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

package, depending on size and value, or from $40.00 to $60.00 per carload. Respondent's annual volume of business in the sale and distribution of fresh 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 fresh 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 California in which respondent is located. Respondent transports, or causes such fresh fruit, when sold, to be transported from its place of business or packing plant in the State of California, or from other places within the State, to such buyers or to the buyers' customers located in various other states of the United States. Thus there has been, at all times mentioned herein, a continuous course of trade in commerce in such fresh fruit across state lines between said respondent and the respective buyers of such fresh fruit.

PAR. 4. In the course and conduct of its business as aforesaid, respondent has been and is now making substantial sales of fresh fruit to some, but not all, of its brokers and direct buyers purchasing in their own name and 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 direct buyers on their own purchases, a commission, brokerage, or other compensation, or an allowance or discount in lieu thereof, in connection therewith.

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

DECISION AND ORDER

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

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint

to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

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

1. Respondent 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, Calif., with mailing address as Post Office Box 2038, Sacramento, Calif.

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 California Fruit Exchange, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the sale of fresh fruit or related 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 fresh fruit or related 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.

719-603—64——77

IN THE MATTER OF

ROAMER-MEDANA WATCH CORPORATION ET AL.

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

Docket C-137. Complaint, May 11, 1962—Decision, May 11, 1962

Consent order requiring New York City distributors of watches to cease representing falsely in advertising that their watches were "Fully Guaranteed", and in such advertising and by means of labels or markings on the backs of watch cases that certain of their watches were "totally waterproof", "Shockproof", "Shock-protected", etc.

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 Roamer-Medana Watch Corporation, a corporation, formerly known as Louis Aisenstein & Bros., Inc., and Stanley Moser, a former officer of said corporation, in his capacity as an individual, and Irving Rosenblum and Ilya Gill, individually and as officers of said corporation, and Stanley Moser and Irving Rosenblum, individually and as former copartners, doing business as Medana Watch Company, 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 Roamer-Medana Watch Corporation, formerly known as Louis Aisenstein & Bros., 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 16 East 40th Street, New York, N.Y.

Respondents Irving Rosenblum and Ilya Gill are officers of the corporate respondent. Their address is the same as that of the corporate respondent. They formulate, direct and control the acts and practices hereinafter set forth.

Until late in 1961 Stanley Moser was also an officer of the corporate respondent and he, together with Irving Rosenblum and Ilya Gill, formulated, directed and controlled the acts and practices of the corporate respondent, including those hereinafter set forth. His address is 11 Glenwood Drive, Great Neck, N.Y.

Respondents Stanley Moser and Irving Rosenblum formerly were copartners, doing business as Medana Watch Company. Their address was the same as that of the corporate respondent.

PAR. 2. Respondents have been engaged in the assembling, advertising, offering for sale, sale and distribution of watches to retailers, wholesalers and others for ultimate resale to the public.

PAR. 3. In the course and conduct of their business, respondents have caused their said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States and the District of Columbia, and have maintained a substantial course of trade in such products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents, for the purpose of inducing the purchase of their products, have represented that their watches are guaranteed by the use of such terms as "Guaranteed" and "Fully Guaranteed", in the advertising of their said products, and have thereby represented that said products are fully and unconditionally guaranteed by them in every respect.

PAR. 5. The aforesaid statements and representations have been false, misleading and deceptive. In truth and in fact, the guarantee provided has been limited both as to time and extent, and the terms, conditions and extent to which such guarantee has applied and the manner in which the guarantor would perform thereunder have not been clearly and conspicuously disclosed in close conjunction with the representations of guarantee. Moreover, a charge has been made for service of certain of respondents' watches, which fact has not been disclosed in respondents' advertisements.

PAR. 6. Respondents, in the course and conduct of their business, and for the purpose of inducing the sale of their watches, have stated and represented by means of advertising in magazines and other media, including advertising by means of labels or markings on the backs of certain of their watch cases, that certain of their watches are "Waterproof" and "totally waterproof". Such statements and representations, on occasion, have appeared without qualifications or limitations of any kind, and on other occasions, such statements and representations have appeared without words of qualification or limitation in immediate conjunction therewith.

Through the use of the aforesaid statements and representations, respondents have represented that their said watches are waterproof in every respect, without qualification or limitation.

PAR. 7. The aforesaid statements and representations have been false, misleading and deceptive. In truth and in fact, said watches have not been unqualifiedly and without limitation waterproof in every respect.

PAR. 8. Respondents have further represented by means of advertising, including marking on the back of the cases of certain of their watches, that their watches are "Shockproof", "Totally Shockproof" "Shock-protected" and have a "Shockproof System".

PAR. 9. The aforesaid statements and representations have been false, misleading and deceptive. In truth and in fact, respondents' watches have not been shockproof, or shock-protected in every respect.

PAR. 10. By the aforesaid acts and practices, respondents have placed in the hands of retailers and others means and instrumentalities by and through which they may mislead the public as to the guarantee, and the waterproof and shockproof characteristics, of their watches.

PAR. 11. In the conduct of their business, as aforesaid, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of watches of the same general kind and nature as those sold by respondents.

PAR. 12. 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. 13. The aforesaid acts and practices of respondents, as herein alleged, have been and are all to the prejudice and injury of the public and of respondents' competitors and have 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 Commision 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, Roamer-Medana Watch Corporation, a corporation, formerly known as Louis Aisenstein & Bros., Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 16 East 40th Street, in the city of New York, State of New York.

Respondents, Irving Rosenblum and Ilya Gill, are officers of said corporation. Their address is the same as that of said corporation.

Respondent, Stanley Moser, was formerly an officer of said corporation, and formerly a copartner with said Irving Rosenblum, doing business as Medana Watch Company. His address is 11 Glenwood Drive, Great Neck, 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, Roamer-Medana Watch Corporation, a corporation, formerly known as Louis Aisenstein & Bros., Inc., and its officers, and Stanley Moser, a former officer of said corporation, in his capacity as an individual, and Irving Rosenblum and Ilya Gill, individually and as officers of said corporation, and Stanley Moser and Irving Rosenblum, individually and as former copartners, doing business as Medana Watch Company, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, labeling, offering for sale, sale and distribution of watches, or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That their watches or any other products are guaranteed, unless the nature and extent of the guarantee and the manner in which the

guarantor will perform thereunder are clearly and conspicuously disclosed.

(b) That their watches or any other products are guaranteed, when a service charge is imposed, unless the amount thereof is clearly and conspicuously disclosed.

(c) That their watches are waterproof unless said watches are waterproof in every respect without qualification or limitation.

(d) That their watches are waterproof under certain conditions, or with certain qualifications or limitations, unless such aforesaid conditions, qualifications or limitations are clearly and conspicuously set forth in immediate conjunction with the term waterproof.

(e) That their watches are shockproof or shock-protected unless said watches are shockproof or shock-protected in every respect.

2. Furnishing any means or instrumentalities to others by and through which they may misrepresent the guarantee, or the waterproof or shockproof character, of their products.

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

NATIONAL RETAILER-OWNED GROCERS, INC., ET AL.

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

Docket 7121. Complaint, Apr. 16, 1958—Decision, May 14, 1962

Order requiring a cooperative purchasing organization and its 35 grocery wholesaler members, operating warehouses in 16 midwestern and southern states to cease accepting unlawful brokerage in violation of Sec. 2(c) of the Clayton Act, such as lower prices, discounts, and promotional allowances received from suppliers of private label merchandise and shared in by such members in the form of patronage dividends; and dismissing the complaint as to National Retailer-Owned Grocers, Inc., the evidence being insufficient to justify an order against it.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties named in the caption hereof and hereinafter more particularly designated and described as respondents herein, have violated and are now violating the provisions of subsection (c) of Section 2 of the

Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent National Retailer-Owned Grocers, Inc., sometimes hereinafter referred to as respondent National, is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 141 West Jackson Boulevard, Chicago 4, Ill.

Respondent National is a cooperative corporation owned and controlled by a group of wholesale grocers many of which are named hereinafter as parties respondent and which, in turn, are owned by retail grocers.

PAR. 2. Respondent Central Retailer-Owned Grocers, Inc., sometimes hereinafter referred to as respondent CROG, is a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business located at 155 North Wacker Drive, Chicago 6, Ill.

Respondent CROG is affiliated with respondent National and was organized in 1948 by respondent National as Central Division, National Retailer-Owned Grocers, Inc. On or about July 20, 1954, its name was changed to Central Retailer-Owned Grocers, Inc., but its membership has been composed of a group of retailer-owned wholesale grocers who own the stock of said respondent and who are also members of respondent National.

PAR. 3. Each of the following respondents is a corporation organized and doing business under the laws of the state specified and whose principal office and place of business is located at the address shown opposite each name:

Name of respondent	State of incorporation	Office and place of business
A. G. Tick Tock Stores, Inc	Michigan	1608 E. Warren Ave., Detroit 7, Michigan.
Allied Grocers of Indiana, Inc	Indiana	1030 E. Ninth Street, Indianapolis, Ind.
Associated Grocers Co., Inc	Missouri	5030 Berthold Ave., St. Louis, Missouri.
Associated Grocers, Inc	Wisconsin	445 N. Broadway, Milwaukee, Wis.
Associated Grocers, Inc	Missouri	2901 S. 22nd St., St. Joseph, Mo.
Associated Grocers, Inc	Kansas	725 E. 37th St., Wichita, Kansas.
Associated Grocers of Alabama, Inc	Alabama	P.O. Box #1169, 114 S. 14th St., Birmingham, Ala.
Associated Grocers of Colorado, Inc	Colorado	1400 W. 3rd Ave., Denver, Colorado.
Associated Grocers Coop., Inc	Georgia	638 Lee St., S.W., Altanta, Georgia
Associated Grocers of East Michigan, Inc	Michigan	P.O. Box #448, 501 W. Kearsley St., Flint, Michigan.
Associated Grocers of Oklahoma, Inc	Oklahoma	P.O. Box #629, 1810 E. Jasper, Tulsa, Oklahoma.
Associated Grocers of Port Arthur, Inc	Texas	P. O. Box #1380, Port Arthur, Texas.
Associated Grocers Wholesale Co	Ohio	3903 Stickney Ave., Toledo, Ohio.
Associated Wholesale Grocers Co., Inc	Missouri	1933 Troost, Kansas City, Mo.
Associated Wholesale Grocers of Dallas, Inc.	Texas	9001 Ambassador Row, (P.O. Box #5293) Brook Hollow Industrial District, Dallas, Texas.

Name of respondent	State of incorporation	Office and place of business
Bibb Grocery Co., Inc	Georgia	P.O. Box #1366, 460 Albert Street, Macon, Georgia.
Central Grocers Coop., Inc	Illinois	2101 S. Carpenter St., Chicago, Ill.
Dixie Saving Stores, Inc	Tennessee	800 East Twelfth St., Chattanooga, Tenn.
Grand Rapids Wholesale Grocery Co	Michigan	1501-19 Buchanan Avenue, S.W., Grand Rapids, Mich.
Grocers Wholesale Coop., Inc	Iowa	334 S.W. 8th St., Des Moines, Iowa.
Kansas Service Grocers, Inc	Kansas	Sunshine Road at 7th Street, Kansas City, Kans.
Lake Erie Coop. Grocers Company	Ohio	4070 West 150 St., Cleveland, Ohio.
Miami Retail Grocers, Inc	Florida	2400 N.W. 23rd St., Miami, Florida.
Muskegon Wholesale Company, Coop	Michigan	1764 Creston St., Muskegon, Mich.
Panhandle Associated Grocers, Inc	Texas	P.O. Box #1299, 622 N. Fairfield St., Amarillo, Texas.
Progressive Associated Grocers, Inc	Illinois	Staunton, Ill.
Redman Bros. of Lansing, Inc	Michigan	P.O. Box #2019, 810 S. Hosmer St., Lansing, Mich.
South Plain Associated Grocers, Inc	Texas	P.O. Box #183, 2606 Avenue "A", Lubbock, Texas.
The Sylvester Company	Wisconsin	149 E. Wilson St., Madison, Wis.
The Tusco Grocers, Inc	Ohio	404 N. Main St., Ubrichsville, Ohio.
United A-G Stores Coop., Inc	Nebraska	7312 Jones St., Omaha, Nebraska.
United Grocers Coop. Assn	Wisconsin	1117 W. Washington St., Appleton, Wis.
Weona Food Stores, Inc	Tennessee	670 S. Cooper, Memphis, Tenn.
White Villa Grocers, Inc	Ohio	537 E. Pearl St., Cincinnati, Ohio.
Central Florida Cooperative, Inc	Florida	P.O. Box #1171, 1224 S. Orange Ave., Ocala, Florida.

Said respondents are all engaged in the wholesale grocery business and are members of respondent CROG and also of respondent National and are sometimes hereinafter referred to as respondent members. The stock of respondents National and CROG is owned by wholesale grocers, the businesses of which are owned by retail grocers.

PAR. 4. Respondent National was organized in 1934 as a buying agency for its various wholesale grocer members, buying from various suppliers for the benefit of its members. Its operations were conducted nation-wide through three regional divisions, covering the eastern, central and western areas of the United States. In 1948 said respondent caused its three divisions to become separate corporations and the function of buying for the members of each has been performed by such divisional or regional corporations. Among the regional corporations is respondent CROG, formerly the Central Division of respondent National.

Respondent National has ownership of and control over certain brand names which are used by the members of both respondent National and respondent CROG on labels describing a majority of the grocery products handled by such members. Said respondent National by agreement licenses respondent CROG to use such brand names as private brands on labels and otherwise in connection with various food products purchased by respondent CROG from various suppliers, thus permitting the merchandising of food and grocery products under such brands.

In addition to control over brand names respondent National also acts as an insurance broker for its various members.

Respondent CROG since 1948 has been engaged in the purchase of food and grocery products from various suppliers on behalf of the member wholesale grocers constituting the owners of said respondent. For the year ended May 31, 1955, said respondent's purchases of such products amounted to approximately $17,500,000.

PAR. 5. Respondent National and respondent CROG have been, and are now engaged in commerce as "commerce" is defined by the Clayton Act in that they cause food and grocery products to be purchased and shipped from various sellers located in different states to wholesale grocers, members of said respondents and including the respondent members, located in other states and in the District of Columbia and there is now and has been a constant current of commerce in such products, and these respondents are instrumentalities in the stream of interstate commerce.

Respondent members are also engaged in commerce as "commerce" is defined in the Clayton Act in that they purchase food and grocery products from various sellers located in states other than the states where such respondent members are located and shipment of such products is made into the states where such respondent members are located, and there is now and has been a constant current of commerce in such products.

PAR. 6. Respondent CROG is now, and has been since 1948, continuously engaged in the purchase of food and grocery products from various sellers for and on behalf of respondent members, whereby orders are placed by such members through respondent CROG with shipments being made direct from the supplier-seller to the respondent members involved and with respondent CROG being invoiced direct and payment made by it to the seller or sellers involved. Said respondent re-invoices its members for the merchandise purchased and sold. In some instances respondent members place orders directly with suppliers, but in all such instances clearance or confirmation of such orders must be obtained from respondent CROG prior to shipment.

In connection with such purchases respondent CROG makes arrangements with various sellers of food and grocery products for the furnishing to them of labels bearing the private brand names owned and controlled by respondent National. The use of such labels and brand names is granted by respondent National to respondent CROG in connection with products sold by such sellers to respondent CROG for resale by its members, respondent members herein. Also respond-

ent CROG designates certain sellers as approved suppliers and demands that such sellers invoice CROG for all sales.

Respondent CROG does not permit respondent members to have access to the labels bearing the controlled brand names so that such respondent members are thereby precluded from making arrangements separately with suppliers of their individual choice.

PAR. 7. Respondent National has also been engaged directly in the acts and practices described and set forth in paragraph 6 herein with respect to respondent CROG, in connection with the purchase and sale of food and grocery products from various suppliers for resale by and through its member-wholesalers.

PAR. 8. Respondent CROG, in engaging in the acts and practices heretofore alleged, has been, and is now, performing services commonly rendered by independent brokers which said respondent replaces in a large number of such transactions of purchase and sale.

Respondent National also has engaged directly in acts and practices which constitute services commonly performed by independent brokers, which respondent National has replaced in a large number of such transactions of purchase and sale.

PAR. 9. In consideration for such acts and practices of respondent CROG many sellers pay or grant to said respondent and respondent receives and accepts from such sellers sums of money as brokerage or as allowances and discounts in lieu of brokerage. For example, one of its suppliers contracted to pay and did pay a sum of $9,000.00 for the year 1955 to said respondent in connection with the furnishing of food products packed under brand names controlled by respondent National as allowances in lieu of brokerage.

Also respondent National in consideration for such acts and practices which it has directly performed in the purchase and sale of food and grocery products for its various members, has likewise received and accepted sums of money as brokerage or as allowances and discounts in lieu of brokerage from many sellers paying or granting such sums to said respondent.

The amounts received by said respondents from various sellers have been substantial and have usually been equivalent to fixed percentages of the purchases from such sellers.

PAR. 10. The sums received and accepted by respondent CROG as brokerage or as allowances and discounts in lieu of brokerage are used by it, together with other funds received from respondent members to defray operating expenses, with the excess of such amounts received being distributed to respondent members in the form of patronage dividends. For example, in 1955, said respondent distrib-

uted approximately $230,000 received from various sellers, to its members in the form of patronage dividends.

PAR. 11. Respondent National, through its ownership of brand names used by respondent CROG and respondent members in the merchandising of food and grocery products and also through its organization of and affiliation with respondent CROG, and its connection with respondent members has been and is both directly and indirectly engaged in the aforesaid acts and practices in violation of subsection (c) of Section 2 of the Clayton Act, as amended, and since about 1948 said respondent has been, and is now, indirectly engaged in the same practices through the operations of respondent CROG and respondent members as referred to hereinbefore.

PAR. 12. The acts and practices of respondents and each of them as alleged and described are in violation of subsection (c) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act.

Mr. Lewis F. Depro and *Mr. Cecil G. Miles* for the Commission.

Litsinger, Gatenbey and Spuller, by *Mr. Andrew W. Gatenby* and *Mr. Fred H. Law, Jr.*, of Chicago, Ill., for all respondents except Associated Grocers of Colorado, Inc., and Associated Grocers of East Michigan, Inc.

Mr. Fred Fishburn, of Denver, Colo., for respondent Associated Grocers of Colorado, Inc.

No appearance for respondent Associated Grocers of East Michigan, Inc.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

This proceeding is brought under § 2(c) of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, § 13), and involves charges of unlawful receipt by respondent corporations of brokerage, or allowances and discounts in lieu thereof, paid to them by suppliers for purchases upon respondents' own accounts, which charges respondents deny. In this initial decision the said charges are found to be sustained and a cease-and-desist order is issued as to all respondents.

The complaint was issued April 16, 1958, and duly served upon all respondents. On August 4, 1958, respondent National Retailer-Owned Grocers, Inc. (usually hereinafter referred to as NROG), and respondent Central Retailer-Owned Grocers, Inc. (usually hereinafter referred to as CROG), filed their separate answers. All of the 35 other respondent corporations, except Associated Grocers of Colorado, Inc., and Associated Grocers of East Michigan, Inc., had filed their joint answer on June 4, 1958. And also, on July 10, 1958, Associated

Grocers of Colorado, Inc., had filed its separate answer. Respondent Associated Grocers of East Michigan, Inc., filed no answer and entered no appearance, and therefore has been and still is in default. While counsel representing other respondents, undoubtedly in good faith, made a statement upon the record that this particular respondent "is out of business" (R. 8), there is no evidence or stipulation in the record to that effect, and disposition of this proceeding as to this respondent will be made on the basis of such default. All respondents which appeared herein, other than Associated Grocers of Colorado, Inc., have been represented throughout by the same counsel. Respondent Associated Grocers of Colorado, Inc., appeared by its executive vice president, who sat throughout most of the hearings. He cross-examined no witnesses and presented no evidence on his corporation's behalf, but indicated a willingness to abide by any ultimate order which might be entered upon the evidence presented upon the whole record.

Prior to hearings a subpoena duces tecum was issued to Harold W. Garbers, the general manager of CROG, which was opposed by his corporation but not by Garbers personally. He appeared at the first and subsequent hearings, testified at length, and in due course produced all documents requested of him, and the subpoena was fully satisfied.

Hearings in this proceeding were held on fifteen various dates, commencing October 22, 1958, and ending May 25, 1960, all such hearings being held either in Chicago, Illinois, or in Milwaukee, Wisconsin. At the close of the case-in-chief the respondents severally moved for dismissal of the complaint. These motions were resisted, and on March 7, 1960, they were denied on the basic ground that a *prima facie* case had been definitely established. Respondents then presented evidence purporting to support their respective defenses under their separate answers, and all parties rested.

Proposed findings, conclusions and order were submitted by counsel supporting the complaint and also by counsel for all respondents who actively participated in the case. While ample opportunity was given for the presentation of such matters by respondent Associated Grocers of Colorado, Inc., this respondent submitted no proposals. On November 14, 1960, counsel for the contesting parties presented their oral arguments in Washington, D.C., and the proceeding was submitted for decision.

All proposed findings of fact and conclusions of law submitted by said respective parties which are not incorporated herein, either as submitted or in substance and effect, have been rejected. The proposed order submitted by counsel supporting the complaint is adopted herein.

The hearing examiner has carefully and fully analyzed the whole record, taking into consideration his observation of the appearance, conduct and demeanor of the witnesses who appeared before him. All procedural matters have been thoroughly reviewed, and, inasmuch as rulings were reserved on certain objections to evidence and motions to strike evidence made by counsel for the contesting respondents, the same are hereby each and all sustained. All arguments, proposals and briefs of counsel have been studied in the light of the entire record. Upon the whole record the hearing examiner finds generally that the Commission has fully sustained the burden of proof incumbent upon it, and has established by reliable, probative and substantial evidence and the fair and reasonable inferences drawn therefrom, all the material allegations of the complaint; and further finds that evidence submitted by or relied upon by respondents fails to establish facts constituting any valid defense to the charges of violations contained in the complaint.

In these § 2(c) cases a decision "depends on the circumstances of each case" (*F.T.C.* v. *Henry Broch & Company*, 363 U.S. 166 (1960), 175–176; sustaining (1959) 54 F.T.C. 673). Much of the long record herein is devoted to identification of numerous documentary exhibits, and to objections, motions and rulings. The numerous exhibits received in evidence, of course, are not in dispute. Counsel supporting the complaint presented the testimony of officials of eleven suppliers with reference to various discounts and allowances made to respondent CROG, and also covering their use of brokers in connection with sales to other buyers as well as to members of CROG in certain situations. Counsel supporting the complaint also examined CROG's general manager Garbers at length respecting respondents' corporate relationships and activities. Respondents presented evidence by a number of their officials. When immaterial minor differences between the parties are disregarded, "we think that the controversy here is over conclusions to be deduced from the facts rather than over the facts themselves", as stated by Circuit Judge Parker in one of the earliest § 2(c) cases, *Oliver Brothers, Inc., et al.* v. *F.T.C.* (1939, C.C.A. 4th), 102 F. 2d 763, 766; sustaining (1937) 26 FT.C. 200.

More specifically, upon due consideration of the whole record, the hearing examiner makes the following:

FINDINGS OF FACT

Respondent National Retailer-Owned Grocers, Inc., is a corporation organized and existing under the laws of the State of Delaware, with

its principal office and place of business located at 141 West Jackson Boulevard, Chicago 4, Ill.

Respondent Central Retailer-Owned Grocers, Inc., is a corporation organized and existing under the laws of the State of Illinois, with its principal office and place of business located at 155 North Wacker Drive, Chicago 6, Ill.

All of the other respondents herein are corporations, and each is incorporated and maintains its principal place of business in one of sixteen Midwestern and Southern states. All such corporations are correctly named and referred to in the complaint, except that respondent Grand Rapids Wholesale Grocery Co. has since changed its name to Spartan Stores, Incorporated (R. 33, 1187), and also respondent Central Florida Cooperative, Inc., has since changed its name to Certified Grocers of Florida, Inc. (R. 988). In order clearly to identify another of such corporate respondents, it is noted that while the respondent South Plain Associated Grocers, Inc., is always referred to by that corporate name in the pleadings of both parties, the evidence shows the correct name of this corporation to be South Plains Associated Grocers, Inc. (R. 989–991, 993, and CXs 2–E and 172–D); and it so appears in the proposed findings, both of counsel supporting the complaint (page 5) and of respondents (page 19). Although the witness Garbers estimated a somewhat higher total number of such corporations (R. 1169), this is immaterial, as no defect of parties is claimed or could properly be claimed by any party to this proceeding. All of these 35 respondents, other than NROG and CROG, have been and now are engaged in the operation of warehouses for their numerous retail-grocer owners. These 35 warehouse corporations are all stockholder members of respondents NROG and CROG, and are accordingly, for the sake of brevity, referred to in this decision either as members or as respondent members. Each of these respondent members has been and is jointly owned by numerous retail grocers in the area in which it operates. The witness Garbers testified that the total of such retail grocers approximated one thousand at the time of hearings (R. 1194). Representatives of respondent members covering about two-thirds of these retailers appeared and testified for respondents during the hearings.

Respondent NROG was organized in 1934 as a buying agency for various wholesale grocer members throughout the entire United States. These members owned all of the stock in said corporation and elected its directors, and at all times controlled its activities. From 1934 to 1938 NROG operated as a broker for various suppliers, but upon objection to such practices by the Federal Trade Commission

after the passage of the Robinson-Patman Act, NROG, in 1938, ostensibly desisted from such practices, and thereafter purported to act as a buyer for its members until 1948. During this ten-year period it did buy from various suppliers of grocery products throughout the country for the benefit of its members. Its methods of operation, however, included the receipt by it of various allowances from sellers, as hereinafter more fully stated. NROG, from its beginning in 1934 up to 1948, operated through three regional divisions, which, respectively, covered generally the Eastern, Central and Western areas of the United States. In April, 1948, due to internal dissensions as to its methods of doing business, and varying demands and conditions in the several sections of the country, NROG's directors, by resolution, authorized its respondent members to organize independent corporations in the Eastern and Central areas of the country. Whether prior authorization by NROG was necessary for such action is immaterial. The western members had already organized a separate corporation named Pacific Mercantile Company. The eastern group of wholesale grocers proceeded to incorporate as "Eastern Division National Retailer-Owned Grocers".

The wholesale-grocer members of NROG who had been doing business in the central area of the country likewise formed the respondent corporation CROG, a corporation separate from NROG, and respondent members here own all of the stock of CROG. It was originally called "Central Division National Retailer-Owned Grocers, Inc.", which name was changed several years later to its present title, Central Retailer-Owned Grocers, Inc.

Each of these three separate regional corporations, in its own manner, thereafter proceeded to carry out, in its own area, the purchasing and certain other functions theretofore handled by NROG. Each of these corporations, however, was permitted by NROG, through corporate resolution, to use the food-product labels owned by it, as well as to receive the benefit of its group-insurance programs and services. This permission continued in force through the years subsequent to 1948 until during 1959. In 1959, and about a year after the hearings herein began, all concerned adopted another corporate device for handling the NROG label, more specifically discussed hereinafter. But this does not alter the findings herein made nor evade the issuance of an appropriate cease-and-desist order against all respondents herein.

Since Pacific Mercantile Company and Eastern Division National Retailer-Owned Grocers, Inc., are not parties respondent, we are only incidentally concerned with their operations subsequent to 1948, and

then only insofar as the order herein issued against respondent NROG affects all of its members.

The foregoing general statement of the corporate relationships of the several respondents has been substantially agreed upon by counsel in their several briefs. The basic dispute in the case arises from the interpretation which should be given to the facts and circumstances relating to the various substantial sums of money which were, beyond question, directly received by respondent CROG from various suppliers, and indirectly received by CROG's respondent members as patronage dividends. Respondents freely concede that these sums were paid to CROG by suppliers, but refer repeatedly to them by various names other than "brokerage", such as "promotional allowances", "service allowances", "sales promotion", "promotion", "discounts", and other similar terms. The management of respondent CROG, and the representative officials of several suppliers who testified, all avoided the terms "brokers" and "brokerage" like the plague, and much of their testimony and arguments consist of discussion of semantics and do not strike at the basic question to be determined. Respondents are so obsessed with the idea that "broker" is a word taboo, that they even object to its use with reference to what is here the rather immaterial and incidental group life and casualty insurance service rendered by NROG, although the evidence unquestionably shows NROG to have been essentially a broker in so servicing its members. In any event, brokerage fees "are not changed in nature by calling them something else, nor made legal by an agreement for their payment" (*Quality Bakers of America, et al.* v. *F.T.C.* (1940), C.C.A. 1st, 114 F. 2d 393, 399; sustaining (1939) 29 F.T.C. 1328). An in *The Great Atlantic & Pacific Tea Company* v. *F.T.C.*, 106 F. 2d 667 (1939, C.C.A. 3rd), cert. den. 308 U.S. 625 (1940), rehearing denied 309 U.S. 694 (1940); sustaining (1937), 26 F.T.C. 486, it was held (106 F. 2d at page 670) that the change of the respondent corporation's brokers' names, after the enactment of the Robinson-Patman Act, to "purchasing agents" and other like terms did not change the nature of their duties and actions.

The complaint charges, in the language of the statute, that respondent CROG has received and accepted such sums of money "as brokerage or as allowances and discounts in lieu of brokerage". The uncontroverted facts presented in detail in the case-in-chief justify a finding that the various sums to be received by CROG, used in part for its operations, and distributed in part as patronage dividends to its members were received by respondents as "allowances and discounts in lieu of brokerage". Respondents have endeavored to avoid

the charges based upon these facts by explaining them. Their principal defense is that the status of CROG is entirely different from that of other buying organizations in that it is a "unique" organization and that, in the several instances specifically established by the evidence, the substantial sums received by it from suppliers are explainable either as volume discounts offered to all large buyers by the seller, as payments by sellers for promotional services rendered by CROG to them, or as reduced prices granted by sellers to CROG in common with all other controlled-label accounts. It is therefore claimed that the activities of CROG and its respondent members are not violative of § 2(c).

On behalf of respondent members it is further implausibly urged that they have nothing to do with CROG's dealings with suppliers, and are, in effect, innocent bystanders who have had no knowledge of what was taking place. But the respondent members of CROG, holding all of the stock in CROG, elect its Board of Directors, through whom the executive officers are then elected or appointed and policies are made and approved. CROG is the buying agent of the respondent members, each of whom is bound by CROG's acts. The sole purpose of CROG's organization in 1948 was to permit its members in the Midwest and Southern regions of the country to retain the advantage of the well-established "Shurfine" and other private labels of NROG, as testified by Garbers, in order to get quality merchandise under "the controlled label that he [each member] so badly needs to meet chain-store competition" (R. 169). Without these private labels, there was no reason for the organization of CROG. While there is some slight reference in the record to CROG's subsequent development of certain private labels of its own, there is no indication that they have ever been substantially or widely accepted by the member respondents. Insofar as the evidence materially discloses, all of CROG's business relates to NROG's private labels, and CROG's procurement from suppliers of various products under such labels for its members. The evidence clearly shows that CROG handles only about 10% of the total business done by its members. The members cannot buy the "Shurfine" and the other controlled-label products of NROG except through CROG. The remaining 90% of their respective purchases are made by the respondent members directly from suppliers, or from the suppliers through their regular brokers, all at the suppliers' regular prices, including brokerage. It is only for the private-label business done by them through CROG that they receive the benefit of any discounts or allowances. Many of the products bearing the suppliers' own packer labels are of like grade and quality to those canned by them

under CROG's labels, and are sold without discount or allowance to the member respondents as well as to other wholesalers and jobbers within the geographical areas of the operations of CROG and its members.

CROG buys some 2,000 different items of grocery products from between 300 and 400 different suppliers. All such products bear the said private labels of NROG so controlled by CROG. It makes contracts with these suppliers, or has well-established understandings with them, covering substantial volumes of business over specific future periods. It is able to do this because its members indicate to it in advance how much of a particular product they will probably need during the ensuing year or other future period of time. When CROG receives these estimates from its members, it consolidates them and then advises the suppliers. As hereinbefore stated, the members cannot order products bearing "Shurfine" or other private labels of NROG directly from the suppliers, but must order them through CROG. When CROG transmits such orders to the supplier, it advises such supplier to ship such merchandise direct to the member involved, but all merchandise so sold by the supplier through CROG's orders is billed to CROG, which pays the supplier and in turn bills the member at cost plus a mark-up. The operating expenses of CROG are paid out of the total income received by it during its fiscal year, which consists of the usual mark-up charged the respondent members on the CROG controlled-label merchandise, plus the many substantial discounts and allowances CROG admittedly has received from the suppliers. After salaries, rent and all other expenses incidental to CROG's operation have been paid, the balance remaining is then distributed to the members in proportion to the amount of business they have done through CROG during that year, and is usually called a "patronage dividend".

CROG, like NROG before it, has never owned any warehouses, and only on rare occasions, when delivery of merchandise, such as foreign imports, could not be effected immediately to its members, has it leased public warehouse space, or space in some member's warehouse, on a temporary basis for the short-term storage of such merchandise pending delivery to the consignee members. It has never bought on its own account any quantity of merchandise and held it in its own storage pending resale to wholesalers or others. In short, it has never operated as a legitimate broker or jobber, although it has received from its numerous suppliers large sums by way of discounts and allowances, which are parallel to similar brokerage payments made by these same suppliers for similar services performed for them by their regular,

legitimate brokers in selling merchandise of like grade and quality offered under the suppliers' own "packer brand" labels in the ordinary course of business.

Before analyzing respondents' various contentions in detail, it is appropriate to review briefly the law relating to § 2(c). Shortly after the passage of the Robinson-Patman Act in 1936, the Commission vigorously instituted and pursued to successful conclusions a considerable number of proceedings to interpret, implement and enforce the provisions of this new Act. A substantial number of these cases involved § 2(c) thereof. In the period from 1938 to 1942, scores of cases brought under this section were decided by the Commission, and a substantial number of them were adjudicated and enforced by the Courts, which in every instance sustained the Commission's interpretation and application of the Act against sellers, sellers' agents and brokers, independent brokers, buyers, and buyers' agents and brokers. Almost every conceivable situation involving the selling and buying of grocery products in particular was covered by these decisions. These early cases are collated in the annotation at 149 ALR 657–677 (1944). It would be supererogation to analzye and discuss even a representative number of these cases in this initial decision, other than aptly to cite or quote from a few. After this early period of activity the Commission successfully continued its said program, and in some instances its later cases also reached the Courts, with like results. To the present time no final judicial decision has ever reversed any holding of the Commission that any respondent has violated § 2(c). The latest of these cases, and the only one which has ever been adjudicated on the merits by the Supreme Court of the United States, is *F.T.C.* v. *Henry Broch & Company*, *supra*. That decision, in substance, has ratified the well-established earlier law and forged the last judicial link in the chain encompassing all relationships of buyer and seller which may be involved in § 2(c) cases. It was held in that case that the seller's broker could not legally pass on any part of his commission to a buyer as a concession to such buyer to effect the one sale involved. In the course of the opinion the Court referred approvingly to many decisions of the Commission and the lower courts, interpreting the "in lieu of" provision of § 2(c) and its application to evidence and contentions in various situations which are similar to or like the evidence and contentions of respondents in the instant proceeding.

From the very beginning the Commission, in its decisions under § 2(c), has held consistently that the payment of "anything of value as a commission, brokerage, or other compensation, or any allowance

or discount in lieu thereof" by or for a seller to a buyer or buyer's agent is absolutely prohibited by said § 2(c), and that the exception clause of said section, authorizing payment for services rendered in connection with the sale or purchase of goods, wares or merchandise, does not permit the buyer to give, directly or indirectly, to the seller, or the seller to receive, directly or indirectly, from the buyer, any commission, brokerage or other compensation or any allowance or discount in lieu thereof, when it is claimed the discriminatory price given to the buyer resulted from the rendition of services by the buyer to the seller, or resulted from savings in distribution costs to the seller. Affirming the Commission's interpretation and application of § 2(c), the Courts have repeatedly held that this "in lieu" clause was intended by Congress to permit the buyer to pay his own agent or broker and the seller to pay his own agent or broker; but to preclude any payment for brokerage service or its equivalent by either to the other, either directly, or indirectly through its broker or agent. "Ye may not serve two masters." See *The Great Atlantic & Pacific Tea Company* v. *F.T.C.*, *supra*, pages 674–675. As the Commission and the Courts have so frequently pointed out, Congress never intended to leave any loophole whereby the purpose of the Act could be nullified. In each case, therefore, the acceptance by the buyer, directly or indirectly, from the seller of anything tantamount to brokerage, by whatever name it might be called, was held to be a violation of the Act.

As has been briefly referred to, at the close of the Commission's case-in-chief, a *prima facie* case under § 2(c) had been definitely established. It was proved that the respondent CROG and its respondent members had received, directly and indirectly, various discounts and allowances which could justifiably be inferred to be in lieu of brokerage. If the impact of such proof were to be avoided, it then became incumbent upon respondents to bring themselves within the statute's exception. To bring a respondent within such exception "the burden of proof that the exception applies is upon the one who so contends" (*F.T.C.* v. *Washington Fish & Oyster Company, Inc.* (C.A. 9, 1960), 282 F. 2d 595, 597; enforcing (1946) 42 F.T.C. 119, and citing *F.T.C.* v. *Morton Salt Co.*, 334 U.S. 37, 44). The respondents have utterly failed to bring themselves within the exception.

The basic tenet of their defense, as hereinbefore stated, is that CROG is a unique organization, whose operations do not fall within the provisions of § 2(c). Respondents claim that CROG is unique in that there is no other organization set up and doing business in the manner in which it operates, whereby its "Shurfine" and other private labels enable its suppliers and its respondent members to

achieve marked special advantages over and above those available to others in the usual courses of trade. The features of respondents' organization and operation, taken either individually or collectively, are neither unique nor legal insofar as they concern the receipt from suppliers of any discounts or allowances, by whatever name. "§ 2(c) contains no classification provision nor is there anything in it which would justify the conclusion that it would not be uniformly applied. It in no way supports the theory that the relative size of businesses coming within its purview or other differing plans of organization determine the question as to whether or not violations of the statute occur." *Biddle Purchasing Co. et al.* v. *F.T.C.* (C.C.A. 2, 1938), 96 F. 2d 687, 690; cert. den. (1938) 305 U.S. 634; sustaining (1937) 25 F.T.C. 564. See also the companion case, *Oliver Brothers, Inc., et al.* v. *F.T.C., supra*, 102 F. 2d at page 771, where respondent corporations' argument that the statute was directed solely at the practices of chain stores, and not against independent dealers, was summarily rejected.

While every case thus far adjudicated has certain peculiar characteristics of its own, § 2(c) was so broadly framed as to preclude any avoidance of compliance with its provisions by any subterfuge or "under any guise". See *Quality Bakers of America, et al.* v. *F.T.C., supra*, 114 F. 2d at page 398. This certainly includes respondents' claim of being "unique". After long consideration the Hearing Examiner has been unable to envision any type of buyer organization which could rightfully claim that by reason of its different or unique character, it can receive special discounts and allowances from any seller in complete immunity and exemption from the clear mandate of the statute.

General manager Garbers of CROG testified, "In the case of CROG, the members are wholesale grocers . . . They perform a wholesale grocer's function, owned by retailers. Actually, it is a chain-store set-up in reverse * * *" (R. 1201). The decisions are many wherein usual corporate chain-store grocery organizations and their buying agents have been prohibited from receiving from sellers anything of value as brokerage, or any allowance or discount in lieu thereof. See, for example, *The Great Atlantic & Pacific Tea Company* v. *F.T.C., supra*, and *Independent Grocers Alliance Distributing Co.* v. *F.T.C.* (C.A. 7, 1953) 203 F. 2d 941; sustaining (1952) 48 F.T.C. 894. These cases make no distinction, and there is no legal distinction under § 2(c), between corporations owned from the top or from the bottom.

Respondent member corporations are all cooperatively owned by their retail grocer members. They have made no claim based thereon to exemption from the provisions of § 2(c), nor would such claim

be valid, as cooperatives are clearly within the inhibitions of said statute. See *Quality Bakers of America, et al.* v. *F.T.C.*, *supra*, 114 F. 2d at pages 399–400. That case alone disposes of respondents' claim that CROG and its members constitute a unique organization. In that case, the purchasing stockholders, wholesale bakeries, who owned the Service Company, their buying organization, were located in 25 different states and bought through their said buying agent from some 200 sellers located all over the country. The said buying agent either bought outright and resold to its stockholders, or placed orders with sellers for shipment direct to its stockholders. In the instant case the member owners of CROG are located in sixteen states, and CROG buys for its members from some 300 to 400 suppliers located throughout the country, assuming liability to the suppliers for payment, but having the goods shipped directly to the members, who pay CROG a marked-up price for such goods. There is no material factual distinction between the *Quality Bakers* case and the case at bar.

As to the claim of respondents that their suppliers had benefited by CROG's activities on behalf of its members in obtaining and submitting to such suppliers annual estimates of the products needed, by reduction in the sellers' billing work and credit risks, by shipping advantages, by the circulation of advertising material, and by promotional meetings and conventions held by CROG for its members, all such matters are concomitants of ordinary business, occurring frequently in transactions between suppliers and wholesalers or jobbers. The seller is always eager to dispose of his merchandise at the best profit he can make, and the buyer is just as eager to buy to his best advantage. How can CROG's operations, then, be so unique, if they comprise the sort of services which are rendered practically every day by or to everyone who engages in such business? Furthermore, whatever advantage or benefit the sellers get from any such transactions are purely incidental to the beneficial services CROG was bound to render to its members, for whom it is the buying agent. See, for example, *Oliver Brothers, Inc., et al.* v. *F.T.C.*, *supra*, 108 F. 2d at pages 770–771; *The Great Atlantic & Pacific Tea Company, et al.* v. *F.T.C.*, *supra*, 106 F. 2d at pages 672–673; *Quality Bakers of America, et al.* v. *F.T.C.*, *supra*, 114 F. 2d at pages 398–399; and *Modern Marketing Service, Inc., et al.* v. *F.T.C.* (C.C.A. 7, 1945), 149 F. 2d 970, 974–978; sustaining (1943), 37 F.T.C. 386. In *Southgate Brokerage Co., Inc.* v. *F.T.C.* (C.C.A. 4, 1945), 150 F. 2d, 607–608; cert. den. (1946) 326 U.S. 774; sustaining (1944) 139 F.T.C. 166, an offer of evidence of such alleged services by the

buyer to the seller was held properly rejected by the Commission as irrelevant. Also this decision discloses (at page 608) that large quantities of goods were contracted for in advance with packers and canners. There is no uniqueness in CROG's similar practice here.

There is nothing unique, either, about NROG's private labels used by CROG and its members. Use of private labels is a common practice which has been before the Courts in § 2(c) cases several times. See *Independent Grocers Alliance Distributing Co.* v. *F.T.C.*, *supra*, at pages 943–944; *Southgate Brokerage Co., Inc.* v. *F.T.C.*, *supra*, 150 F. 2d at pages 607–608; and *Modern Marketing Service, Inc., et al.* v. *F.T.C.*, *supra*, 149 F. 2d at page 977. Many suppliers are glad to pack private-label products, just as the suppliers are happy to get this type of business from CROG in the present case. But in respondents' operations, the furnishing of the private label to the suppliers is essential to all services rendered by CROG to its members, and whatever benefit accrues therefrom to the suppliers is purely incidental to this fairly ordinary, and certainly not unusual, business transaction.

There is therefore no basis for respondents' contention that they are exempt from the provisions of § 2(c) by reason of the unique character of their organization. But they have also raised other questions ancillary thereto, which will now be disposed of.

Respondents argue that the *Broch* case, *supra*, shows that the Supreme Court made a distinction between the situation of the seller's broker there involved and a case involving buyers such as respondents herein, quoting particularly the Court's dictum (363 U.S. at page 174), "The buyer's intent might be relevant were he charged with receiving an allowance in violation of § 2(c)." The Court, at best, only indicated the mere possibility of relevance of intent on the part of the buyer, and did not indicate that such intent was controlling or decisive. Furthermore, § 2(c) is purely a *malum prohibitum* statute, and intent to violate it is not made requisite thereto. And in *Modern Marketing Service, Inc., et al.* v. *F.T.C.*, *supra*, 149 F. 2d at page 978, it was expressly held "that where such relationship [between seller and buyer's broker] exists it is immaterial whether the services rendered the seller were genuine or fictitious and whether they were incidental or otherwise. Even good faith on the part of both the broker and the seller cannot be utilized to escape the condemnation of the provision". Intent to violate § 2(c) was held immaterial, and the buyers and their broker and all other respondents were found to have violated § 2(c).

But is is urged here, in effect, that since there is no direct evidence that these respondents were aware that they were receiving preferential prices, they were innocent of any wrongdoing. In any view the position of respondents is an anomalous one. They have claimed throughout that since CROG performed valuable services for the sellers, respondents could receive these allowances. If this position were sound, respondents would, of course, be bound by the imputed knowledge of their principals, the sellers. But they then contend that, since they are acting for the buyers, they are distinctly separate from the sellers, and are not bound by any knowledge the sellers may have. These two contentions are mutually exclusive, and without merit.

Even if such knowledge were necessary to prove violation by respondents, the evidence itself clearly compels the inference that respondents knew what was going on. During ten years or more of dealing with numerous suppliers and bargaining with them for better prices, discounts and allowances, CROG's officers and members certainly knew they were enjoying substantial advantages that the small wholesalers in competition with respondent members were unable to obtain. CROG's general manager Garbers, its buyer, William A. Stolte, and Mike Rabinowitz, one of the chief organizers of CROG and its president on several occasions, and currently president of NROG and also manager for the member respondent Associated Grocers of Oklahoma, Inc., testified extensively herein as accredited representatives of all the corporate respondents, who cannot now deny that accreditation. These three experts were closely observed by the Examiner. They were not naive beginners in the merchandising of food products. Their evidence discloses that, as mature men who had spent practically all the years of their adult lives in the grocery buying and distributing business, each is highly competent, experienced and successful in that field. They knew all the practices of the trade, from the producers all the way through the channels of trade to the ultimate consumer. They knew that their members were paying more for packer-labeled goods than for NROG-labeled goods of like grade and quality. They knew that their suppliers used brokers in dealing with others, and that smaller independent wholesale grocers were not getting the same buying advantages as respondents. In fact, CROG was organized for the express purpose of effecting savings for its wholesaler members by bulk purchasing to reduce the prices ordinarily paid by wholesalers to suppliers for grocery products (Articles of Incorporation, Commission's Exhibit 11–A). As stated in the *Broch* case, *supra*, at page 174, "The powerful buyer who demands a price conces-

sion is concerned only with getting it." Respondents also knew that small wholesale houses could not afford private labels. That was precisely why NROG was organized, and later its labels continued in use by CROG. General Manager Garbers testified with reference to the ability of the respondent members to compete with the chain-grocery brands: "We supply them [respondent members] with a controlled label merchandise program * * * on a basis that is comparable to the chain operation, because individually these warehouses could not embark upon a private label or controlled label program. * * * [I]t would cost them so much more money, it would be uneconomical. They can't afford to buy the labels necessary in order to get the right price" (R. 1195). Respondents knew absolutely that the leverage of the private NROG labels would give them advantages that these small competitive wholesalers were unable to get. As so well said in *Mid-State Distributors, et al.* v. *F.T.C.* (C.A. 5, 1961), 287 F. 2d 512, 520: "[O]ne caught in the middle cannot, to ward off his huge and overpowering rival, injure, even unwittingly, a smaller one."

A Commission decision, *Main Fish Company, Inc.*, 1956, 53 F.T.C. 88, is relied on by respondents to support another argument that since respondent is not the only customer which the suppliers sell direct without the intervention of brokers, and as to some suppliers their sales through brokers constitute an insignificant portion of total sales, this indicates "the lack of a clear pattern relating the prices, discounts and allowances involved to brokerage payments". This is claimed an important factor to be considered in determining whether a violation of § 2(c) has been proved. There is nothing unusual in this; and it would indeed be strange if all suppliers had exactly the same pattern as others for all qualities and grades of merchandise handled by them. It is clear from reading the *Main Fish* case that the circumstances are quite different from those in the case at bar, because in that case there was no variance between list prices for all customers and prices paid by all customers, and the product there involved was a perishable product, on which the prices varied from day to day. The essence of that holding is that there were many transactions shown in evidence wherein there was no difference between the price charged by respondent to its preferred and non-preferred customers for the same grade and quality of fresh fish; hence no violation of § 2(c) was established. In the opinion of the Commission sustaining the order issued by the Examiner dismissing the complaint, at page 97, it is pointed out, among other things, "Because so many factors normally influence the prices of this perishable commodity, its merchandising differs considerably from the sale of stable commodities." The complaint was dismissed on the

basis that the facts in the record showed no direct evidence of unlawful payment of brokerage by respondent, and did not warrant an inference thereof. In the case at bar, however, we are dealing with "stable" commodities which are placed by the suppliers in cans or other containers bearing the NROG private labels. The evidence here shows long-standing contracts or understandings between such suppliers and the respondents for the granting of substantial discounts and allowances designated by various names during the very times when the said suppliers were charging regular brokerage to other customers, and also to respondent members, for goods of like quality and character. In many of these instances respondents were the only customers of the seller who received any such discounts or allowances whatsoever, and it was established, in each and every instance presented in evidence, that there was a fixed, continuous, long-term program of favoritism by the suppliers to the respondents as against other buyers.

Respondents presented evidence from their records which reflected that all of the business done with CROG for the fiscal year ending May 31, 1957, by the eleven suppliers whose evidence was presented herein amounted to but 0.073% of CROG's total business done that year with all of its 300 to 400 suppliers. Upon these facts it is contended, in substance, that the evidence of the Commission, at best, only establishes a *de minimis* amount of alleged brokerage received by respondents. Since the evidence shows that the total purchases of CROG for the fiscal year ended May 31, 1955, were $17,500,000; for the fiscal year ended May 31, 1957, $24,491,427.59; and for the fiscal year ended May 31, 1959, approximately $36,000,000, any brokerage premised upon even 1% of such purchases would be substantial in any of those years. The evidence shows, however, that the brokerage varied from 1% up to even 7% and 8% in some instances, usually being about 5%. While it is impossible to determine precisely, from the evidence, just how much of the total volume of respondents' business was obtained on the basis of any particular amount of price reduction in lieu of brokerage, any percentage of any of these many millions of dollars is exceedingly substantial, and can hardly be called "*de minimus*". Moreover, § 2(c) does not concern itself with *de minimis*, nor require that the Commission establish that the amount of preference to respondents is exactly equal in every instance. Under the law the granting and receipt of such allowances in any amount is positively prohibited. Furthermore, if even one transaction had been established wherein such favoritism appeared, that would be sufficient to warrant a cease-and-desist order, since in the most recent case, the

Broch case, *supra*, the Supreme Court said the Act was violated and an order warranted when only one $814.73 brokerage transaction was involved (363 U.S. at page 168). There is no such defense as *de minimis* in this type of case.

Respondents contend further that the brokerage allowed the suppliers' brokers for such products, in many dealings shown by the evidence, does not precisely equal the discounts or allowances received by CROG on behalf of its members. This is immaterial. While in several of the cited decisions the brokerage incidentally happened to be exactly equivalent to the discounts allowed a mass buyer, there is no precedent which holds that the establishment of a § 2(c) violation depends upon such equality. To the contrary, mathematical commensuration of price reductions to a favored buyer with brokerage included in price to non-favored buyers is unnecessary. *Thomasville Chair Company*, Docket No. 7273; Commission's opinion, March 15, 1961.

Respondent members contend that whatever discounts and allowances CROG received from the sellers were intermingled with the funds obtained by it from its resale to buyers of its private-label products at marked-up prices, and that when the annual patronage dividends were paid to the members, only a small portion of such dividends was attributable to such discounts and allowances; and that since such payments were so intermingled with CROG's other earnings, the members, upon receiving the dividends, did not know what portion thereof derived from such discounts and allowances, and that, in essence, such amounts were *de minimis* anyway. It is immaterial whether the said discounts and allowances received by CROG from the suppliers could have been passed on immediately to its members, or retained and used in the operation of CROG's business with other currently available funds. Since the members own and control CROG, and it is therefore their *alter ego*, they could "elect to receive the greater part of the brokerage in a form other than cash; but they receive it nevertheless" (*Quality Bakers of America, et al.* v. *F.T.C.*, *supra*, 114 F. 2d at page 398). This contention is without merit.

Respondent NROG presents an additional and separate argument in its own defense. It contends that it has not been engaged in commerce for many years, since it has not handled merchandise for its members since 1948. From 1938 to 1948, however, it did buy merchandise for its members, and did receive substantial sums as promotional allowances and the like from numerous suppliers. Thereafter its services to CROG and the two other regional corporations and their respective members, except for its insurance program, not here in-

volved, were limited to granting them the right to use NROG's "Shurfine" and other private labels. But these labels were the *sine qua non* of CROG's very existence. As said in *Modern Marketing Service, Inc., et al.* v. *F.T.C., supra*, 149 F. 2d at pages 977, 979, a case closely paralleling the one at bar, "Without the use of these brands Modern Marketing [the purchasing agent for numerous wholesalers] could not exist * * * [A]ll of Modern Marketing's income was the result directly or indirectly of the license agreement and its right to use the labels of Red and White. Without such use it could not have existed." In the present case, had NROG refused to permit CROG to use the NROG labels, there would have been no reason to organize CROG in the first place. All through the years after 1948, when NROG ceased buying merchandise for its members, it has permitted CROG to occupy substantially its old position in the Midwest and South through the exclusive use of NROG's private labels. Whether NROG received any money for the use of its labels is immaterial. Its members, who were also members of CROG, certainly received the substantial benefits derived from the use of the labels.

In 1959, more than a year after the complaint herein was issued and after hearings had begun, NROG assigned all of its interest in the labels and trademarks used by its members to a new corporation, called "Shurfine Foods, Inc.". NROG's Board of Directors organized this new corporation, which is owned in equal shares by the three regional corporations, Pacific Mercantile Company, Eastern Division National Retailer-Owned Grocers, and CROG. The president of this new corporation, "Shurfine Foods, Inc.", is also the president of Spartan Stores, Inc., of Grand Rapids, Michigan, a respondent herein, which concern is a member of respondents NROG and CROG. There may have been good internal corporate reasons, as indicated by counsel for the respondents, for the organization of this new corporate device, but irrespective thereof, the material fact remains that NROG, after supplying CROG, so to speak, with the munitions of war, cannot now unilaterally withdraw itself from the conflict by disclaiming any responsibility for the unlawful acts of CROG and its respondent members. NROG has made no separate treaty of peace with the Federal Trade Commission by way of an agreement consenting to the issuance of a cease-and-desist order, but, in effect, merely nonchalantly now declares that it has no further interest in the illegal activities which it has so generated and kept alive. It is well established that a cease-and-desist order issued by the Commission should be sufficiently comprehensive to cover all possible future violations by any or all respondents, related or similar to those proved. To permit

NROG to absolve itself thus casually of any violations of law for which the evidence shows it is basically responsible, by attributing such acts to others, would be to nullify the whole intent and purpose of the statute.

Respondent CROG and its respondent members have been and now are engaged in commerce, as "commerce" is defined in the Clayton Act, in that they have caused grocery products to be purchased and shipped in substantial quantities from various sellers located in many states, across state lines to the buyers thereof, the respondent members. Payments therefor have been transmitted in commerce by CROG to such various sellers. Respondent NROG likewise has been engaged in commerce as defined in the Clayton Act, in that it has heretofore engaged in like puurchasing and shipping of grocery products across state lines to its respondent and other members. Furthermore, respondent NROG has furnished its private labels to respondent CROG and its respondent members for all of the controlled-brand grocery products that have been purchased and shipped in commerce by CROG to its respondent members as aforesaid. Respondents are now, and have been for many years, maintaining a constant current and course of trade in commerce in such products, and all respondents are equally responsible therefor.

The hearing examiner, after mature consideration of the whole record, makes the following conclusions of law:

1. The Federal Trade Commission has jurisdiction over the acts and practices of the respondents as herein found;

2. The said acts and practices of respondents are violative of §2(c) of the Clayton Act as amended by the Robinson-Patman Act (U.S.C. Title 15, §13).

Upon the foregoing findings and conclusions, the following order is issued.

It is ordered, That the respondents, National Retailer-Owned Grocers, Inc., Central Retailer-Owned Grocers, Inc., A. G. Tick Tock Stores, Inc., Allied Grocers of Indiana, Inc., Associated Grocers Co., Inc., Associated Grocers, Inc., (Wis.), Associated Grocers, Inc., (Mo.), Associated Grocers, Inc., (Kans.), Associated Grocers of Alabama, Inc., Associated Grocers of Colorado, Inc., Associated Grocers Coop., Inc., Associated Grocers of East Michigan, Inc., Associated Grocers of Oklahoma, Inc., Associated Grocers of Port Arthur, Inc., Associated Grocers Wholesale Co., Associated Wholesale Grocers Co., Inc., Associated Wholesale Grocers of Dallas, Inc., Bibb Grocery Co., Inc., Central Grocers Coop., Inc., Dixie Saving Stores, Inc., Grand Rapids Wholesale Grocery Co., Grocers Wholesale Coop.,

Inc., Kansas Service Grocers, Inc., Lake Erie Coop. Grocers Company, Miami Retail Grocers, Inc., Muskegon Wholesale Company, Coop., Panhandle Associated Grocers, Inc., Progressive Associated Grocers, Inc., Redman Bros. of Lansing, Inc., South Plain Associated Grocers, Inc., The Sylvester Company, The Tusco Grocers, Inc., United A-G Stores Coop., Inc., United Grocers Coop. Assn., Weona Food Stores, Inc., White Villa Grocers, Inc., and Central Florida Cooperative, Inc., all corporations, their officers, directors, representatives, agents and employees, directly or through any corporate or other device, in connection with the purchase of food and grocery products and related products, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage or other compensation, or any allowance or discount in lieu thereof, upon any purchase made by respondents National Retailer-Owned Grocers, Inc., or Central Retailer-Owned Grocers, Inc., for their own account or for resale to their stockholder members, or upon any purchase made by any of said members for any purpose.

OPINION OF THE COMMISSION

By Dixon, *Commissioner:*

The complaint herein charges respondents with violation of Section 2(c) of the Clayton Act. The hearing examiner in his initial decision held the allegations of the complaint supported by the evidence and the matter is now before the Commission on appeal of respondents [1] from that decision.

Specifically in issue in this proceeding are sums of money received by respondent Central Retailer-Owned Grocers, Inc., hereinafter referred to as CROG, from suppliers of private label merchandise in the form of lower prices, discounts or promotional allowances.

The complaint alleges that CROG, a cooperative purchasing organization, received such sums as brokerage or discounts and allowances in lieu thereof and that such allowances have been used by CROG to defray its operating expenses, the excess being distributed as patronage dividends to the 35 retailer-owned warehousing distributing units [2] who hold the stock of CROG and are also named

[1] One of the respondents herein, Associated Grocers of East Michigan, Inc., which, according to counsel for other respondents, is defunct and has never made an appearance in this proceeding, has not joined in the appeal. The hearing examiner held this respondent in default for want of specific evidence on this point, and we see no reason at this time to disturb his ruling.

[2] Hereinafter referred to as respondent members.

as respondents in this proceeding. In addition, the complaint charges that respondent National Retailer-Owned Grocers, Inc., hereinafter referred to as NROG, has been directly and indirectly engaged in the receipt of brokerage or allowances in lieu thereof through the operation of CROG and its member warehouses. In this connection, the complaint cites NROG's ownership of the labels used by CROG and its respondent members, NROG's participation in the organization of CROG, and its affiliation with the latter's members.

The threshold question among other issues presented by respondents in their appeal is their contention that the reductions from general list prices, discounts and allowances, shown by the record as having been granted to CROG, were not intended to and did not constitute commissions, brokerage or other compensation or allowances or discounts in lieu thereof, but were granted because of cost differences other than savings of commissions and brokerage.

In this connection, respondents strongly urge that the record lacks evidentiary support for a finding that either respondents or their suppliers intended the price reductions, allowances or discounts granted CROG to constitute brokerage or amounts in lieu thereof. Respondents apparently rely on the fact that the record discloses no express characterization of these sums as brokerage or as sums in lieu thereof by the parties to the transactions, as well as their denials and those of their suppliers that brokerage was involved.

The fact that neither suppliers nor respondents have expressly defined these amounts granted to CROG by certain of its suppliers as brokerage or amounts in lieu thereof does not preclude a finding that receipt of such amounts was violative of Section 2(c) of the Clayton Act. The fact that the parties to the sale do not openly employ the terminology of brokers' dealings does not preclude the inference that payments have been made in lieu of brokerage. *Main Fish Company, Inc.*, 53 F.T.C., 88, 97 (1956). The nature of such payments must be determined from all circumstances surrounding the transactions in issue. *In re Whitney & Company*, 273 F. 2d 211 (9th Cir. 1959). Crucial in this inquiry, therefore, is the nature of the interrelationship between CROG and its members, and the functions performed by these respondents in the purchase of private label goods.

Fundamental to respondents' argument is their assertion that CROG has not acted as intermediary, agent, or broker for its members because the respondent members purchase private label merchandise directly from CROG, and in no case through CROG from any other seller. Respondents apparently rely heavily on the fact that

at one point in these transactions CROG takes theoretical title to the goods, since it transmits its members' orders to the suppliers, who make direct shipments to the members involved but bill and receive payments direct from CROG, while the latter bills and receives payments at various markups from its members for the goods purchased. Other salient facts surrounding the transactions, however, make it abundantly clear that CROG is acting in the capacity of a controlled intermediary of its members in the purchase of private label merchandise.

The unrealistic nature of the compartmentalized approach to CROG's purchases of private label goods of which respondents here seek to persuade us is highlighted by the testimony of respondents' own witness, CROG buyer William Stolte, who, several times in describing his negotiations with suppliers, stated on the record that:

* * * primarily we buy and sell to ourselves * * *.

Of particular importance in determining whether CROG'S purchases are, in fact, made independently of its members are its Articles of Incorporation, which state in pertinent part:

* * * the purpose of this corporation shall be:— to provide a purchasing organization for the member retail grocers and to effect such savings by bulk purchasing and distribute such savings to the member retail grocers, on a patronage percentage basis of purchases.

The Articles of Incorporation make it abundantly clear that CROG, in making purchases, far from acting independently, is making such purchases in order to secure savings for its members. Obviously, the sole reason for CROG'S operation in the light of the stated purpose of the Articles of Incorporation is to act as the agent or intermediary of its members in purchasing operations.

The record further discloses that CROG resells goods to no one except its members; its negotiations with suppliers are based on advance estimates furnished by its members, and since it does not warehouse the merchandise,[5] it can, as a practical matter, make no purchases from suppliers except pursuant to the order of its members. CROG's negotiations in purchases of private label goods clearly are geared solely to the needs of its members and to hold, under these circumstances, as respondents argue, that CROG's purchases of private label goods were made in an independent capacity and not as an intermediary under the control of its members would confuse form with substance.

Respondents concede that the member respondents own all the stock of CROG and hence control CROG in the formal sense, since they vote

[5] Such warehousing as has been performed by CROG has been insignificant and is not relevant to the issues under consideration.

at shareholders' meetings and elect the Board of Directors. Notwithstanding this admission, respondents assert that the direct or indirect control of intermediaries receiving or accepting a commission or brokerage or discounts or allowances in lieu thereof envisaged by Section 2(c) must be restricted to actual control of the purchasing operations in connection with which the brokerage or sums in lieu thereof are granted, claiming that this element is lacking in the instant case. Although contact with the suppliers herein may have been delegated to CROG's staff, the Board of Directors, and therefore ultimately the members who elected them, are empowered by the by-laws to exercise all the powers of the corporation, and, therefore, must be charged also with the ultimate responsibility for CROG's purchasing operation irrespective of whether or not they are involved in these transactions in detail. In this connection, it may be noted that the only Director who is not a Warehouse Manager of one of CROG's respondent members is Harold Garbers, CROG's General Manager.

Furthermore, respondents' witness, Mike Robinowitz, Manager of respondent Associated Grocers of Oklahoma, Inc., stated that the member stockholders' concern at annual meetings was to see that CROG was operated profitably and to get the reports on its operations. In this connection he stated significantly, ". . . the larger the patronage, the better we like it. . . ." Although respondent members may not be directly involved in negotiations with suppliers or even conversant with the detail of such transactions or the identity of the supplier involved, in view of their concern with the profitable operation of CROG and their desire for large patronage dividends at the end of the year, they cannot escape responsibility for the manner of CROG's operation. The respondent members as stockholders cannot abdicate such responsibility nor can the responsibility be delegated away by the Directors elected by them.

The foregoing facts further make inescapable the conclusion that CROG is a controlled intermediary of its members for the purpose of purchasing private label merchandise and has dealt with suppliers in that capacity.

Pertinent at this point in our discussion is the definition of the broker's function in the report of the House Judiciary Committee, accompanying the enactment of the Robinson-Patman Act, stating:

> . . . The true broker serves either as representative of the seller to find him market outlets, or as representative of the buyer to find him sources of supply. . . .[4]

[4] H.R. Rep. 2287, 74th Cong., 2nd Sess. 1936.

CROG, therefore, when securing sources of private label goods for its members, clearly acts in the capacity of a buyer's broker.

The fact that CROG in its representative capacity has by implication demanded sums in lieu of brokerage in the form of price reductions is documented by the testimony of respondents' witness, CROG buyer William Stolte, describing his approach to certain CROG suppliers in purchasing negotiations. This witness testified the suppliers were informed that because of the unique way in which CROG did business, savings would accrue to them and that these should be reflected in the purchase price. The witness stated that it was pointed out to such suppliers that CROG obtained requirements for all members in advance, that the label and credit risks were controlled, an assured volume of business offered, and that they need look for payment to only one office. In effect, by demanding price concessions on this basis, CROG required compensation for the tasks it performed in purchasing private label goods on behalf of its members. The reasonable inference to be drawn from the circumstances surrounding these transactions is that this constituted simply a demand for sums in lieu of brokerage irrespective of the terminology used by CROG and its suppliers in connection with these purchases.

An analysis of the reasons given by certain suppliers for savings claimed in dealing with CROG in justification of resultant lower prices also makes it clear that in reality such suppliers were paying for services rendered by this respondent in its intermediary capacity in behalf of its members. For example, Robert Gordon of W. O. Sommers, Inc., testified that in determining CROG's prices he took into consideration the fact that CROG gave a yearly contract and that it promoted his product by putting on specials, but in this connection, it must be noted that the merchandise in question promoted by CROG was under private label, and, therefore, this service was performed primarily on respondents' own behalf. Another witness, Kenneth Chalmers of the Olds Products Company, stated he felt savings to his company stemmed from the fact that he did not have to deal with accounts directly and that his company did not have to undertake the work of soliciting, selling and taking of orders with CROG necessary in the case of other customers. In their appeal, respondents argue that the lower prices, allowances and discounts were not granted for services but for savings arising out of CROG's unique way of doing business, but it is clear from our review of the foregoing circumstances surrounding these transactions that, in fact, the unique or distinguishing characteristic, if any, of the respondent buying coopera-

tive's business methods arose solely from services performed in securing sources of private label merchandise for its members.

CROG's receipt of lower prices, allowances, or discounts for services performed in its intermediary capacity are clearly in contravention of Section 2(c) of the Clayton Act, as amended, since the Act prohibits payments for services rendered by a broker who is related to the opposite party in any of the ways designated in the statute. *Modern Marketing Service, Inc., et al.* v. *Federal Trade Commission*, 149 F. 2d 970 (7th Cir. 1945).

Furthermore, the fact that CROG selected the private label suppliers for particular items of merchandise supports a finding that this in and of itself constituted an inducement to its members to buy the goods of certain suppliers rather than those of their competitors.

The activities of a cooperative when acting as an intermediary of its members in inducing the members to handle a supplier's products are, of course, equivalent to the functions of brokers and compensation for such service is in lieu of brokerage. Where such intermediary acts in behalf of the buyers, it is unlawful, under Section 2(c) of the Clayton Act, for it to receive compensation in lieu of brokerage. A controlled intermediary of the buyer, although a cooperative, is no more entitled to receive compensation for activities of this nature than a chain store would be entitled to receive compensation from the seller in requiring individual stores in the chain to stock a particular line of merchandise. See *Carpel Frosted Foods, Inc., et al.*, 48 F.T.C. 581, 602 (1951).

The fact that savings may have been realized by suppliers from services rendered by CROG to its members which, in respondents' terminology are described as the buying cooperative's unique way of doing business, is immaterial. Since we have found that the sums received by CROG for such services were in lieu of brokerage, the attempt to segregate such cost savings and ascribe them to CROG's business methods in order to rebut an inference that these sums constituted savings in brokerage is irrelevant.[5] Furthermore, in view of the fact that CROG performs brokerage functions in behalf of its members, and the fact that its suppliers, according to the record, use brokers in varying degrees, the allegation of the complaint that CROG, by virtue of its operations, has replaced independent brokers is sustained, although this is not prerequisite to violation of the statute.

In light of the above record facts, it is unnecessary to document a pattern whereunder the lower prices, allowances and discounts granted

[5] At any rate, the evidence with respect to cost savings on which respondents apparently rely is not endowed with sufficient precision to serve as a foundation for any finding.

CROG may be correlated mathematically with the brokerage rates of CROG's suppliers in order to infer the payment of brokerage or amounts in lieu thereof to that respondent. The inferences to be drawn from the interrelationship of CROG and its members and the manner of their transactions with CROG's suppliers are conclusive on this point. Further, we have previously ruled that a finding that the price differential be arithmetically commensurate with the amount of brokerage is not prerequisite to such an inference. *Thomasville Chair Company*, Docket No. 7273 (1961). However, the facts of record showing a correlation between price differences favoring CROG and a supplier's usual rate of brokerage with respect to certain of respondents' suppliers give additional support to our finding that CROG's receipts of lower prices under varying forms, in fact, constituted the receipt of payments in lieu of brokerage.

These facts are particularly persuasive in the case of the Tharinger Macaroni Company, which has brokers in areas where CROG members are located and whose usual brokerage rates are 3 and 5 per cent on bulk and package goods, respectively. The record shows that in the case of this supplier these brokerage rates very closely approximate the price differences favoring CROG and its members as opposed to Tharinger's customers generally.

In the same connection, the pattern evidenced by Plochman & Harrison's sales to CROG in the Grand Rapids, Michigan, area, as contrasted to this supplier's dealings with its broker and other customers, is also noteworthy. This supplier granted CROG a 3 per cent "promotional allowance" on purchases while Plochman & Harrison's broker in the Grand Rapids, Michigan, area received 2 per cent brokerage on the shipments to the respondent member in that location; on sales to customers other than the CROG member in that area, this broker received commissions of 5 per cent. Even though the record discloses that Plochman & Harrison had been granting CROG a 3 per cent promotional allowance some time prior to taking on the broker in question, the mathematics inherent in this situation compel the conclusion that, in fact, this supplier was passing on to CROG a saving in brokerage.

In the case of certain of the suppliers involved in this proceeding—specifically M. Steffen, Inc., Baker Food Company, and Plochman & Harrison—respondents argue that the allowances granted CROG may not be construed as sums in lieu of brokerage because they were granted to all private label buyers. This contention is supported only by the statement, largely hearsay, of respondents' witness William Stolte, a buyer of respondent CROG, and is not supported by the supplier witnesses. Such statements are insufficient to rebut the inferences reason-

ably to be drawn from the circumstances surrounding the transactions, namely, that CROG, as the controlled intermediary of its members, performed brokerage functions for which it was given sums in lieu of brokerage. The self-serving nature of Stolte's statements in this regard is emphasized by the contradictory statement of Carl M. Plochman, partner in the firm of Plochman & Harrison, stating that he did not recall arrangements similar to the 3 per cent allowance granted to CROG in the case of other customers.

Respondents also deny that the record contains evidence indicating that any of the allowances and discounts granted to CROG are, in turn, transmitted to its members in the form of patronage dividends or otherwise. Respondents' argument is without merit. As respondents concede in their brief, CROG's by-laws require that patronage dividends, viz., the balance remaining after the expenses and costs of operation, are to be paid to members of the cooperative on the basis of their participation in making purchases from CROG. These facts in and of themselves are sufficient to support a finding that such payments constituted a passing on of the sums received in lieu of brokerage by CROG. It is not prerequisite to a Section 2(c) violation that sums in lieu of brokerage be passed on directly by the intermediary. For example, brokerage may be received in forms other than cash, such as credits for membership dues as well as payments of dividends on stock and operating expenses. *Quality Bakers of America, et al.* v. *Federal Trade Commission*, 114 F. 2d 393 (1st Cir. 1940). Brokerage may be passed on in the form of services, including advertising allowances and stock dividends. *Independent Grocers Alliance Distributing Co.* v. *Federal Trade Commission*, 203 F. 2d 941 (7th Cir. 1953). As held by the Seventh Circuit, the fact that payments are not direct but more subtle in form does not preclude a finding that brokerage or sums in lieu thereof have been passed on. See *Modern Marketing, Inc., et al.* v. *Federal Trade Commission, supra*, where the Court ruled that passing on a part of brokerage receipts as advertising allowances for point-of-sale advertising satisfied the criteria of Section 2(c).

With respect to this issue, it is significant that in the case of certain suppliers, including W. O. Sommers, Inc., payments received under promotional contracts have been allocated for operating costs and "patronage dividends" to CROG's members according to the financial statements of the respondent buying cooperative.

Respondent NROG argues separately in its own behalf that in any case the initial decision and order are inappropriate as far as it is concerned, since the record does not substantiate the finding that it received brokerage or amounts in lieu thereof from CROG and its sup-

pliers. In effect, the hearing examiner held on this point that the use of NROG's labels were prerequisite to CROG's business practices, if not its very existence, and, further, that NROG's members, who are also members of CROG, received substantial benefits as a result of CROG's use of the labels or brand names.

These facts, in and of themselves, are insufficient, however, to support an inference that brokerage has been passed on to NROG, and we are compelled to disagree with the hearing examiner on this question, for the record is devoid of evidence that NROG received brokerage directly or indirectly on private label purchases by CROG on behalf of its members. Since 1950, according to the evidence, the only compensation inuring to NROG for the use of its labels or brands by the regional corporations,[6] including CROG, has been a charge of one-tenth of 1 percent of the cost of such labels, the receipts to be funneled into a reserve fund until a total of $10,000 had been accumulated, the fund then to be maintained at this level.

Although NROG in the period 1934–1939 did accept brokerage for its members, and, subsequently, in the period 1939 to 1948, purchased merchandise in its own name for its members, possibly in much the manner of CROG, such evidence at this late date is insufficient to justify an order against this particular respondent.

Furthermore, as the hearing examiner found, since 1959, more than a year after the issuance of the complaint, NROG assigned all of its interest and control over labels to a new corporation called "Shurfine Foods, Inc.", owned by the three regional corporations, Eastern Division, NROG, Pacific Mercantile Co., and CROG. Since that time NROG apparently has had no interest in or functions to perform in connection with the private labels formerly controlled by it. The hearing examiner held, in effect, and correctly so, that these circumstances do not support a defense of abandonment. However, it is our view that the question of abandonment does not arise since, on the basis of this record, we are unable to find that NROG has received brokerage on private label purchases negotiated by CROG for its members.

We have already determined, as heretofore stated, that the receipt by CROG and its respondent members of brokerage, or amounts in lieu thereof, contravenes Section 2(c) of the Clayton Act, as amended. The recurrence of such violations can be adequately prevented by a proper cease and desist order covering the activities of CROG and its members. Under these circumstances, absent the showing that

[6] Eastern Division NROG, Pacific Mercantile Co., and CROG; only CROG is involved in this proceeding.

NROG has received brokerage or amounts in lieu thereof on private label purchases by CROG, to place that respondent under order merely because its membership is composed in part of CROG's membership would be an exercise in formalism not in the public interest.

Respondents also argue that in any case the order entered by the hearing examiner is too broad in scope as far as the respondent members of Central Retailer-Owned Grocers, Inc., are concerned. In this connection, respondents object strenuously to the inclusion in the order of the phrase "upon any purchase made by any of said members for any purpose".

This phraseology would put within the prohibitions of the order purchases by the respondent members made individually and without the intervention of Central Retailer-Owned Grocers, Inc., or other controlled intermediary, agent, or representative acting in the capacity of buyer's broker. An order of such breadth is not required by the circumstances of this case; the complaint does not allege and the record contains no evidence indicating that respondents have received or are likely to receive in the future sums in lieu of brokerage on purchases made by them individually without the intervention of an agent, representative, or some other controlled intermediary performing the functions of a buyer's broker.

We hold, therefore, that an order with prohibitions limited to situations where Central Retailer-Owned Grocers, Inc., or some other intermediary performs the functions of a buyer's broker will be sufficient to proscribe the violation of law we have found here as well as such other related activities which may be in contravention of Section 2(c). For clarity's sake, the order accompanying this opinion will be limited to that situation.

The appeal of respondents is denied with certain exceptions noted in this opinion. To the extent that the findings of the hearing examiner are deficient and not in conformity with our opinion, the initial decision is modified to include the factual findings with reasons and basis therefor embodied in this opinion. Where the record evidences changes in the corporate name of certain of the respondent members since the issuance of complaint, the correct name will be utilized in the order accompanying this opinion.

Commissioner Elman dissented to the decision herein.

DISSENTING OPINION

By ELMAN, *Commissioner:*

It seems to me that the Commission's decision stretches Section 2(c) of the Robinson-Patman Act far beyond the limits of its language

and manifest purpose, to a point where it now threatens to swallow up much of the territory covered by the more general statutory provisions which it was intended to supplement. At the same time, ironically, the Commission has issued what may well be the death warrant of a business practice designed to enable the independent grocer to compete in some degree with the large chain stores—the very objective of the Robinson-Patman Act itself.

Section 2(c) of the Robinson-Patman Act makes it unlawful for "any person . . . to pay or grant . . . anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods . . . either to the other party to such transaction or to an . . . intermediary therein . . . ." The legislative history of this section has been the subject of too much recent exploration to require extensive restatement here (see, *e.g.*, Edwards, *The Price Discrimination Law* (1959), pp. 46–48, and Rowe, *Price Discrimination Under the Robinson-Patman Act* (1962), pp. 332–337). Its purpose and relation to the scheme of the Robinson-Patman Act were summarized by the Supreme Court in *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 168–169 (1960). The Court there said:

> The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power. A lengthy investigation revealed that large chain buyers were obtaining competitive advantages in several ways other than direct price concessions and were thus avoiding the impact of the Clayton Act. One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. But it was not the only means by which the brokerage function was abused and Congress in its wisdom phrased § 2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination.

The purpose of the "in lieu thereof" provision was also explained by the Court:

> In the Final Report on the Chain-Store Investigation . . . Congress had before it examples not only of large buyers demanding the payment of brokerage to their agents but also instances where buyers demanded discounts, allowances, or outright price reductions based on the theory that fewer brokerage services were needed in sales to these particular buyers, or that no brokerage services were necessary at all. . . . These transactions were described in the report as the giving of "allowances in lieu of brokerage . . ." or "discount[s] in lieu of brokerage."

In prohibiting indirect price concessions through "dummy" brokers, or payments in lieu of brokerage, Congress deliberately precluded the defenses available under the other sections of the statute. It considered the false brokerage device a means of evasion which—because of its covert nature as a camouflaged or disguised price concession—should be unconditionally prohibited; Congress thus sought to bring price discriminations, where they exist, into the open. As the court put it in *Biddle Purchasing Co.* v. *Federal Trade Commission*, 96 F. 2d 687, 692 (2d Cir., 1938):

> If a price discount is given as a brokerage payment to a controlled intermediary, it may be and often is concealed from other customers of the seller. One of the main objectives of section 2(c) was to force price discriminations out into the open where they would be subject to the scrutiny of those interested, particularly competing buyers.[1]

In the light of these statutory purposes, it would appear that the price concessions received by CROG were in violation of Section 2(c) if shown by the evidence to come within either of two categories:

1. If the price concessions were made as "brokerage" payments by the sellers to CROG; [2] or

2. If the price concessions were based on savings made by the sellers because they did not sell to CROG through their regular brokers, and thus were "in lieu of" brokerage.

Although the basis for the Commission's decision is not altogether clear, its principal reliance appears to be upon what is in effect an inversion of the first category. For, instead of finding that CROG has accepted price concessions disguised as brokerage payments, the

---

[1] Citing this case, the Supreme Court in discussing another Robinson-Patman Act subsection stated:
"Congress could very well have felt that sellers would be forced to confine their discriminatory practices to price differentials, where they could be more readily detected and where it would be much easier to make accurate comparisons with any alleged cost savings." *Federal Trade Commission* v. *Simplicity Pattern Co.*, 360 U.S. 55, 68 (1959).

[2] The principal "buying group" cases under Section 2(c) have involved admitted payments of "brokerage" to the buying organizations. For example, in *Independent Grocers Alliance Distributing Co.* v. *Federal Trade Commission*, 203 F. 2d 941 (7th Cir. 1953); *Modern Marketing Service, Inc.* v. *Federal Trade Commission*, 149 F. 2d 970 (7th Cir. 1945); and *Quality Bakers of America* v. *Federal Trade Commission*, 114 F. 2d 393 (1st Cir. 1940), the issue was not whether the sellers' payments were made as "brokerage" but whether the intermediaries to whom they were made were controlled by the buyers and whether the payments were justified by services actually rendered the sellers. (Although the courts held the "except for services rendered" clause inapplicable, some doubt may have been cast upon the validity of this interpretation by the *Broch* case, *supra*. See Rowe, *supra*, p. 355.)

It is interesting to note that, after the court's decision in the *Quality Bakers* case, the respondent sold its assets to a cooperative which apparently now operates in essentially the same manner as CROG, receiving price concessions described as quantity discounts from some suppliers and passing them on to its members as patronage dividends. See Edwards, *supra*, p. 120.

Commission finds that it has received what are in substance brokerage payments under the masquerade of price concessions.

The Commission seems to reason as follows: The function of a buyer's broker is "to find him sources of supply." CROG, when securing sources of supply for its members, "acts in the capacity of a buyer's broker." Ergo, price concessions granted CROG on goods which it purchases for its members are illegal payments "in lieu of brokerage." [3]

But the conclusion thus reached is in accord neither with the facts of this case nor with the legislative purpose of the statute. It is clear that the price concessions received by CROG were not "brokerage" within the meaning of the statute. Although CROG may have performed for its members some of the functions which in other situations are performed by brokers, CROG is not a broker and there is no evidence that the price concessions which it received were ever described or understood as "brokerage" payments. On the contrary, they were openly admitted to be discounts or allowances from the sellers' regular prices. There is here no problem of "dummy brokerage" which must be forced into the open and exposed as price discriminations. As the court stated in *Robinson* v. *Stanley Home Products*, 272 F. 2d 601, 604 (1st Cir. 1959):

> The matter covered by section 2(c) is unearned brokerage, *per se*, not discrimination. * * * There is no necessity for calling something brokerage that is not. If, after ceasing to employ brokers, a manufacturer improperly discriminates between customers, section 2(a) will accomplish the purposes of the act.[4]

[3] The Commission also points to the fact that CROG's selection of the suppliers from whom it purchased its private label goods constituted an inducement for its members to buy the goods of these suppliers. Since inducing a buyer to purchase the goods of a particular supplier is "equivalent to the functions of brokers" the Commission reasons that "compensation for such service is in lieu of brokerage." But surely this proposition has no application to the present case. *Carpel Frosted Foods, Inc.*, et al., 48 F.T.C. 581 (1951), upon which the Commission relies, involves the entirely different situation of a buyers' cooperative which, the Commission found, accepted payments from a supplier for inducing its members to purchase that supplier's products. No suggestion of such an unethical, as well as illegal, practice on the part of CROG is suggested by the present record. CROG's only inducement to its members to buy the goods of its suppliers was the simple fact that these were the only goods which CROG had for sale. CROG could hardly change this state of affairs, and the Commission can hardly find a violation of Section 2(c) by such bootstrap reasoning.

[4] The House Small Business Committee has explained:

"* * * [The purpose of attaching per se illegality to the section 2(c), (d), and (e) prohibitions was precisely to force unearned commissions out in the open. False brokerage qua brokerage is absolutely forbidden. False brokerage qua 'a naked quotation in price' does not fall into the 'masquerade' category; rather it falls into the trap deliberately set for it by the law. Discriminatory concessions which cannot disguise themselves as brokerage or 'allowances' are thus forced to show their true character, and to be measured by the sections of the law dealing with discrimination." H.R. Rept. No. 2966, 84th Cong., 2d Sess., pp. 97–98 (1956).

Nor, so far as the record shows, are the price concessions "discounts or allowances in lieu of brokerage" within the meaning attributed to this phrase by the Supreme Court in *Broch* (*supra*), for they are not shown to be direct price reductions "based on the theory that fewer brokerage services were needed in sales to these particular buyers, or that no brokerage services were necessary at all."

The examiner, although supporting his conclusion with little more specific than the assertion that it was to him "obvious," found that the price concessions received by CROG were "in lieu of brokerage," presumably on the grounds that they paralleled the sellers' usual payments to their regular brokers on sales to other customers, and could therefore be inferred to reflect the sellers' savings of brokerage on sales to CROG. The examiner pointed out that the "except for services rendered" proviso of Section 2(c) cannot be invoked to justify allowances reflecting such savings.[5] But CROG's contention was not that the price concessions received from its suppliers were in compensation for their savings in brokerage or for any "services rendered" but merely that they reflected the sellers' cost savings, brokerage aside, resulting from CROG's centralized buying—*i.e.*, from the various factors which may justify price discriminations under the provisions of Section 2(a), and which give the chain stores their buying advantages over competing independent wholesalers and retailers.[6]

In cases of this type the Commission must determine from the evidence, including the manifest intent of the parties and any inferences which may be drawn from the identity of the amounts received and the sellers' usual brokerage payments, whether the challenged payments were in fact made in lieu of brokerage.[7] Although the examiner concluded that CROG "has received from its numerous suppliers large sums by way of discounts and allowances, which are parallel to similar brokerage payments made by these same suppliers for similar services performed for them by their regular, legitimate

[5] *Great Atlantic & Pacific Tea Co.* v. *Federal Trade Commission*, 106 F. 2d 667 (3rd Cir. 1939), cert. denied, 308 U.S. 625.

[6] CROG's Articles of Incorporation, cited in both the initial decision and the Commission's opinion, state its purpose as being "to effect . . . savings by bulk purchasing."

[7] The Supreme Court in *Federal Trade Commission* v. *Henry Broch & Co.*, 363 U.S. 166, 175–176, stated:

"This is not to say that every reduction in price, coupled with a reduction in brokerage, automatically compels the conclusion that an allowance 'in lieu' of brokerage has been granted. As the Commission itself has made clear, whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case. Main Fish Co., Inc. 53 FTC 88."

It also there noted that:

"The buyer's intent might be relevant were he charged with receiving an allowance in violation of § 2(c)." (p. 174)

brokers * * *," he supported this conclusion by no particular findings, and, with the exception of the payments made by one or two sellers, it simply is not justified by the record.[8]

Thus far I have discussed only what seem to be the obvious defects of the Commission's opinion. There remains the question of how the price concessions received by CROG are realistically to be viewed. Counsel supporting the complaint and the examiner make much of the fact that neither CROG nor its suppliers ever mentioned the word "brokerage" although the suppliers obviously saved their usual brokerage expenses in selling directly to CROG. But surely the parties' failure to call these concessions "brokerage" is not evidence that they were brokerage. Why is it not consistent with the facts to assume that CROG was simply attempting to conduct its business in accordance with the requirements of Section 2(c) of the Robinson-Patman Act and that it therefore accepted price concessions from its suppliers only when they were not made in compensation for brokerage functions rendered to the sellers or for savings in sellers' brokerage?

This assumption—which, I submit, the Commission must accept in the absence of substantial evidence to the contrary—would not, of course, exempt CROG's price concessions from scrutiny under the more general provisions of the statute. Instead, they might be regarded as price discriminations which, if anticompetitive in their effect, and if a cost justification or good faith meeting of competition defense were not established, would be illegal under Section 2(a),[9] and their inducement by CROG illegal under Section 2(f) (or possibly Section 5 of the FTC Act). In the present case the price discriminations would undoubtedly be defended as being justified by the sellers' lower costs in selling to CROG. This possible justification, although concededly making the Commission's case—particularly under Section 2(f)—more difficult, has an important purpose which I believe is well illustrated by the situation here. For CROG is not merely another big buyer but is instead a cooperatively-owned

[8] Although the Commission's theory differs from that of the hearing examiner, it finds "additional support" in "the facts of record showing a correlation between price differences favoring CROG and a supplier's usual rate of brokerage with respect to certain of respondents' suppliers." But the Commission's only example of such correlation hardly provides the support which the Commission seeks. For although the supplier in question, in an area where its usual brokerage was 5%, granted CROG a 3% discount (described as a promotional allowance), and at the same time granted its broker unearned brokerage of 2% on sales to CROG, the Commission admits that the seller had been granting CROG the 3% allowance "some time prior to taking on the broker in question."

[9] Where the concessions were claimed to be promotional allowances they would, unless made to the sellers' other customers on proportionally equal terms, of course be in violation of Section 2(d).

enterprise through which its independent wholesaler members—who in turn supply independent retail grocers—seek to offset the buying power of the chains. The importance of such buying groups has been recognized by the Commission. Chairman Dixon has recently stated:

> [C]ombination in one form or another by small firms may be essential to their survival, particularly in those industries characterized by massive aggregates of corporate power. The growth of the giant food chains, for example, revolutionized the behavior of the small independent grocery stores. They were quickly faced with the alternative of constructing cooperative buying arrangements or extermination. Certainly many independent food stores long ago would have withered before the competitive threat of large chains had they not formed retailer-owned cooperative wholesalers; stores with combined retail sales of over $7 billion are now affiliated with such jointly-owned wholesalers.[10]

In contrast to this recognition of the value of cooperative buying groups in achieving the competitive strength which the Robinson-Patman Act was also intended to safeguard, the Commission's opinion would most certainly have the effect of driving these groups out of existence. For what it in effect holds is that any price concessions to a cooperative buying organization—which of necessity performs functions which a buyers' broker would perform—will be deemed in lieu of brokerage in *per se* violation of Section 2(c).[11]

To object to this interpretation does not imply that buying cooperatives or similar groups should be afforded special treatment under Section 2(c). But it is important that the various sections of the Robinson-Patman Act be interpreted and administered in harmonious relation to each other and to other antitrust acts, and not on the basis of which provision—if stretched to cover the practices in question—affords the easiest route to an order to cease and desist.

FINAL ORDER

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

The Commission, for the reasons stated in the accompanying opinion, having granted in part and denied in part the appeal of respond-

---

[10] Address before The Economic Club of Detroit, March 12, 1962.

[11] This result was at least frankly admitted by the hearing examiner who stated that he was

"unable to envison any type of buyer organization which could rightfully claim that by reason of its different or unique character, it can receive special discounts and allowances from any seller in complete immunity and exemption from the clear mandate of the statute."

ents and having modified the initial decision to the extent necessary to conform to the views expressed in the said opinion:

It is ordered, That the initial decision be modified by striking therefrom that portion beginning on page 1229 with the words "Respondent NROG presents an additional and separate argument" and ending on page 1231 with the words "intent and purpose of the statute."

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

It is ordered, That respondent Central Retailer-Owned Grocers, Inc., a corporation, its officers, directors, representatives, agents and employees, directly or through any corporate or other device in connection with the purchase of food, grocery and related products, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller anything of value as a commission, brokerage, or other compensation or any allowance or discount in lieu thereof upon any purchase for its own account or on behalf of its members when it is acting as agent, representative or controlled intermediary of its members.

It is further ordered, That respondents, A. G. Tick Tock Stores, Inc.; Allied Grocers of Indiana, Inc.; Associated Grocers Co., Inc.; Associated Grocers, Inc. (Wis.); Associated Grocers, Inc. (Mo.); Associated Grocers, Inc. (Kans.); Associated Grocers of Alabama, Inc.; Associated Grocers of Colorado, Inc.; Associated Grocers Coop., Inc.; Associated Grocers of East Michigan, Inc.; Associated Grocers of Oklahoma, Inc.; Associated Grocers of Port Arthur, Inc.; Associated Grocers Wholesale Co.; Associated Wholesale Grocers Co., Inc.; Associated Wholesale Grocers of Dallas, Inc.; Bibb Grocery Co., Inc.; Central Grocers Coop., Inc.; Dixie Saving Stores, Inc.; Spartan Stores, Inc. (formerly Grand Rapids Wholesale Grocery Co.); Grocers Wholesale Coop., Inc.; Kansas Service Grocers, Inc.; Spartan Grocers, Inc. (formerly Lake Erie Coop. Grocers Company); Miami Retail Grocers, Inc.; Muskegon Wholesale Company, Coop.; Panhandle Associated Grocers, Inc.; Progressive Associated Grocers, Inc.; Redman Bros. of Lansing, Inc.; South Plains Associated Grocers, Inc. (erroneously named in the complaint as South Plain Associated Grocers, Inc.); The Sylvester Company; The Tusco Grocers, Inc.; United A–G Stores Coop., Inc.; United Grocers Coop. Assn.; Weona Food Stores, Inc.; White Villa Grocers, Inc.; Certified Grocers of Florida, Inc. (formerly Central Florida Cooperative, Inc.), all corporations, and their officers, agents, representatives and employees, directly or through any corporate or other device, in connection with

the purchase of food, grocery and related products, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Receiving or accepting, directly or indirectly, from any seller anything of value as a commission, brokerage, or any allowance or discount in lieu thereof upon any purchase where they are represented by Central Retailer-Owned Grocers, Inc., or any other agent, representative, or intermediary controlled by them.

It is further ordered, That the complaint as to respondent National Retailer-Owned Grocers, Inc., be, and it hereby is, dismissed.

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

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 THE MATTER OF

R. H. MACY & CO., INC.

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

Docket 7869. Complaint, Apr. 19, 1960—Decision, May 15, 1962

Order requiring the world's largest department store, with principal place of business in New York City and operating through six divisions in six areas in the United States, to cease violating the Federal Trade Commission Act by soliciting or receiving donations from its vendors, such as requests it made to some 750 of its 20,000 suppliers to contribute $1,000 each toward the cost of the year-long 100th Anniversary celebration of Macy's New York, with the result that approximately 582 contributed $1,000 each to the cost of the celebration.

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 R. H. Macy & Co., Inc., hereinafter referred to as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act (U.S.C. Title 15,

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 stating its charges as follows:

PARAGRAPH 1. Respondent, R. H. Macy & Co., Inc., hereinafter sometimes referred to as Macy, is a corporation organized, existing and doing business under the laws of the State of New York, with its principal office and place of business located at 151 West 34th Street, New York, N.Y.

PAR. 2. Macy is now and for many years last past has been engaged in the operation of retail department stores. It operates through six department store divisions in six areas throughout the United States. These divisions are Macy's New York; Bamberger, New Jersey; Davison-Paxon Company, Georgia and South Carolina; La Salle & Koch Company, Ohio; Macy's California; and Macy's Missouri-Kansas.

Respondent sells directly to the consuming public through the above enumerated divisions thousands of products of the type normally and usually sold by the department store trade. Respondent's sales are substantial totaling more than $450,000,000 for the year 1958. Sales of its New York division for the year 1958 totaled approximately $225,000,000.

PAR. 3. In the course and conduct of its business, respondent is now and for many years has been engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent purchases its products from many suppliers located throughout the various States of the United States and causes such products to be transported from various States in the United States to other States for distribution and sale by respondent through its retail department stores.

PAR. 4. In the course and conduct of its business, as herein described, respondent has been for many years, and is now, in substantial competition in the sale and distribution of department store products, in commerce between and among the various States of the United States, with other corporations, persons, firms and partnerships.

PAR. 5. In the course and conduct of its business in commerce, respondent, in commemoration of its one-hundredth year in business, conducted during the year 1958 a year-long celebration. Since Macy started in New York City, the celebration took place only in Macy's New York division. The celebration consisted of a year-long series of special events, special advertising and special promotions, all of

an institutional nature and all designed to enhance Macy's position in the community.

In connection with this celebration and in anticipation of it, Macy's New York division, through its officers and employees, asked approximately 750 of its approximately 20,000 vendors to contribute $1,000 each towards the cost of this celebration. Approximately 582 vendors pledged to contribute $1,000 each. As of January 30, 1959, Macy had received from such vendors approximately $524,000. Contributions from vendors were continuing to be received throughout 1959.

PAR. 6. Purchases by Macy's New York division from the contributing vendors in the year 1958 varied from a low of $10,000 to a high of $300,000. Included among, but not limited to, and as examples of, the contributing suppliers to Macy, each of whom contributed $1,000, the products which they manufacture and sell, and their 1958 sales to Macy's New York division, are the following:

Supplier's name	Product	1958 sales to Macy's New York
College Hall Fashions, Inc	Men's Clothing	$162,000
General Textile Co	Ironing Board Pads and Covers	80,000
Phil Horowitz, Inc	Men's Trousers	284,913
David Kahn, Inc	"Wearever" Pens and Pencils	10,000
National Pants Co	Boys' and Men's Trousers	201,748
Queen Knitting Mills, Inc	Ladies' Sportswear	45,036
Record Corporation of America	Phonograph Records	15,841
Seal Sac, Inc	Plastic Closet and Kitchen Accessories	71,400
George Sherwin, Inc	Boys' and Men's Shirts	35,436
Thomases & Co	Brief Cases and School Bags	29,624
Varsity Pajamas, Inc	Men's Pajamas	62,789
Yardley of London, Inc	Cosmetics and Toiletries	28,798

PAR. 7. Respondent used the force of its purchasing power to induce contributions from its vendors who—because of their individual inequality of economic strength compared to respondent; the highly competitive nature of their business; their lack of ability to combat such practices; the fact that their economic existence is enhanced and improved by continuing to sell to Macy; and that supplying Macy enhances the prestige and selling ability of the supplier with other actual and potential customers—are relatively powerless to refuse to make such contributions. These circumstances are enhanced by the fact that Macy's New York store is one of the largest, if not the largest, department stores in the United States. Very few, if any, of these 750 vendors can afford to make contributions of this type to all or any substantial number of their other customers.

PAR. 8. The aforesaid acts and practices of respondent, a powerful buyer using the leverage of its purchasing power and position, asking for and receiving contributions, gifts or donations of whatever nature

from its vendors for the 100th Anniversary Celebration of Macy's New York, or for any other purpose, are all to the prejudice and injury of such vendors and their competitors, and to the competitors of respondent and the public, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of, and in violation of, Section 5 of the Federal Trade Commission Act.

Mr. Lars E. Janson, supporting the complaint.

Howrey, Simon, Baker & Murchison, of Washington, D.C., by *Mr. William Simon*, and *Mr. Marvin Fenster*, of New York, N.Y., for respondent.

INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

The Federal Trade Commission issued its complaint against the above-named respondent on April 19, 1960, charging it with soliciting contributions from certain of its vendors to finance an Anniversary Celebration, and further charging that the asking for and receiving of these contributions constituted unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act.

This proceeding is before the hearing examiner for final consideration upon the complaint, answer, testimony and other evidence, and proposed findings of fact and conclusions filed by counsel for respondent and by counsel supporting the complaint. Consideration has been given to the proposed findings of fact and conclusions submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings as to the facts, conclusion drawn therefrom and order:

FINDINGS AS TO THE FACTS

1. Respondent, R. H. Macy & Co., Inc., hereinafter sometimes referred to as Macy, is a corporation organized, existing and doing business under the laws of the State of New York, with its principal office and place of business located at 151 West 34th Street, New York, N.Y.

2. Macy is now and for many years last past has been engaged in the operation of retail department stores. It operates through six department store divisions in six areas throughout the United States. These divisions are Macy's New York; Bamberger, New Jersey; Davison-Paxon Company, Georgia and South Carolina; La Salle & Koch

Company, Ohio; Macy's California; and Macy's Missouri-Kansas.

3. Respondent sells directly to the consuming public through the above enumerated divisions thousands of products of the type normally and usually sold by the department store trade. Respondent's sales are substantial, totaling more than $450,000,000 for the year 1958. Sales of its New York division for the year 1958 totaled approximately $225,000,000.

4. In the course and conduct of its business, respondent is now, and for many years has been, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent purchases its products from many suppliers located throughout the various states of the United States and causes such products to be transported from various states in the United States to other states for distribution and sale by respondent through its retail department stores.

5. In the course and conduct of its business, as herein described, respondent has been for many years, and is now, in substantial competition in the sale and distribution of department store products, in commerce, between and among the various states of the United States, with other corporations, persons, firms and partnerships.

6. In the course and conduct of its business in commerce, Macy, in commemoration of its one-hundredth year in business, conducted during the year 1958 a year-long celebration. Since Macy started in New York City, the celebration took place only in Macy's New York division.

7. The celebration consisted of a year-long series of special events, special advertising and special promotions, all of an institutional nature and all designed to enhance Macy's position in the community.

8. In connection with this celebration and in anticipation of it, Macy's New York, through its officers and employees, asked approximately 750 of its approximately 20,000 vendors to contribute $1,000 each toward the cost of this celebration.

9. Approximately 582 vendors agreed to contribute $1,000 each.

10. As of January 30, 1959, Macy had received from such vendors approximately $524,000. Contributions from vendors were continuing to be received throughout 1959 so that by March 21, 1960, Macy had received approximately $540,000.

11. Purchases by Macy's New York in 1957 from the vendors who were asked to contribute varied from a low of approximately $800 to a high of approximately $2,600,000. Purchases by Macy's New York in 1958 from the vendors who were asked to contribute varied from a low of $900 to a high of approximately $2,700,000.

12. Included among the vendors, each of whom contributed $1,000, the products which they manufacture and sell, and their approximate 1958 sales to Macy's New York, were the following:

Supplier's name	Product	1958 sales to Macy's New York
College Hall Fashions, Inc.	Men's Clothing	$162,000
General Textile Co.	Ironing Board Pads and Covers	80,000
Phil Horowitz, Inc.	Men's Trousers	284,913
David Kahn, Inc.	"Wearever" Pens and Pencils	10,000
National Pants Co.	Boys' and Men's Trousers	201,748
Queen Knitting Mills, Inc.	Ladies' Sportswear	45,036
Record Corporation of America	Phonograph Records	15,841
Seal Sac, Inc.	Plastic Closet and Kitchen Accessories	71,400
George Sherwin, Inc.	Boys' and Men's Shirts	35,436
Thomases & Co.	Brief Cases and School Bags	29,624
Varsity Pajamas, Inc.	Men's Pajamas	62,789
Yardley of London, Inc.	Cosmetics and Toiletries	28,798

13. The selection of the number of vendors to be asked to contribute, as well as the amount of money to be raised, was based in large part on the amount of money which Macy needed to put on the extensive anniversary program.

14. Contemporaneously with the celebration, Macy continued its regular publicity program, engaging in displays, newspaper advertising, direct mail advertising, radio, TV, periodicals and programs. Macy's expenditures for publicity in 1958, exclusive of direct charges for the celebration, were approximately the same as they were in 1957 and 1959.

15. Competition at the vendor level at the time the vendors were being solicited by Macy for the $1,000 contributions was intense and most of the vendors had a substantial number of competitors.

16. Some of the vendors had been in business only a few years and some had been selling to Macy's New York for a short period of time, while still others had been in business for many years and some of them had sold to Macy for many years.

17. Vendors to the department and specialty store trade have a substantial number of customers, some numbering into the thousands.

18. For many of the vendors, Macy was considered to be a big customer and accounted for a large volume of sales.

19. No amount other than $1,000 was provided for in the vendor participation program.

20. Some vendors acceded to Macy's request in hope of improving their position with Macy; some gave because competitors were being asked to contribute; some gave because of their large volume of sales to Macy; and some gave because of the length of time they had been selling to Macy.

21. The buyers for the various departments made the solicitations from the vendors and the vendors were aware that the buyers exercised their judgment and discretion and made the decision as to whom to buy from and the volume to buy. Vendors are reluctant to refuse requests of these buyers.

22. Macy's New York is the largest department store in the world, is in competition with a large number of stores in the greater New York area, and all vendor witnesses testified that they sold to many customers in this trading area.

23. Many of the vendor witnesses testified that they were either unwilling or unable to give equal or proportionate contributions to their other customers who competed with Macy.

24. It cannot be concluded from this record that contributions have been favored because they made a contribution or that vendors who were solicited and refused to contribute suffered a loss of sales for that reason.

DISCUSSION

It is clear that the Federal Trade Commission may determine whether an act or practice is unfair within the meaning of Section 5 of the Federal Trade Commission Act whether or not such act or practice has heretofore been considered or determined to be unlawful. Except for this expansion of concept in the Keppel [1] case, the guidelines expressed in the Gratz [2] case have been followed in the decided cases. There the Court said:

> The words "unfair methods of competition" are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. * * *

Of these criteria mentioned, there are two that could be involved here. First, was there "oppression" involved in these solicitations? Were the vendors faced with a choice of donating or risking the loss of sales to a valued account, or, if they were not faced with this choice, did respondent expect them to so believe? There is no evidence that this was the vendors' choice or that respondent's solicitors expected them to believe that it was. The solicitors were instructed to advise the vendors that whether they donated or not the decision would not affect future dealings. Because of the nature of the buyer-seller relation-

[1] *F.T.C.* v. *Keppel, R. F. & Bro., Inc.*, 291 U.S. 304; see also *A. L. A. Schechter Poultry Corp., et al.* v. *U.S.*, 295 U.S. 495.

[2] *F.T.C.* v. *Gratz, et al.*, 253 U.S. 421.

ships the vendors continually sought to maintain the good will of the Macy buyers and the Macy buyers and executives who planned the solicitations knew this, but this is not sufficient to impute to them knowledge that they were forcing a choice upon the vendors or knowledge that the vendors so believed. There is evidence that some vendors feared that they were faced with such a choice, but respondent's acts were not the kind or degree of oppression which the law has condemned.

The other element to be considered is the effect of the solicitations on competition. Gratz uses the phrase "tendency unduly to hinder competition" which may be equated with "may be substantially to lessen competition". It is concluded that the evidence does not show a reasonable likelihood of a substantial lessening of competition between vendors or between Macy and its competitors. The most that can be said is that Macy profited at the expense of some suppliers who may or may not have also profited through increased sales of Macy. There is no direct evidence that competition at the retail level was significantly affected. These donations cannot be considered in the same light as price differences which recur order after order.

It may be, as counsel supporting the complaint contends, that acts such as are involved here circumvent Section 2(d) of the Clayton Act, but it does not necessarily follow that they are inherently unfair and constitute per se violations of the Federal Trade Commission Act.

It cannot be concluded that respondent's acts, as herein found, were inherently unfair, or that the evidence shows the probability of a substantial lessening of competition resulting from them, however, since the solicitations could be repeated and have a cumulative effect, the order of dismissal which follows is without prejudice.

CONCLUSION

The acts of respondent as herein found do not constitute unfair methods of competition or unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That the complaint herein be, and the same hereby is, dismissed, without prejudice to the right of the Commission to institute further proceedings should future circumstances so warrant.

OPINION OF THE COMMISSION

By KERN, *Commissioner:*

This matter is before us upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision dismissing the

complaint without prejudice. The complaint charges respondent, R. H. Macy & Co., Inc. (Macy), with violating Section 5 of the Federal Trade Commission Act in connection with its solicitation of contributions of $1,000 each from approximately 750 of its suppliers or vendors for Macy's One-hundredth Anniversary Celebration.[1]

Counsel on the appeal does not argue that the examiner's findings are materially incorrect, but rather that his conclusions and his application of the law to the facts as found are erroneous. There is no apparent dispute about any material fact. Respondent does not challenge the findings or conclusions of the initial decision.

Macy's, a New York corporation with its principal place of business at 151 West 34th Street, New York City, is engaged in the operation of retail department stores. It sells directly to the consuming public goods of the type usually sold by department stores through six divisions, as follows: Macy's, New York; Bamberger, New Jersey; Davison-Paxon Company, Georgia and South Carolina; LaSalle & Koch Company, Ohio; Macy's California; and Macy's, Missouri-Kansas. Respondent's total sales were more than $450,000,000 in 1958. Sales of its New York division for that year totaled approximately $225,000,000.

In 1958, Macy's New York, celebrated the one-hundredth anniversary of its founding by conducting various events and promotions during the entire year. Among other things, it sponsored certain ceremonies attended by public officials; created shop facades around Macy's street floor to duplicate the atmosphere of New York in 1858; conducted a great fireworks display on the 4th of July; and engaged in certain institutional type advertising featuring Macy's 100th Anniversary. Macy's asked approximately 750 of its some 20,000 vendors, i.e., suppliers, to contribute $1,000 each toward the cost of this celebra-

[1] Paragraphs 7 and 8 of the complaint charge as follows:

"PAR. 7. Respondent used the force of its purchasing power to induce contributions from its vendors who—because of their individual inequality of economic strength compared to respondent; the highly competitive nature of their business; their lack of ability to combat such practices; the fact that their economic existence is enhanced and improved by continuing to sell to Macy; and that supplying Macy enhances the prestige and selling ability of the supplier with other actual and potential customers—are relatively powerless to refuse to make such contributions. These circumstances are enhanced by the fact that Macy's New York store is one of the largest, if not the largest, department stores in the United States. Very few, if any, of these 750 vendors can afford to make contributions of this type to all or any substantial number of their other customers.

"PAR. 8. The aforesaid acts and practices of respondent, a powerful buyer using the leverage of its purchasing power and position, asking for and receiving contributions, gifts or donations of whatever nature from its vendors for the 100th Anniversary Celebration of Macy's New York, or for any other purpose, are all to the prejudice and injury of such vendors and their competitors, and to the competitors of respondent and the public, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of, and in violation of, Section 5 of the Federal Trade Commission Act."

tion. The $1,000 figure was arrived at more or less arbitrarily. The 750 vendors were chosen on the basis of past performance and potential. Approximately 582 vendors pledged or agreed to contribute $1,000 each. By March 21, 1960, Macy received approximately $540,000 from these vendors in such payments. The pledges were for $1,000 each; no more, no less. It was not part of the program to offer the vendors any particular display or advertising promoting their product. The purpose for which the money was received was to help defray the costs of Macy's 100th Anniversary Celebration.

The hearing examiner in his initial decision held that the guidelines of *Federal Trade Commission* v. *Gratz, et al.*, 253 U.S. 421 (1920), should be applied to the facts in this proceeding. There the Supreme Court held that the words "unfair methods of competition" are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. He found or concluded that the evidence of record did not satisfy the pertinent *Gratz* tests, and so ordered that the complaint be dismissed, but without prejudice "since the solicitations could be repeated and have a cumulative effect."

The Supreme Court in 1953 in *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, reviewed certain prior decisions in cases brought under Section 5 (omitting *Gratz*) and stated the law on defining "unfair methods of competition", as follows:

> The "unfair methods of competition," which are condemned by § 5(a) of the Act, are not confined to those that were illegal at common law or that were condemned by the Sherman Act. *Federal Trade Commission* v. *Keppel & Bro.*, 291 U.S. 304. Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases from the field of business. *Id.*, pp. 310–312. It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act (see *Federal Trade Commission* v. *Beech-Nut Co.*, 257 U.S. 441, 453)—to stop in their incipiency acts and practices which, when full blown, would violate those Acts (see *Fashion Guild* v. *Federal Trade Commission*, 312 U.S. 457, 463, 466), as well as to condemn as "unfair methods of competition" existing violations of them. See *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 691. Id. 394–395.)

It is for the courts to determine what practices or methods are to be deemed unfair, but in passing on that question the determination of the Commission is of great weight. *Federal Trade Commission* v. *Keppel & Bro.*, 291 U.S. 304, 314 (1934); *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 720 (1948). In *Motion Picture Advertising Service Co., Inc., supra*, the Court stated that the precise

impact of a particular practice on the trade is for the Commission, not the courts, to determine. The Court there further said that the point where a method of competition becomes "unfair" within the meaning of the Act will often turn on the exigencies of a particular situation, trade practices, or the practical requirements of the business in question. 344 U.S. at 396.

We will proceed to determine whether the acts and practices of the respondent here charged are "unfair" within the meaning of Section 5.

The examiner found—and his findings are not challenged by the respondent—in part as follows: Macy's New York is the largest department store in the world. For many of the vendors, Macy was considered to be a big customer and accounted for a large volume of their sales. Macy's is in competition with a large number of stores in the New York area, and all vendor witnesses testified that they sold their products to many customers in the trading area. Many of the vendor witnesses testified that they were either unwilling or unable to give equal or proportionate contributions to their other customers who competed with Macy. The buyers for the various departments of Macy's made the solicitations from the vendors, and the vendors were aware that the buyers exercised their judgment and discretion and made the decision as to whom to buy from and the volume to buy. Vendors are reluctant to refuse requests of the buyers.

There is clearly shown here a form of coercion or oppression which, we believe, is an unfair trade practice and one which may be condemned as a violation of Section 5 even under the relatively strict tests of the *Gratz* case. While the record does not show overt pressure upon vendors to give, such threats of discontinuance of purchases or offers of more business, vendors, as a practical matter, could not well afford to refuse Macy's request. The impression that continued business with Macy's might be involved was helped by the fact that Macy's buyers made the contacts. The vendor could not know what the result might be if he refused, and this in itself was great pressure on him to give. It is clear from the record that the sums paid to Macy constituted a considerable financial burden to many vendors. Under the circumstances here shown, we hold that the practice of a large buyer using the leverage of its size and importance to exact from suppliers, who cannot refuse to give or who are reluctant to refuse to give, substantial gifts or sums of money solely for the buyer's own advantage, is an "unfair" practice within the meaning of Section 5 of the Federal Trade Commission Act.

The Commission further holds that Macy's practice was shown to be "unfair" within the meaning of Section 5 because of its injurious effect upon Macy's competitors. In considering this, it is important to keep in mind that "unfair methods of competition" condemned by Section 5 are not confined simply to those illegal at common law or condemned by the Sherman Act or the Clayton Act.

Since the present case falls so clearly within the framework of competitive activity covered by the Robinson-Patman Act, there is no doubt that in determining competitive injury the less stringent requirements of that Act as to injury may be applied, i.e., a reasonable likelihood of substantial injury to competition with vendors who granted the discriminatory concessions or with Macy, the recipient of such concessions. It should be noted that there is no need for the evidence to show specific losses to Macy's or actual diversions of trade from competitors. *Hastings Mfg. Co.* v. *Federal Trade Commission*, 153 F. 2d 253, 257–258 (1946). See also *Federal Trade Commission* v. *Simplicity Pattern Co., Inc.*, 360 U.S. 55, 63 (1959), where the Court in a case involving discriminatory concessions inferred that losses occurred to the unfavored stores from the fact of competition and the discriminatory concessions.

From the examiner's findings, it may reasonably be concluded that the practice gave Macy an unfair and substantial advantage over competing stores. Clearly, the amounts of $1,000 each from vendors totaling $540,000 expended in promoting Macy's as an institution were substantial concessions to Macy's over its competitors. In one instance set out in the initial decision, the payment was 10 per cent of the sales of the vendor to Macy's New York in 1958. Macy's benefited over competitors in about the same way as it would have benefited had the payments been in the form of price concessions. The loss of business by competitors to Macy may be inferred in either case. It is noted that while Macy received payments for a particular promotion, the money, in effect, was general revenue and could have been used, for instance, to reduce prices. This is so because vendors' products were not specifically promoted and Macy's would have celebrated its 100th Anniversary (although perhaps not on the same scale) whether or not it received contributions from vendors. The money taken in, therefore, might be considered as funds largely free and clear to be used for any purpose.

In this case, Macy's in soliciting gifts of money, shifted to its vendors a substantial portion of its own advertising and promotional costs, i.e., the costs of promoting Macy's as an organization. It was able to do this because of its size and importance. Stores

competing with Macy purchasing from the same vendors could not similarly shift promotional costs and so were to that extent at a substantial competitive disadvantage. We believe, therefore, that there is sufficient evidence to find, and we do find, that respondent's practices were such as to result in a reasonable likelihood of substantial injury to competition with Macy's.

We are also of the view that the same general principle which governed the *Grand Union* and *American News* cases [2] should apply here. The mere circumstance that in this case there is no showing that any service or facility was furnished by the respondent for the contributions solicited and received is not a significant difference. The inequity in the use of size to obtain special concessions is the same in either case. If it is contrary to public policy for a large buyer by reason of its size to secure disproportionate advertising allowances, clearly public policy is contravened in the exercise of economic might to obtain outright gifts or donations.

If anything, the unfairness of the act is compounded by the failure to furnish a benefit to the contributor. What a mockery of justice it would be to say that it is illegal for a large retailer to solicit cash donations even when it gives some advertising benefits in return—yet it is perfectly legal for such a retailer to solicit cash donations of substantial benefit to it, pocket the entire proceeds and give nothing in return. It would be an open invitation to wide-scale solicitation of funds by large buyers from suppliers. Indeed, it would create a new hunting ground from which it would be impossible for the game to escape. The resulting competitive benefits to large soliciting buyers would be limited only by self-imposed restraint on their own rapacity—and that restraint would no doubt be limited in turn only by weighing what the seller-supplier traffic would bear.

We conclude that payments here solicited and received constitute an "unfair" practice within the meaning of Section 5 of the Federal Trade Commission Act, and that respondent is in violation of Section 5 of that Act. We believe that any other conclusion would have the most deleterious consequences in this entire general area of commercial practices involving solicitation of funds from suppliers by large buyers.

Threaded throughout respondent's brief is an argument to the effect that the 100th Anniversary was a unique and unusual event and that this in some way justifies the request for contributions. The obvious

[2] *The Grand Union Company* v. *Federal Trade Commission*, 300 F. 2d 92 (1962); *American News Company and The Union News Company* v. *Federal Trade Commission*, 300 F. 2d 104 (1962).

answer to this is that we are not here concerned with Macy's New York, 100th Anniversary as such, which is clearly a unique occurrence, but with all events for which like contributions might be collected. Department stores characteristically find at least several events during a year to run special promotions. If the practice is proper for a 100th Anniversary, there is no reason why it would not be justified for other occasions and become a continuing practice.

We conclude that the hearing examiner erred in construing and applying the law and in dismissing the complaint in this proceeding.

The appeal of counsel supporting the complaint accordingly is granted. The initial decision will be modified to conform to the views herein expressed and, as so modified, will be adopted as the decision of the Commission. An appropriate order will be entered.

FINAL ORDER

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

The Commission, for the reasons appearing in the accompanying opinion, having granted the appeal, and having directed that the initial decision be modified to conform to its views expressed therein, and that the initial decision, as so modified, be adopted as the decision of the Commission:

It is ordered, That the initial decision be, and it hereby is, modified by striking everything therein under and including the headings Discussion, Conclusion and Order and substituting the following:

25. Respondent knew or had reason to know that the contributions solicited from the vendors were not available on equal or proportional terms to other stores competing with Macy in the sale of the vendors' products.

26. The acts or practices of respondent in knowingly inducing and receiving preferential contributions from vendors had the effect of a probable substantial lessening of competition between Macy's and its competitors.

27. Macy, a large buyer, used the leverage of its size and importance to exact from suppliers, who could not refuse to give or who were reluctant to refuse to give, substantial gifts or sums of money solely for its own advantage. While the record does not show overt pressure upon vendors to give, such as threats of discontinuance of business or offers of more business, vendors, as a practical matter, could not well afford to refuse Macy's request. The impression that con-

tinued business with Macy's might be involved was helped by the fact that Macy's buyers made the contacts. The vendor could not know what the result might be if he refused, and this in itself was great pressure on him to give. The sums paid to Macy constituted a considerable financial burden to Macy's vendors. The solicitations and receipt of gifts of money by Macy in the manner here shown were oppressive and unfair acts.

CONCLUSIONS

1. This proceeding is in the public interest.

2. The acts or practices of respondent as herein found constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent, R. H. Macy & Co., Inc., a corporation, its officers, employees, agents or representatives, directly or through any corporate or other device, in or in connection with the purchase of department store products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Receiving or soliciting and receiving contributions, gifts, donations or anything of value of whatever nature, directly or indirectly, from its vendors to aid or support, in whole or in part, any publicity, advertising, promotion or other program planned and carried out by respondent to further its department store business, except that this order shall not apply to compensation or consideration for services or facilities furnished by or through respondent in connection with the sale or offering for sale of products sold to respondent by any of its vendors.

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

It is further ordered, That respondent, R. H. Macy & Co., 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 the order to cease and desist contained in the initial decision as modified.

IN THE MATTER OF

BROWN AND LOE, INC.

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

Docket C-138. Complaint, May 16, 1962—Decision, May 16, 1962

Consent order requiring a Kansas City, Mo., wholesale distributor of citrus fruit and produce to cease violating Sec. 2(c) of the Clayton Act by accepting illegal brokerage on its own purchases for resale, such as a commission or discount, usually at the rate of 10 cents per 1⅗ bushel box, on purchases of citrus fruit from Florida and California packers, or a lower price reflecting such commission.

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 Brown and Loe, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 104 E. 5th Street, Kansas City, Mo.

PAR. 2. Respondent is now and for the past several years has been engaged in business primarily as a wholesale distributor, buying, selling and distributing citrus fruit and produce, hereafter sometimes referred to as food products. Respondent purchases such food products from a large number of suppliers located in many sections of the United States. The annual volume of business done by respondent in the purchase and sale of food products is substantial.

PAR. 3. In the course and conduct of its business for the past several years, respondent has purchased and distributed, and is now purchasing and distributing, food products, in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, from suppliers or sellers located in several states of the United States other than the State of Missouri, in which respondent is located. Respondent transports or causes such products, when purchased, to be transported from the places of business or packing plants of its suppliers located in various other states of the United States to respondent who is located in the State of Missouri, or to respondent's customers located in said State, or elsewhere. Thus, there has been

at all times mentioned herein a continuous course of trade in commerce in the purchase of said food products across state lines between respondent and its respective suppliers of such food products.

PAR. 4. In the course and conduct of its business for the past several years, but more particularly since October 1, 1959, respondent has been and is now making substantial purchases of food products for its own account for resale from some, but not all, of its suppliers, and on a large number of these purchases respondent has received and accepted, and is now receiving and accepting, from said suppliers a commission, brokerage, or other compensation or an allowance or discount in lieu thereof, in connection therewith. For example, respondent makes substantial purchases of citrus fruit from a number of packers or suppliers located in the States of Florida and California, and receives on said purchases a brokerage or commission, or a discount in lieu thereof, usually at the rate of 10 cents per 1⅗ bushel box, or equivalent. In other instances respondent receives a lower price from the suppliers which reflects said commission or brokerage.

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

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the 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 Brown and Loe, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 104 E. 5th Street, Kansas City, Mo.

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

ORDER

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

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

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

In the Matter of

MASON BROS. & TARLIN, INC., ET AL.

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

Docket C-139. Complaint, May 18, 1962—Decision, May 18, 1962

Consent order requiring Boston importers to cease violating the Flammable Fabrics Act by selling in commerce leis which were so highly flammable as to be dangerous when worn.

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 Mason Bros. & Tarlin, Inc., a corporation, and Paul Mason, individually and as an officer of said corporation, 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. Respondent Mason Bros. & Tarlin, Inc., is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of Massachusetts. Respondent Paul Mason is the President of the corporate respondent. He formulates, directs and controls the policies, acts and practices of the said corporate respondent. The respondents have their offices and principal place of business at 73–75 High Street, Boston, Mass.

PAR. 2. Respondents, subsequent to July 1, 1954, the effective date of the Flammable Fabrics Act, have 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 herein were leis.

PAR. 3. The aforesaid acts and practices of respondents herein alleged were and are in violation of the Flammable Fabrics Act and of 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, Mason Bros. & Tarlin, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business located at 73–75 High Street, in the city of Boston, State of Massachusetts.

Respondent Paul Mason 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 respondent Mason Bros. & Tarlin, Inc., a corporation and its officers, and respondent Paul Mason, individually and as an officer 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) 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 said Flammable Fabrics Act, as amended, is so highly flammable as to be dangerous when worn by individuals.

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.

Complaint

IN THE MATTER OF

NORTH AMERICAN QUILTING CORP. ET AL.

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

Docket C-140. Complaint, May 18, 1962—Decision, May 18, 1962

Consent order requiring Brooklyn, N.Y., manufacturers to cease violating the Wool Products Labeling and Federal Trade Commission Acts by labeling and invoicing as "80% reused wool, 20% reused unknown fibers", quilted interlining materials which contained substantially less reused wool than so represented; failing to label certain interlining materials with the generic name of the constituent fibers and the percentage thereof, and to comply in other respects with labeling requirements; and furnishing false guaranties that products were not misbranded.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that North American Quilting Corp., a corporation, and Harry Belsky, Leon Diamond, and Mayer Ofman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Wool Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complant stating its charges in that respect as follows:

PARAGRAPH 1. Respondent North American Quilting Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Individual respondents Harry Belsky, Leon Diamond, and Mayer Ofman are president, secretary, and treasurer, respectively, of the corporate respondent. Said individual respondents cooperate in formulating, directing and controlling the acts, policies and practices of the corporate respondent, including the acts and practices hereinafter referred to. All respondents have their office and principal place of business at 561 Grand Avenue, in Brooklyn, N.Y.

PAR. 2. Subequent to the effective date of the Wool Products Labeling Act of 1939, and more especially since July, 1956, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, and

offered for sale in commerce, wool products, as the terms "commerce" and "wool product" are defined in said Act.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively labeled or tagged with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were quilted interlining materials labeled or tagged by respondents as "80% reused wool, 20% reused unknown fibers", whereas, in truth and in fact, said products contained substantially less than the represented quantity of reused wool.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged or labeled as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto were certain interlining materials with labels which failed: (1) to show the true generic names of the fibers; (2) to show the percentages of such fibers.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The required information descriptive of the fiber content contained on the labels attached to the wool products was minimized, and rendered obscure and inconspicuous, so as likely to be unnoticed by purchasers and purchaser-consumers, by the use of other written and printed matter intermingled with the required information, in violation of Rule 11 of the aforesaid Rules and Regulations.

(b) The stamps, tags, labels, and other marks of identification attached to certain wool products contained the names or designations of fibers not present in said products, in violation of Rule 25 of the aforesaid Rules and Regulations.

PAR. 6. Respondents have furnished false guaranties that certain of their wool products were not misbranded, when they knew, or had reason to believe, that the said wool products so falsely guaranteed might be introduced, sold, transported, or distributed in commerce, in violation of Section 9 of the Wool Products Labeling Act of 1939.

PAR. 7. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, 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.

PAR. 8. Respondents are now, and for some time past have been, engaged in the offering for sale, selling and distributing of quilted interlining materials.

PAR. 9. In the course and conduct of their business, respondents now 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 New York 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 products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 10. Respondents in the course and conduct of their business, as aforesaid, have made statements on invoices and shipping memoranda to their customers misrepresenting the fiber content of certain of their said products. Among such misrepresentations were statements representing quilted interlining materials to be "80% reused wool, 20% unknown fibers", whereas in truth and in fact, the said products contained substantially less than the represented quantity of reused wool.

PAR. 11. The acts and practices set out in paragraphs 9, and 10 have had and now have the tendency and capacity to mislead and deceive purchasers of said products as to the true content thereof and to cause them to misbrand products manufactured by them in which said materials are used.

PAR. 12. The acts and practices of the respondent set out in paragraphs 8, 9 and 10 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, 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 Wool Products Labeling Act of 1939, 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, and admission by 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, North American Quilting Corp., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 561 Grand Avenue, in the city of Brooklyn, State of New York.

Respondents Harry Belsky, Leon Diamond, and Mayer Ofman are officers of said corporation and their 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 respondent North American Quilting Corp., a corporation, and its officers, and respondents Harry Belsky, Leon Diamond and Mayer Ofman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the manufacture for introduction into commerce, the introduction into commerce, or the offering for sale, sale, transportation, distribution or delivery for shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding wool products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of the constituent fibers included therein.

2. Failing to securely affix to or place on each product, a stamp,

tag, label, or other means of identification showing in a clear and conspicuous manner, each element of information required to be disclosed by Section 4(a) (2) of the Wool Products Labeling Act of 1939.

3. Minimizing or rendering obscure or inconspicuous the required information descriptive of the fiber content contained on the labels attached to such wool products.

4. Setting forth the name or designation of fibers not present in wool products on the stamp, tag, label or other mark of identification affixed to such wool products.

5. Furnishing false guaranties that wool products are not misbranded under the provisions of the Wool Products Labeling Act, when there is reason to believe that the wool products so guaranteed may be introduced, sold, transported or distributed in commerce.

It is further ordered, That respondent North American Quilting Corp., a corporation, and its officers, and respondents Harry Belsky, Leon Diamond, and Mayer Ofman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of interlining materials or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting the character or amount of constituent fibers contained in such products on invoices or shipping memoranda applicable thereto or in any other 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.