 2(b) of the Clayton Act, as amended.

11. With respect to the charge that respondent violated Section 2(d) of the Clayton Act, as amended, the record shows that respondent granted allowances to Fred Meyer, Inc., of Portland, Oregon, and to Central Grocers, Inc., of Boston, Massachusetts, as compensation or in consideration for services furnished by these purchasers in connection with the sale or offering for sale of products sold by respondent. There is also sufficient evidence to establish that, at approximately the same time these allowances were granted, respondent sold products of like grade and quality to other purchasers competing with Fred Meyer, Inc., and Central Grocers, Inc., in the distribution of such products. The record also shows that, with respect to each of the favored purchasers, the arrangement to grant the allowance was a specially tailored or negotiated deal involving promotional activities initiated by the purchaser. Neither of these deals was offered to competing purchasers and respondent has failed to show that the allowances were made available to such competing purchasers on proportionally equal terms.

12. On the basis of the record herein, the Commission finds that respondent has granted allowances to certain customers for services rendered by such customers in connection with the sale of respondent's products without making such allowances available on proportionally equal terms to other customers competing in the distribution of such products.

CONCLUSIONS

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent. The discriminations in price by respondent, as hereinabove found, constitute violations of subsection (a) of Section 2 of the Clayton Act, as amended. The acts of respondent in granting allowances to certain customers, as hereinabove found, constitute violations of subsection (d) of Section 2 of the Clayton Act, as amended.

ORDER

It is ordered, That respondent, Tri-Valley Packing Association, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device in, or in connection

with, the sale of food products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

1. Discriminating 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 who, in fact, competes with the purchaser paying the higher price or with customers of such purchaser.

2. Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer, in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products with the favored customer.

It is further ordered, That respondent, Tri-Valley Packing Association, 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.

Commissioner Elman dissenting.

IN THE MATTER OF

CONTINENTAL BAKING COMPANY

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

Docket 7880. Complaint, May 5, 1960—Decision, May 11, 1962 *

Consent order requiring the dominant supplier of bread and bread-type rolls in the Omaha, Nebr., area and other sections of the country, to sell a competing Omaha baking concern which it purchased in 1958 and which was probably the eighth largest in the country and also had plants and competed with Continental in other sections, and to refrain for 10 years from acquiring any interest in any concern producing bread and rolls without Commission permission; and dismissing allegations that its acquisition of two other bakeries—in Rochester, Minn., and Pittsburgh, Pa., respectively—violated the antimerger statute and that it engaged in other unlawful practices in restraint of trade.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondent has violated and is now violating the pro-

* As modified November 13, 1962.

visions of Section 7 of the amended Clayton Act (15 U.S.C. Sec. 18) and Section 5 of the Federal Trade Commission Act (15 U.S.C. Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint charging as follows:

COUNT I

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at Rye, N.Y.

Respondent is engaged in the business of manufacturing, distributing and selling bread and other bakery products. Its products are sold primarily under the trade name of "Wonder" for bread and "Hostess" for cakes. Respondent is the largest commercial baker of white bread, and one of the largest bakers of cake in the United States. Its total sales during the year 1957 exceeded $307,000,000.

Respondent's products are baked by some 86 plants located in approximately 64 cities in 29 states and the District of Columbia, and are distributed by approximately 333 agencies and depots throughout a 44 state system. The daily production of each bakery of the respondent is distributed to grocery stores, restaurants, institutions, and other users, by approximately 5000 driver-salesmen operating light delivery trucks on about 4500 regularly established routes.

PAR. 2. Sales of bread and bread-type rolls are made from each of respondent's bread plants throughout an effective area of distribution of several hundred miles from each plant. This radius is governed by the distance each plant can economically ship its products. Within this effective area of distribution, each plant encounters competition from local independent bakers and other plants of national bakers.

For example, typical of the trade areas in which respondent operates is the Omaha, Nebraska, trade area. In this trade area, respondent operates a bakery plant that ships fresh bread and bread-type rolls within its marketing or distributional area. Within this trade area of its Omaha plant, respondent encounters competition in the distribution and sale of bread and bread-type rolls from local independent wholesale bakeries and plants of other competing national bakeries.

PAR. 3. In the course and conduct of its business, respondent ships bread and bread-type rolls directly from its bakeries to the purchasers thereof, some of whom are located in states other than those from which such shipments originate. Further, respondent ships bread and bread-type rolls from its bakery to sales depots or loading stations

some of which are located in states other than those from which such shipments originate, for the purpose of having such products re-shipped to its purchasers, some of whom are located in states other than those from which re-shipments are made.

Further, in the course and conduct of its business, respondent carries on negotiations across state lines with some of its customers for the sale of its products. As part of such negotiations, adjustments of accounts between respondent and some of its customers regularly take place across state lines.

Advertising of respondent's products, on both a national and local scale, is prepared and placed in various advertising media by respondent, or under its direction and control, from its headquarters at Rye, New York.

In the regular course and conduct of its business from its headquarters, respondent purchases various raw materials for the manufacture of its products as well as supplies, equipment and other needs for such manufacture and ships or causes to be shipped such items to its bakeries located in states other than those from which such shipments originated.

In the regular course and conduct of its business respondent maintains and controls, either directly from its headquarters or through its regional offices, activities of its bakeries located in the various states of the Untied States, such as:

1. The areas in which, and the prices at which, each bakery sells respondent's products;
2. The standard of production of all of its bakeries;
3. The nature and extent of most repairs to plants and equipment;
4. Personnel policies; and
5. Funds to be collected and dispersed by said bakeries.

In the exercise of such controls, there is maintained across state lines a steady flow of correspondence and other contacts between and among respondent's headquarters, regional offices, bakeries and sales depots.

By these methods, respondent maintains a course of trade in commerce, as "commerce" is defined in the amended Clayton Act and in the Federal Trade Commission Act, in bread and other bakery products, among and between the various states of the United States.

PAR. 4. Prior to the acquisition alleged herein, Omar, Inc., was a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 1910 Harney Street, Omaha, Nebraska.

It was engaged in the manufacture, distribution and sale of bread and other bakery products, from plants located at Omaha, Nebraska;

Indianapolis, Indiana; Milwaukee, Wisconsin; and Columbus, Ohio. These products were shipped from the plants mentioned via trucks to approximately 50 branches or depots for further distribution throughout some 1500 routes in the States of Illinois, Indiana, Iowa, Wisconsin, Nebraska, and portions of the States of Missouri, Kentucky and West Virginia.

Total sales of Omar, Inc., during the year 1957 were approximately $40,000,000, which volume placed it among the ten largest commercial bakers in the United States.

PAR. 5. In the course and conduct of its business, Omar, Inc., shipped bread and bread-type rolls from its various bakery plants directly to its purchasers, some of whom were located in states other than those from which such shipments originated. It also shipped its products from its bakeries to sales depots or loading stations, some of which were located in states other than those in which such shipments originated, for regular reshipment to purchasers, some of whom were located in states other than those from which such reshipments were made.

Omar, Inc., carried on negotiations across state lines with some of its customers for the sale of its products, as well as for the adjustment of accounts between it and its customers.

Advertising of its products was prepared and placed in various advertising media by Omar, Inc., or under its direction and control, from its headquarters in Omaha, Nebraska.

In the regular course and conduct of its business from its headquarters, Omar purchased raw material for the manufacture of its products as well as supplies, equipment and other needs, and shipped or caused to be shipped such items to its bakeries located in states other than those from which such shipments originated.

In the course and conduct of its business, Omar, Inc., maintained control over various activities of its different bakeries such as, for example:

1. The areas in which, and prices at which, each bakery was permitted to sell;
2. Standards of products to be maintained by said bakery;
3. The nature and extent of most repairs to plants and equipment;
4. Personnel policies; and
5. Funds to be collected and dispersed.

In the exercise of such controls, Omar, Inc., maintained across state lines a steady flow of correspondence and other contacts between and among its headquarters and its bakeries.

By such means, Omar, Inc., maintained a course of trade in commerce, as "commerce" is defined in the amended Clayton Act and in the Federal Trade Commission Act, in bread and other bakery products among and between the various states of the United States.

PAR. 6. Since 1952 respondent has entered into a continuous practice of acquiring various bakeries throughout the United States, many of which, prior to their acquisition by respondent, had competed with respondent within the marketing areas of the acquired companies, and all of which prior to their acquisition by respondent were engaged in commerce, as "commerce" is defined in the amended Clayton Act and the Federal Trade Commission Act.

In 1952 respondent acquired Southern California Bakery Co., San Diego, California, thereby eliminating the largest independent local wholesale bakery in the San Diego market.

In December 1953 respondent acquired Smith Baking Co., Lincoln, Nebraska, eliminating this independent bakery as a competitive factor in the Lincoln market.

In December 1954 respondent acquired Royal Baking Co., Raleigh, North Carolina, thereby obtaining a bakery and 12 established distribution depots covering the distributional area of eastern North Carolina. This acquisition constitutes a market entry into this area by respondent.

In November 1955 respondent acquired Morton Packing Co., a manufacturer of frozen meat pies, frozen fruit pies, and other frozen food items from plants located at Crozet, Virginia, and Webster City, Iowa, thereby obtaining a market entry in the line of commerce stated.

In April 1958 respondent acquired DiCarlo's National Bakery, Inc., San Pedro, California, thereby adding to its overall competitive strength in the lower California market area and eliminating one of the remaining competitive independent wholesale bakeries in that area.

Since the acquisition of Omar, Inc., respondent has acquired other bakeries in furtherance of its policy and practice of acquiring bakeries with some of which it had competed prior to such acquisition.

For example, in November 1958 respondent acquired Rochester Bread Company, Rochester, Minnesota, which operated 35 wholesale routes within a 100 mile radius of Rochester and was the largest independent wholesale bakery in the Rochester trade area.

Further, in December 1958 respondent acquired the Braun Baking Co., Pittsburgh, Pennsylvania, which distributed bread and bakery products in 10 counties in western Pennsylvania. By this acquisition respondent has entered that market area in a strongly competitive position.

PAR. 7. Prior to the Omar acquisition alleged herein, respondent competed with Omar, Inc., in the distribution and sale of bread and bread-type rolls in such distributional areas or sections of the country as Omaha, Nebraska; Indianapolis, Indiana; Milwaukee, Wisconsin; and Columbus, Ohio.

For example, prior to the acquisition herein alleged, in the Omaha, Nebraska, marketing or distributional area, or "section of the country", respondent was a leading factor in the supply of bread and bread-type rolls. In 1957 respondent accounted for approximately 10% of the total amount of bread and bread-type rolls marketed in this area. In this same year, Omar, Inc., accounted for approximately 17% of said total amount.

PAR. 8. On or about November 29, 1958, the respondent acquired all of the assets of Omar, Inc., for approximately $5,217,850. Thereafter, Omar, Inc., became a wholly owned subsidiary of respondent, operating under the name of "Omar Bakery, Inc."

PAR. 9. Respondent has violated Section 7 of the amended Clayton Act in that the acquisition of Omar, Inc., as well as the other acquisitions listed in paragraph 6, either individually or collectively, may have the effect of substantially lessening competition or tending to create a monopoly in the respondent in the following ways, among others:

1. Respondent has become, actually or potentially, the leading and dominant supplier of bread and bread-type rolls within the "section of the country" of the Omaha, Nebraska, marketing or distributing area;

2. Respondent has become, actually or potentially the leading and dominant supplier of bread and bread-type rolls in the other "sections of the country" in which Omar, Inc., had bakery plants, and in which respondent competed with Omar, Inc., in the sale and distribution of these products;

3. Respondent has become, actually or potentially, the leading and dominant supplier of bread and bread-type rolls in the "section of the country" considering the entire distributional area of the bakeries of Omar, Inc., as one "section of the country";

4. Respondent has eliminated actual or potential competition by and between it and Omar, Inc., and between it and the other bakeries acquired as described in paragraph 6, in each of the "section(s) of the country" or market areas described;

5. Respondent has substantially lessened actual and potential competition throughout the country in the manufacture, sale and distribution of bread and bread-type rolls;

6. Respondent has eliminated Omar, Inc., and the bakeries it has acquired as alleged in paragraph 6 as independent competitive factors in the manufacture, sale and distribution of bread and bread-type rolls in the "section(s) of the country" described;

7. Respondent has enhanced its competitive advantage in the manufacture, sale and distribution of bread and bread-type rolls to the detriment of actual and potential competition throughout the country.

8. Respondent has significantly increased the trend to industry-wide concentration of the manufacture and sale of bread and bread-type rolls;

9. Respondent has precluded and prevented suppliers of various items and products used in the manufacture, sale and distribution of bread and bread-type rolls from selling same to Omar Bakery, Inc., as they did to Omar, Inc., and to the other bakeries described in paragraph 6;

10. Respondent has enhanced its power and ability to preclude or foreclose new entrants into the bread and bread-type rolls industry in the sections of the country described.

PAR. 10. The foregoing acquisitions and the acts and practices of respondents, as herein alleged, constitute violations of Section 7 of the Clayton Act (U.S.C. Title 15, Sec. 18) as amended and approved December 29, 1950.

COUNT II

PAR. 11. All of the allegations of paragraphs 1 through 9 hereof are hereby realleged and incorporated herein by reference, and made a part of this Count II as though each were set forth in full herein.

PAR. 12. By its policies and practices of acquiring bakeries throughout the United States, respondent has acquired the power and ability to achieve an actual or potential monopoly in the manufacture, sale and distribution of bread and bread-type rolls in the United States.

By virtue of its position in the bakery industry and its continuous growth by acquisitions, respondent has acquired an actual or potential monopoly power to impede and prevent the growth and business opportunities of its competitors, as well as their ability to survive in the manufacture, sale and distribution of bread and bread-type rolls in the United States.

In the course and conduct of its business in commerce, respondent has used its increasingly dominant position and economic power to engage in, and is now engaged in, performing or effectuating various policies, acts and practices in the business of manufacture, distribution and sale of bread and bread-type rolls in the United States. Among such acts, methods and practices are:

1. Direct payments of cash to grocers for preferred space for the display of respondent's products;

2. Reductions in prices or charges to some grocers or retailers—without relation to any savings on respondent's costs in the manufacture, distribution, or sale of its products—for the purpose, or with the effect, of gaining entry into the stores of such grocers or retailers, thereby enhancing the potential resale of these products at the expense of competitive products; and

3. Giving discriminatory rebates, discounts and allowances, by various methods, in order to enable the purchasers of respondent's bread, as well as its other bakery products, to reduce the consumer prices therefor, or in lieu thereof, to enjoy a greater net profit on retail sales of respondent's products.

PAR. 13. The effect of the acquisitions alleged and the consequent and effectuating policies, methods, acts and practices of respondent as alleged, has been or may be:

1. To divert to respondent, from its competitors, who are not in the economic position to successfully engage in such policies, methods, acts and practices, a substantial share of the sales of bread and bread-type rolls;

2. To discourage or tend to foreclose the entry of any new competitors in the manufacture, distribution and sale of bread and bread-type rolls;

3. To lessen, hinder, restrain and suppress competition in the manufacture, sale and distribution of bread and bread-type rolls.

4. To actually or potentially enable respondent to dominate the manufacture, sale and distribution of its products, in various sections of the country; and

5. To tend to create a monopoly in respondent in the manufacture, sale and distribution of bread and bread-type rolls in those sections of the country where respondent sells and distributes such products.

PAR. 14. The foregoing policies, methods, acts, practices and acquisitions of respondent, as herein alleged, are all to the prejudice of respondent's competitors and to the public; have a tendency or capacity to hinder and prevent, and have hindered and prevented, actual or potential competition in the manufacture, sale and distribution of bread and bread-type rolls in commerce and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45) and constitute a violation thereof.

Mr. Edward H. McGrail and *Mr. V. Rock Grundman, Jr.*, for the Commission.

Covington & Burling, of Washington, D.C., by *Mr. Paul C. Warnke* and *Mr. John H. Schafer*, for respondent.

INITIAL DECISION BY WILMER L. TINLEY, HEARING EXAMINER

On May 5, 1960, the Commission issued its complaint against respondent, Continental Baking Company, a producer of bread and other bakery products, charging violation of Section 7 of the amended Clayton Act in connection with its acquisition of Omar, Inc., and Rochester Bread Company, in November 1958, Braun Baking Company, in December 1958, and certain other companies during the period 1952 through 1958; and with violation of Section 5 of the Federal Trade Commission Act by its continuous practice of acquiring various baking concerns throughout the United States.

Hearings have been held in support of the complaint in Columbus, Ohio, Milwaukee, Wisconsin, Indianapolis, Indiana, and Omaha, Nebraska, as well as in the District of Columbia. Further hearings, which were scheduled, were cancelled because of submission by counsel of the agreement hereinafter referred to.

By its order of February 28, 1962, the Commission waived in this case the provision of its Notice of July 14, 1961, requiring the filing prior to September 1, 1961, of a notice of intent to dispose of any pending proceeding by consent agreement; and referred to the hearing examiner for appropriate consideration under the applicable Rules of Practice the request of February 26, 1962, by counsel supporting the complaint on behalf of all parties to the proceeding, which was considered as a notice, timely filed, of intent to dispose of the proceeding by consent agreement.

Thereafter, on March 28, 1962, there was submitted to the hearing examiner an "Agreement Containing Consent Order to Divest and to Cease and Desist", which agreement was entered into by and between Continental Baking Company, by its duly authorized officers and attorneys, and by counsel supporting the complaint, with the approval of the Chief, Division of Mergers, and the Director, Bureau of Restraint of Trade, in accordance with Section 3.25 of the Commission's Rules of Practice in effect prior to July 21, 1961. By the terms of said agreement, the parties agree that:

1. Respondent is a corporation doing business under and by virtue of the laws of the State of Delaware with its principle place of business located at Halstead Avenue, Rye, N.Y.

2. Pursuant to the provisions of Section 7 of the amended Clayton Act, and Section 5 of the Federal Trade Commission Act, the Federal Trade Commission on May 5, 1960, issued its complaint in this proceeding against respondent and a true copy was thereafter duly served on respondent.

3. Respondent admits all the jurisdictional facts alleged in the complaint and agrees that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations.

4. The agreement disposes of all of this proceeding as to all parties; and that the order contained therein is in the public interest for the reasons set forth in appendix A which is attached to the agreement and by reference is made a part thereof.

5. Respondent waives:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

6. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and the agreement.

7. The agreement shall not become a part of the official record of the proceeding unless and until it is accepted by the Commission.

8. 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.

9. For the purposes of the agreement, the definition of bread and bread-type rolls shall be that used by the Bureau of the Census as set forth in the Census of Manufactures category S.I.C. 20511.

10. The order incorporated in the agreement may be entered in this proceeding by the Commission without further notice to respondent. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

The hearing examiner has considered the agreement and the order contained therein, together with the representations made in appendix A attached thereto, and is of the opinion that they provide an appropriate basis for settlement and disposition of this proceeding in the public interest. The content of the agreement meets all of the requirements of Section 3.25(b) of the Commission's Rules of Practice in

effect prior to July 21, 1961. The agreement is, accordingly, hereby accepted, and the following order is issued.

ORDER *

I

It is ordered, That respondent, Continental Baking Company, a corporation, through its officers, directors, agents, representatives and employees shall on or before February 15, 1963, divest itself absolutely and in good faith, subject to the approval of the Commission, of all assets, properties, leases, rights and privileges, tangible and intangible, including but not limited to all contract rights, plants, machinery, equipment, trade names, trade-marks and goodwill, acquired by respondent as a result of its acquisition of all of the assets of Omar Incorporated, together with all additions and improvements made by respondent to such plants, machinery buildings, equipment and any other property of whatever description, as may be necessary substantially to reestablish the competition that was previously afforded by Omar Incorporated.

II

It is further ordered, That respondent shall not sell or transfer the aforesaid assets, tangible or intangible, directly or indirectly, to anyone who at the time of divestiture is a stockholder, officer, director, employee, or agent of, or otherwise directly or indirectly connected with or under the control or influence of the respondent.

III

It is further ordered, That for a period of ten (10) years from the date of issuance of this order by the Federal Trade Commission respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital, or assets of any concern, corporate or non-corporate, engaged in any state of the United States in the production and sale of bread and bread-type rolls unless the Commission, on petition for modification of this Section III of this order, permits such an acquisition by respondent, said modification to be within the sole and final discretion of the Federal Trade Commission.

IV

It is further ordered, That respondent shall submit to the Federal Trade Commission bi-monthly reports describing the action that has

* As modified November 13, 1962.

been taken and the efforts that have been made to sell the subject assets. Such reports shall indicate the methods and means employed to effectuate a sale, the result of such actions and efforts and shall set forth the name and address of each person or company contacted, or who has indicated interest in acquiring said assets, together with copies of all correspondence and summaries of all oral communications with such persons or companies.

V

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

VI

It is further ordered, That, except as provided in Paragraphs I, II and III of this order, the allegations of the complaint herein are dismissed.

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 11th day of May 1962, become the decision of the Commission; and, accordingly:

It is ordered, That the respondent shall file with the Commission such reports in writing as are required by the initial decision.

Commissioner MacIntyre not concurring.

IN THE MATTER OF

THE HOWARD ZINK CORPORATION ET AL.

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

Docket C-135. Complaint, May 11, 1962—Decision, May 11, 1962

Consent order requiring Fremont, Ohio, manufacturers of automobile seat covers and their sales manager at Long Beach, Calif., who sold to independently owned retail stores, some of which were franchised by them and operated under the trade name "Sure Fit Store", to cease representing falsely in catalogs, advertising mats and proofs, and display cards furnished to dealers, and in advertisements inserted in newspapers for their franchised

dealers, that excessive "Suggested Retail", "Regular", "reg.", and "were" prices were the usual retail prices; through use of the words "Sale Prices", "Special", "Save", "Save to $4.95", etc., that usual prices were reduced; and through use of the word "customized", that seat covers so described were made to order.

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 Howard Zink Corporation, a corporation, and Jack D. Zink, Clarence M. Werling, Warren A. Zink, and Norbert S. House, individually and as officers of said corporation, and Norbert Zink, an individual, 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 Howard Zink Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at Jackson and Napoleon Streets, in the city of Fremont, State of Ohio.

Respondents Jack D. Zink, Clarence M. Werling, Warren A. Zink and Norbert S. House are officers of the corporate respondent. They formulate, direct and control the policies, 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. Respondent Norbert Zink is an individual and sales manager of respondents' Sure Fit Division with his business address at 5550 Paramount Boulevard, Long Beach, Calif., and participates in and aids in carrying out the acts and practices of the corporation including the acts and practices hereinafter set forth.

PAR. 2. Respondents are now and for some time last past have been, engaged in the manufacturing, advertising, offering for sale, sale and distribution of automobile accessory equipment consisting mainly of seat covers. Respondents' products are sold to independently owned and operated retail stores for resale to the public. Certain of these stores are franchised by respondents and they operate under the trade name "Sure Fit Store".

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said automobile seat covers, when sold, to be shipped from their place of business in the States of California and Ohio to purchasers thereof located in various other states of the United States, and maintain, and at

all times mentioned herein have maintained, a substantial course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, relating to automobile seat covers, respondents have made numerous statements in catalogs, in advertising mats and proofs, and in display cards furnished to retailers, and in advertisements inserted in newspapers for their franchised dealers, respecting certain manufacturing features of said seat covers, their retail prices and the savings afforded to purchasers of said products. Typical, but not all inclusive, of such statements are the following:

In the catalog furnished to retailers:

Suggested Retail [Model Number and Price] Customized

In mats and proofs furnished to retailers and in advertisements inserted by respondents:

Plastic Reg. $24.95—$19.88
100% CLEAR PLASTIC.
SAVE! SAVE! $21.88
$19.95 Full set
reg. $24.95
FULL SET $21.88
reg. $24.95
SAVE 20% to 40%
15.00 FULL SET
SAVE $4.95
$22.00 FULL SET
SAVE TO $4.95
SAVINGS 20% to 40% off
FULL SET $16.95
OUR BETTER CLEAR PLASTIC $21.95
OUR BEST CLEAR PLASTIC $24.95
WERE $24.95
NOW 16.88
WERE $19.95
NOW 14.88
YOUR CHANCE TO SAVE UP TO 40%
REGULAR PRICE $19.95 SALE PRICE $14.95
REGULAR PRICE $29.95 SALE PRICE $19.95
REGULAR PRICE $34.95 SALE PRICE $24.95

On display cards:

SPECIAL THIS MONTH:
FULL SET $16.79
SPECIAL THIS MONTH:
FULL SET $29.79
SARAN PLASTIC
SALE PRICE $28.95

PAR. 5. Through the use of the aforesaid statements respondents represented, directly or indirectly:

1. That the designated "Suggested Retail" price was the price at which the merchandise referred to was usually and customarily sold in the trade area where such representation was made and that a saving of the difference between said designated "Suggested Retail" price and the actual selling price of said merchandise was afforded to purchasers.

2. That the higher prices designated "Regular", "reg." and "were" were the advertiser's usual and customary retail prices in the recent, regular course of business of the merchandise referred to and that savings amounting to the differences between such prices and the lower offering prices were afforded to purchasers.

3. Through the use of the words "Sale Prices", "Special" and "Save" that the advertiser's usual and customary retail price of the advertised merchandise in the recent, regular course of business had been reduced.

4. Through the use of the statements such as "Save", "Save 20% to 40%", "Save $4.95", "Save to $4.95", "Your chance to save up to 40%", that the advertiser's usual and customary retail price of the merchandise in the recent, regular course of business had been reduced the amount or percentage stated, thus affording savings to that extent to purchasers.

5. Through the use of the word "customized" that the seat covers so described are made to order for the automobile of each purchaser.

PAR. 6. Said statements were false, misleading and deceptive. In truth and in fact:

1. The designated "Suggested Retail" price was not the price at which the merchandise was usually and customarily sold in the trade area where such representation was made but was in excess of the actual retail selling price of said merchandise and a saving of the difference between the designated "Suggested Retail" price and the actual selling price was not afforded to purchasers.

2. The higher prices designated "Regular", "Reg." and "were" were not the advertiser's usual and customary retail prices in the recent regular course of business of the merchandise referred to but were in excess of the advertiser's actual retail prices, and savings amounting to the differences between said designated prices and the lower selling prices were not afforded to purchasers.

3. The advertiser's usual and customary prices in the recent, regular course of business of the merchandise advertised "sale price", "special" or "save" had not been reduced.

4. The advertiser's usual and customary prices of the advertised merchandise in the recent, regular course of business had not been

reduced in the amount or percentage stated and savings to that extent were not afforded to purchasers.

5. The seat covers described as "customized" were not made to order for the automobile of each purchaser but were ready-made.

PAR. 7. Respondents, by furnishing retailers with catalogs and advertising material containing the statements and representations as aforesaid, have thereby placed in the hands of retailers the means and instrumentalities through and by which the purchasing public may be misled as to the prices and manufacture of said seat covers and the savings afforded to purchasers of said merchandise.

PAR. 8. 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 automobile seat covers of the same general kind and nature as those sold by respondents.

PAR. 9. The use by respondents 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 respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. 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 methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 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 to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by re-

spondents 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, The Howard Zink Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at Jackson and Napoleon Streets in the city of Fremont, State of Ohio.

Respondents Jack D. Zink, Clarence M. Werling, Warren A. Zink and Norbert S. House are officers of said corporation and their address is the same as that of said corporation.

Respondent Norbert Zink is an individual and sales manager of respondents' Sure Fit Division with his business address at 5550 Paramount Boulevard, Long Beach, Calif.

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 The Howard Zink Corporation, a corporation, its officers, and Jack D. Zink, Clarence M. Werling, Warren A. Zink, and Norbert S. House, individually and as officers of said corporation, and Norbert Zink, an individual, and respondents' agents, representatives and employees directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of automobile seat covers or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication that any amount is the usual and customary retail price of merchandise in a trade area or areas when such amount is in excess of the price at which said merchandise is usually and customarily sold at retail in the trade area or areas where the representation is made.

2. Using the words "suggested retail" to describe or refer to the retail price of merchandise when the amount so designated is in excess of the price at which said merchandise is customarily sold at retail in the trade area, or areas, where the representation is made.

3. Representing directly or by implication that any amount is any

dealer's usual and customary retail price of merchandise when it is in excess of the price at which such merchandise has been usually and customarily sold by such dealer in the recent, regular course of business.

4. Using the words "regular", "Reg." or "were" to describe or refer to any dealer's retail price of merchandise when the amount so described is in excess of the price at which the merchandise has been usually and customarily sold by such dealer in the recent, regular course of business.

5. Using the words "sale price", "special" or "save" to designate or describe the price at which merchandise is being offered for sale by a dealer unless such price constitutes a reduction from such dealer's usual and customary price in the recent regular course of his business.

6. Representing, directly or by implication, that any savings are afforded from any dealer's usual and customary retail prices unless the price at which the merchandise is offered constitutes a reduction from the price at which it has been sold by such retailer at retail in the recent, regular course of business.

7. Representing directly or by implication, that any saving is afforded in the purchase of merchandise from the price at which said merchandise is usually and customarily sold at retail in the trade area, or areas, where the representation is made unless the price at which it is offered constitutes a reduction from such price.

8. Using percentage savings claims or amounts to represent that merchandise is offered at a reduction from any dealer's usual and customary retail price unless the price of such merchandise has been reduced in the percentage or amount stated from such retailer's usual and customary price in the recent, regular course of business.

9. Misrepresenting in any manner the amount of savings available to purchasers buying respondents' merchandise from any dealer, or the amount by which the price of said merchandise is reduced from the price at which it is usually and customarily sold by such dealer in the recent, regular course of his business, or from the price at which said merchandise is usually and customarily sold in the trade area or areas where the representation is made.

10. Furnishing or otherwise placing in the hands of retailers of said products, or others, any means or instrumentality by or through which they may mislead and deceive the public in the manner or as to the things hereinbefore prohibited.

11. Using the word "customized" or any other word or words of the same import to refer to or describe products which are ready-made, or

respresenting in any other manner that such products are made to order for the automobile of each purchaser.

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

CALIFORNIA FRUIT EXCHANGE

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

Docket C-136. Complaint, May 11, 1962—Decision, May 11, 1962

Consent order requiring a Sacramento, Calif., packer of fresh fruit to cease granting unlawful commissions or discounts on substantial sales to some of its brokers and direct buyers purchasing for their own account 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 California Fruit Exchange is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at Sacramento, California, with mailing address as Post Office Box 2038, Sacramento, Calif.

PAR. 2. Respondent is now and for the past several years has been engaged in the business of packing, selling and distributing fresh fruit, such as peaches, plums, pears, apricots, grapes, apples, nectarines, cherries and strawberries, all of which are hereinafter sometimes referred to as fresh fruit and related products. Respondent sells and distributes its fresh fruit through brokers, wholesalers, jobbers and commission merchants, 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 a varying rate of 5 cents to 20 cents per