

From a review of the evidence relating to Cyanamid's conduct during the Patent Office proceedings, we have no doubt that this respondent wanted Pfizer to obtain a patent on the product tetracycline in order that other firms could be excluded from the broad spectrum market. Cyanamid would, as its patent officials stated, "rather pay royalties to a bona fide patentee than see the pharmaceutical business in which it has a major interest ruined by irresponsible price cutting". (CX 12, p. 115.)

Insofar as Pfizer is concerned, the statements made by officials of this firm clearly disclose that after entering into the cross-licensing agreement with Cyanamid it intended to exclude all other firms from the tetracycline market in order to avoid price competition on this product. The importance Pfizer attached to a controlled tetracycline market is graphically demonstrated by the methods it employed to obtain a patent on this product.

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THE PRICING PRACTICES CHARGE

We now turn to the charge that the respondents engaged in illegal pricing practices. The facts establish (1) that all respondents, Pfizer, Bristol, Squibb, Upjohn and Cyanamid, conspired with one another to fix and stabilize tetracycline prices.

(The published prices to retailers of broad spectrum antibiotics sold by Cyanamid, Pfizer, Bristol, Squibb and Upjohn during the period relevant to this proceeding are set forth in the following tabulations):

1951-1958 Tabulation of Price to Retailer of Tetracycline, Aureomycin and Terramycin

	Cyanamid Achromycin	Pfizer Tetracyclin	Bristol Polycycline	Squibb Steclin	Upjohn Panmycin	Cyanamid Aureomycin	Pfizer Terramycin
Capsules:							
100 MG 25's.....	\$3.61	\$3.61	\$3.61	\$3.61	\$3.61	\$3.61	\$3.60
100 MG 100's.....	13.77	13.77	13.77	13.77	13.77	13.77	13.77
250 MG 16's.....	5.10	5.10	5.10	5.10	5.10	5.10	5.10
250 MG 100's.....	30.60	30.60	30.60	30.60	30.60	30.60	30.60
Intramuscular: 100 MG Vial.....	.94	.94	.94	.94	.94	-----	.94
Intravenous:							
250 MG Vial.....	1.62	1.62	1.62	1.62	1.62	1.62	1.62
500 MG Vial.....	2.91	2.91	2.91	2.91	2.91	2.91	2.90
Ped. Drops: 100 MG/cc 10cc.....	1.47	1.47	1.47	1.47	1.47	1.47	1.47
Oral Susp.: 250 MG/5cc 1 oz.....	2.54	2.55	2.54	2.54	2.55	-----	2.55
Syrup:							
125 MG/5cc 2 oz.....	2.54	2.55	2.54	2.54	2.55	-----	2.55
125 MG/5cc 16 oz.....	18.36	18.36	18.36	-----	18.36	18.36	18.36

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Respondents' Price to Retailer of Combination Products

Company	Product	Dosage form	Package size	Retail price
TETRACYCLINE-VITAMINS				
Cyanamid	Aureomycin SF	250 mg cap.	16's	5.28
Cyanamid	Achromycin SF	250 mg cap.	16's	5.28
Pfizer	Terramycin SF	250 mg cap.	16's	5.28
Pfizer	Tetracycln SF	250 mg cap.	16's	5.28
Cyanamid	Aureomycin SF	250 mg cap.	100's	31.60
Cyanamid	Achromycin SF	250 mg cap.	100's	31.60
Pfizer	Terramycin SF	250 mg cap.	100's	31.60
Pfizer	Tetracycln SF	250 mg cap.	100's	31.60
Cyanamid	Achromycin SF	Oral susp.	2 oz.	2.64
Pfizer	Tetracycln SF	Oral susp.	2 oz.	2.64
TETRACYCLINE-ANTIHISTAMINES				
Cyanamid	Achrocidin	125 mg tablets	24's	4.26
Bristol	Tetrex APC	125 mg cap.	24's	4.26
Pfizer	Tetracydin	125 mg tablets	24's	4.26
Cyanamid	Achrocidin	125 mg tablets	100's	17.04
Bristol	Tetrex APC	125 mg cap.	100's	17.04
Pfizer	Tetracydin	125 mg tablets	100's	17.04
TETRACYCLINE-NYSTATIN				
Cyanamid	Achrostatin	250 mg cap.	16's	5.60
Squibb	Mysteclin	250 mg cap.	16's	5.60
Upjohn	Comycin	250 mg cap.	16's	5.60
Cyanamid	Achrostatin	250 mg cap.	100's	33.50
Squibb	Mysteclin	250 mg cap.	100's	33.50
Upjohn	Comycin	250 mg cap.	100's	33.50
Squibb	Mysteclin	125 mg cap.	100's	17.23
Upjohn	Comycin	125 mg cap.	100's	17.23

In reviewing that part of the initial decision dealing with this phase of the case, we find the following errors on the part of the hearing examiner:

(1) He erred in assuming that it would have been illogical for any of respondents to have fixed prices prior to the settlement of the tetracycline patent infringement suit.

(2) He erred in finding that there was extensive and substantial price competition in the NPA⁶⁵ and CCS⁶⁶ hospital markets and in the Federal market.⁶⁷

(3) He erred in finding that the totality of the evidence relating to the pricing practices of any of the respondents warrants an inference that there was no conspiracy among any of them to fix prices.

⁶⁵ Nonprofit association consisting of privately owned hospitals and clinics, whether or not operated for profit; hereinafter referred to as NPA.

⁶⁶ City, County and State hospitals consisting of tax supported hospitals operated by municipalities, cities, counties and states; hereinafter referred to as CCS.

⁶⁷ The Federal market includes such federal agencies as GSA, VA and Defense Department facilities; hereinafter referred to as the Federal market.

(4) He erred in considering the evidence relating to pricing separately and apart from the other circumstances of record.

(5) He erred, finally, in drawing the inference from the shift in market shares that there was price competition among respondents.

1. The hearing examiner declared:

It seems highly improbable that persons bitterly fighting each other over a patent infringement matter would at the same time enter into a conspiracy or agreement to fix the prices of the same product which was the subject matter of the patent, and which Pfizer was doing everything within its power to keep Bristol, Squibb and Upjohn from marketing. (Initial Decision pp. 143-144)

Thus the hearing examiner inferred that a price-fixing agreement would hold no attraction to these alleged participants. This reasoning not only ignores facts of record but reflects a lack of understanding of the close relationship which existed among respondents.

The Supreme Court has often noted that it is not necessary for the Government to fix with exactitude the time when a conspiracy was conceived. In *United States v. United States Gypsum Co., et al.*, 333 U.S. 364, 393 (1948), the Court held:

We do not attempt to fix a date when the conspiracy was first formed. At least the declarations which we have quoted were made with the purpose of advancing a plan which ultimately eventuated in the licenses of 1929.

See also: *United States v. Masonite Corp.*, 316 U.S. 264 at 275 (1942).

It is sufficient to note here that the conspiracy as to all of the respondents was in effect at least as early as 1955—thus during the pendency of what Pfizer terms its “hard fought patent infringement litigation”⁶⁸ against Bristol, Squibb and Upjohn.

In a sense the argument that the patent infringement case is “inconsistent with any possibility”⁶⁹ of Pfizer’s involvement in a price fixing conspiracy is simply a more poignant variant of the old and rejected theme that the Government must prove that a price-fixing scheme permeated through every facet of corporate activity and every related corporate transaction. In rejecting such premises, the District Court noted in *United States v. Minneapolis Electrical Contractors Association*, 1952-53 Trade Cases, Par. 67,488 (D.C. Minn. 1953):

⁶⁸ Pfizer’s Answering Brief, Part II p. 24.

⁶⁹ Pfizer’s Answering Brief, Part II, p. 24.

Moreover, in *United States v. The Singer Manufacturing Company*, 31 U.S. L. Week, 4674 (U.S. June 17, 1963), the Court rejected “as a question of law, the * * * inference that the attitude of suspicion, wariness and self-preservation negated a conspiracy”. Previously in *United States v. Line Material Co.*, 333 U.S. 287, 297 (1948), the Court found a price-fixing conspiracy among patent licensees many of whom actively opposed the plan to which they were required to accede as the price of the patent license.

* * * [T]hat this scheme was not successful in all of its ramifications is no defense, and that at times even the conspirators did not in every transaction comply with all the mandates of the planners is not controlling as to whether the conspiracy was launched * * * and participated in.

See also: *U.S. v. Trenton Potteries Co.*, 273 U.S. 392, at 402 (1927).

Indeed, in contrast to respondents' arguments which assume an unvarying monolithic consistency within a corporation, it is more probable, as contended by many high echelon executives, that today's corporation is a hydra-headed affair in which policies promulgated by the sales department may sometimes be at variance with directives from the Board of Directors.⁷⁰ Indeed, in instances where it has been *proven* that subordinates were involved in price-fixing criminal conspiracies, one of the defenses often urged with sincerity and truthfulness for exculpation of their corporate superiors is that the price-fixing policy was inconsistent with other announced corporate directives and policies promulgated by the Board of Directors or senior executive officers. Even in theory, we are not completely convinced that, within a single corporate empire, price fixing and patent infringement suits are mutually exclusive alternatives. Moreover, this issue of a single unified posture versus conflicting corporate practices need not be resolved by speculation; for the record of this case established that during the existence of the hard fought litigation the bitterness of the courtroom never affected the continuing cordiality between the marketing divisions of at least two of the litigants. Thus, at the very height of the infringement suit in June 1955, Pfizer and Upjohn were careful to exchange precise and detailed price information. On June 2, 1955, Pfizer wrote:

Under separate cover we are sending you a complete new set of price pages for your Pfizer Laboratories loose-leaf catalog. Kindly remove all pages from your present cover and insert this refill.

When new products are added to our line, you will receive announcements in the form of "Pfizer Scripts", a new series of price and product information folders. These pages when inserted in the proper sequence will keep your copy of our price list up-to-date.

⁷⁰The Broady incident corroborates our analysis that agents or employees sometimes take positions repugnant to some other announced company policies with or without authorization. From December 1954 to February 1955, Pfizer admits that "Broady was a private investigator who had been employed by Pfizer". *Pfizer's Answering Brief*, Part II, page 23. Broady was paid \$60,000 for a three month security investigation; during this time he tapped the wires of Squibb, Bristol and other parties, for which he was subsequently convicted. McKeen, now President of Pfizer, testified that the wire tap was unauthorized and thus, assuming his veracity, his testimony established another instance in which Pfizer's employees or agents blithely ignored corporate policy and exercised individual initiative in a highly questionable manner. See also Bristol's Answering Brief, Appendix 1-12, Excerpts from the Record on Appeal in the Broady Wiretap Case, *The People of the State of New York v. John G. Broady*, 6 A.D. 2d 674 (1st Dept. 1958).

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Please continue to send me new product and price information on your line so that my copy of your catalog will always be current.

Thank you for your cooperation.

Very truly yours,

H. H. KIBBE,
Manager, Pricing Department.

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On June 9, 1955, Upjohn replied as follows:

Thank you very much for sending us a copy of the new Pfizer Laboratories loose-leaf price schedule. We will also look forward to receiving the "Pfizer Scripts" and will see that they are inserted promptly to keep your price list up to date. Information folders should be directed to my attention.

We have mailed you a copy of the Upjohn catalog, and your name has been placed on our mailing list so that you will receive reprinted pages as they are prepared.

Very truly yours,

THE UPJOHN COMPANY,
H. E. SHEPARD.

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Admittedly the simple exchange of price information can be a neutral factor in the proof of a conspiracy. But as was stated by the Supreme Court in *Sugar Institute v. United States*, 297 U.S. 553, 600, in weighing the relevance of the exchange of such trade statistics "each case demands a close scrutiny of its own facts". See also: *Tag Manufacturers, et al. v. Federal Trade Commission*, 174 F. 2d 452 (1959). Upon scrutiny of the facts of each case, the dissemination of pricing information plus other anti-competitive and conspiratorial conduct could tip the scales for a finding against respondents. Numerous principles announced in *Morton Salt Company v. United States*, 235 F. 2d 573, 576 (10th Cir., 1956), are applicable in the instant case. There the Court noted:

* * * They [defendants] produced expert witnesses who testified that since all salt is virtually alike and the major consumers are generally informed buyers a fraction of a cent difference in price will cause a major shift in business; thus by operation of the laws of economic behavior the tendency is to highly uniform prices in a market area. Nevertheless, it seems clear that the free disclosure to each other of pricing data and proposed bids speeded the achievement of uniform prices. Appellants urge otherwise because they say the information was readily accessible from other trade sources. While the publication of prices bid to government agencies and a spy system would undoubtedly reveal partial pricing information on competitors, some of the evidence shows extensive information was not easily acquired.

* * * * *
In the instant case we have more than a dissemination of statistics, there was a frank exchange, between competitors controlling 95% of the market, of all

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the details of a fairly complicated pricing system. *Certainly the exchange is a factor appropriately considered in determining the existence of a conspiracy.* (Emphasis added.)

We note that on the facts of this case, there is no evidence of a beneficial industry-wide purpose to be served by the exchange of the information; nor is there evidence of chaos in the tetracycline industry to suggest the necessity for exchange of such information. Cf. *Appalachian Coals, Inc., et al. v. United States*, 288 U.S. 344 (1933).

In the instant case, we find that between the competitors controlling 100% of the market, there was an exchange of the details of a reasonably complicated pricing, manufacturing and distribution system. As in *Morton Salt* such exchange of information made it unlikely for any of the respondents to inadvertently engage in active price competition.

Also disregarded is the contemporaneously expressed dissatisfaction with the vigorous competition which had broken out in previous antibiotic markets, *e.g.*, penicillin. As hereinabove found, respondents wanted tetracycline to be controlled by patent and as discussed herein each of them desired to avoid price competition in the sale of this product. Early in these proceedings, the entrance of Bristol, Squibb and Upjohn was opposed by Pfizer and Cyanamid. These two firms feared that additional entries in the market would cause a price decline. But Bristol, Squibb and Upjohn wished to take advantage of the existing price structure. Any ill will felt by Bristol, Squibb and Upjohn would probably yield to a profit motive. In these circumstances, on the basis of our cumulative experience and judgment, a price agreement would have been just as logical as engaging in price cutting or any other form of price competition, adversely affecting the price level of tetracycline. Thus, disagreement on other matters, including the patent infringement case, is not dispositive of the price fixing charge.

2. Nor does the record support the hearing examiner's finding of extensive or substantial price competition in the hospital and Federal markets. Clearly the existence of the congruent pricing practices of respondents in these markets does not support the hearing examiner's conclusion that there was "no conspiracy to fix prices" among Pfizer, Cyanamid, Bristol, Squibb and Upjohn. While we think this evidence, when viewed separately from other facts of record, may be consistent with an inference of individual action, upon considering the record as a whole, we find it more consistent with an inference of agreement.

We find that all respondents deliberately avoided any form of competition which would materially affect the price level of broad spectrum antibiotics. It may be that respondents to some extent competed among themselves in the broad spectrum market by developing new products, by use of detail men, by use of "free goods," and by other methods.⁷¹ However, it is clear that each of them was careful not to compete in any manner which would cause a significant decline in the publicly established NPA price, because of the competitive effects which this would cause in the retail market. (See *infra*.)

Approximately 75 percent of the respondents' total sales of tetracycline were made to wholesalers and retailers who resold to the consuming public. The uniform pricing found to exist in this retail market, when considered apart from the pricing practices in other markets, might be deemed to have resulted from independent decisions of respondents not to change their prices. Cf. *Pevely Dairy Co. v. United States*, 178 F. 2d 363 (8th Cir., 1949). To be sure, each of them realized that a price reduction would promptly be met; so it was unlikely that any firm could sell its fungible products at a higher price.

As indicated in Finding 31, despite the purchasing power of a single hospital, the market to retailers was the largest one to which respondents sold. Obviously they could not afford to cut the price to the hospital market and not cut the price to the retail market without putting in jeopardy their largest source of revenue. And the very fact that the price to retailers remained uniform during the period relevant to this action is significant in this proceeding.

THE NPA MARKET

There was a peculiar "follow the leader" relationship existing between the price to retailers and the publicly known price at which tetracycline was sold to NPA and CCS hospitals. Respondents concede that the price to NPA hospitals by tradition has been the same as the price to the retail trade, and the evidence shows that a direct price cut to NPA hospitals would result in immediate pressure to cut the price to the retailer. As in the retailer market, a price cut in the

⁷¹ "The fact that there existed competition of other kinds between the various Plymouth dealers, or that they cut prices in bidding against each other, is irrelevant. This point is touched upon in the recent case of *United States v. American Smelting & Refining Company*, D.C. S.D. N.Y. 182 F. Supp. 834." *Plymouth Dealers' Association of Northern California v. United States*, 279 F. 2d 128, 132 (9th Cir., 1960).

Moreover, the Supreme Court has held that the existence of such competition does not preclude a finding of agreement to fix prices. See *Federal Trade Commission v. Cement Institute, et al.*, 353 U.S. 683 (1948); *National Lead Company, et al., v. Federal Trade Commission*, 227 F. 2d 825 (7th Cir., 1955).

NPA hospital market by any one of the respondents would have been self-defeating, but, unlike the larger but dispersed retailer market, the NPA hospitals were able to exert pressure for price reductions. Also, unlike the retailer, hospital pharmacists were usually not required to purchase tetracycline by brand name. Because of this method of buying, there was a great incentive for respondents somehow to reduce the price in order to capture large spot sales. Instead of cutting the published NPA price, however, each of the respondents offered "free goods" as an inducement to obtain the business of these institutions. The hearing examiner has found in this connection that "free goods" were furnished to NPA hospitals "as a means of effecting a price reduction on negotiated sales". We draw a different inference. "Free goods" were used by the respondents as a concealed rebate device in lieu of direct price reductions to prevent a general price reduction in this market and in the traditionally related retail or prescription market. If the evidence relating to the practice of furnishing "free goods" is viewed out of context, it can, of course, be argued that the similar behavior of Pfizer, Cyanamid, Bristol, Squibb and Upjohn in using this device did not stem from actual agreement but resulted from individual decisions not to engage in direct price competition.

But we find that the evidence concerning the common use of the "free goods" device is persuasive circumstantial evidence of agreement to stabilize prices by Pfizer, Cyanamid, Bristol, Squibb and Upjohn. It is clear that these named respondents have adhered to a policy of refraining from direct price competition in the NPA market in order to protect the price level in the retail market.

THE CCS MARKET

In the CCS hospital market, as in the NPA, the respondents were faced with power buyers, and the incentive to reduce prices again was considerable. Here also there was a danger that reduction of the CCS price might spread to the prescription market. Respondents solved this problem by refusing to deviate from their published prices in direct bids to CCS institutions and by limiting the form of price competition to varying bids submitted by their dealers (retailers and wholesalers). In this connection, the retailers' purchase prices, and after May of 1955, the wholesalers' purchase prices, were higher than the published CCS prices. To enable their dealers to bid for CCS business, the respondents uniformly granted a ten percent handling allowance to compensate the dealers for their services. Although respondents did not usually encourage price competition among dealers,

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a dealer could pass on all or any part of their handling allowance to the CCS buyer. By using this method of selling, respondents Pfizer, Cyanamid, Bristol, Squibb and Upjohn, were able to avoid direct price competition among themselves, and to obscure the origin and extent of any price reductions made to CCS institutions. Thereby they protected their published prices; and with respect to this group of power buyers (CCS), limited price reductions to a ten percent discount from list prices.⁷²

FEDERAL MARKET

With respect to the Federal Market, the record shows that, except for sales to the Veterans Administration during a fourteen month period (June 6, 1955 to July 30, 1956), there were some variations in the prices at which tetracycline was sold to the various agencies.⁷³

This departure from the pricing patterns in other markets can be accounted for by efforts of the federal agencies to bring about competitive prices. It is also quite probable that respondents realized that price uniformity in sales to the government might bring about an antitrust investigation. It is significant, however, that in sales in this market the deviations from the published price were not so great as to cause a substantial price decline. As late as 1958, the price to the federal government had not reached the lower level at which respondents had sold tetracycline to the Canadian government in 1955.

3. From our review of the pricing practices of respondents, we conclude that there was an intentional and deliberate avoidance of effective price competition. By use of the aforementioned devices and others, including the adoption of uniform package sizes, resale price maintenance, avoidance of price competition among different dosage

⁷² Cf. *Plymouth Dealers' Ass'n. of Northern Cal. v. U.S.*, 279 F. 2d 128, 134 (9th Cir., 1960): "This [a fixed uniform price list] established as a matter of actual practice one boundary of 'the range within which sales would be made'. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at page 222, 60 S. Ct. at page 844. This was 'a factor which prevents the determination of [market] * * * prices by free competition alone.' *Id.*, 310 U.S. at page 223, 60 S. Ct. at page 844."

⁷³ Moreover, our Finding 37 notes that during this period there was such an extraordinary identity between the respondents' prices that at one point the VA was forced to draw the name of the winning bidder out of a hat.

And cf. *National Lead Company v. Federal Trade Commission*, 227 F. 2d 825, 833, 834 (7th Cir., 1955), where the Court stated:

"Furthermore, it is clear that a finding of unbending price uniformity is not a requisite of a finding of conspiracy to control prices, but that any device which has the purpose and effect of fixing prices to consumers is an illegal restraint of trade. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-3, and 'it is not important that the prices fixed * * * were uniform and inflexible'. *Allied Paper Mills v. Federal Trade Commission*, 168 F. 2d 600, 607 (CA-7). The same principle applies to evidence that petitioners' bids on government contracts frequently were not uniform. We cannot say that the inference of agreement cannot stand in the face of such evidence."

forms, and refusal to give quantity discounts, respondents have been able to maintain substantial price uniformity in the sale of tetracycline. The question presented, therefore, is whether all of the respondents adopted these devices to facilitate the maintenance of price uniformity solely by individual decision, whether they did so by agreement, or finally whether they did so in a setting such that their acts violated § 5. A determination of this issue can be made only by considering all the relevant facts.

The hearing examiner states:

Of course it is clear that uniformity of price is an essential first step in the circumstantial chain necessary to infer agreement. Without such substantial uniformity, it would be difficult even to contend that a price-fixing conspiracy existed. *The confusion here arises in treating such uniformity as the only circumstance needed.* As shown above, this is fallacious. Given other persuasive circumstances ("plus factors") from which an agreement is inferable, together with price uniformity, the test has been met. The uniformity of price is but one circumstance, the first step in a chain of proof. Standing alone it cannot lead to an inference of agreement. [Emphasis added.]

But it is obvious from counsel's proposed findings that *they do not rely solely on the showing of substantial price uniformity to sustain the allegation of price fixing.* The hearing examiner acknowledges this fact himself in that section of the initial decision entitled "Miscellaneous Items of Evidence Concerning Prices".⁷⁴ But he rejected these "miscellaneous items" finding each document by itself inconclusive; and any inference to be drawn therefrom he held explained away by oral testimony.

In such a context, he has concluded that while "a price-fixing conspiracy may be inferred from circumstantial evidence and does not have to be proved by direct evidence of agreement, it is well settled that uniformity of prices, even though known to each trader, while one of the pertinent circumstances standing alone does not establish such an agreement." See *Pevely Dairy Co. v. U.S.*, *supra*; but cf. *C-O Two Fire Equipment Co., et al. v. U.S.*, 197 F. 2d 489 (1952). Thus, the examiner concluded that the allegedly neutral factor of price uniformity was not bolstered by other believable evidence. At best, the hearing examiner concluded that the case presented by complaint counsel amounted to "conscious parallelism" and this, he said, has clearly been held to be no offense under the Sherman Act.

⁷⁴In referring to this evidence the examiner states on page 168: "* * * based upon certain items of documentary evidence, primarily intracorporate memoranda during the period of the litigation, counsel supporting the complaint propose numerous findings to the effect that Pfizer, Cyanamid, Bristol, Squibb and Upjohn agreed to fix prices at that time. The items of evidence and exhibits frequently cited and relied upon by counsel supporting the complaint are as follows:" [Emphasis added.]

Our view of this matter requires some preliminary discussion. And in our opinion “* * * whether an unlawful combination or conspiracy is proved is to be judged by what the parties did not what they said”. *U.S. v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). Facts, not semantic labels, are the criteria of this Commission.

Preservation of competition is the main thrust of Section 5. Basically under that law we are concerned with the commercial impact of techniques employed by firms in maintaining or increasing their standing in the market place. In today's economy there are many industries which are characterized by “price leadership”. Characteristically, in such a market, each firm only changes its action when the “price leader” alters its course. On the other hand, both the nature of the product and profit considerations may create a situation where the sellers are more or less equal; and with no specific leader present and with no communication and no agreement, tacit or otherwise, each firm may adjust its actions to the other so that a type of happy symbiosis exists. *Cf. American Tobacco Co. v. U.S.*, 328 U.S. 781 (1948). Apparently the hearing examiner has concluded that the tetracycline market was an example of the aforementioned condition. Our view of the facts is different. And the power of this Commission to reverse a fact finding decision by a hearing examiner is substantially broader than the power of Federal Appellate Courts to reverse the findings of fact of Federal District Trial Courts. That this is so has been carefully articulated by the Supreme Court.⁷⁵ In *F.C.C. v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955), it stated:

The Court of Appeals * * * attitude goes too far * * *. It seems to adopt for examiners of administrative agencies the “clearly erroneous” rule of the Fed. Rules Civ. Proc., 52(a), applicable to courts * * *. The Federal Communications Act gives the Commission the power of ruling on facts and policies in the first instance.

Yet even under the more limited factual review power exercised by the Supreme Court, decisions of lower trial courts have been reversed under the “clearly erroneous” doctrine. See *United States v. The Singer Manufacturing Co.*, 31 U.S. L. Week 4674 (U.S., June 17, 1963).⁷⁶

⁷⁵ “But the Supreme Court in *Universal Camera* made it clear that the responsibility for decision is still on the Board or Commission.” Jaffe, *Judicial Review: Question of Fact*. 69 H. L. Rev. 1020, 1038 (1956).

⁷⁶ “The evidence here, including many findings of the trial court, clearly compels the conclusion that the parties' concerted activities were motivated by a common purpose, and the court's conclusion to the contrary must be regarded as clearly erroneous. *United States v. United States Gypsum Co.*, *supra*; see *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.*, 178 F. 2d 541 (C.A. 9th Cir., 1949).” 31 U.S. L. Week at 4680.

Thus the written and even the spoken word are always susceptible to varying interpretations and the equivocal nature of each separate document and each separate utterance may be heightened when it is placed *in vacuo*. From our experience we know that finding one document or even a series of documents spelling out in detail the existence of a conspiracy is a rare occurrence. Even more unusual is the conspiracy proven by the sworn testimony of the conspirators. But the law does not tell us that we must by some psychic tour de force, rip bare the collective psyches of respondents and reveal every factual detail of a conspiracy with precise clarity. Nor, on the facts of this case do we have to speculate whether the general existence of commercial peace in an oligopoly is a believable coincidence or whether, by itself, that condition creates the presumption of an agreement not to wage war. As to these respondents these questions have been answered by the record in this case. We find that the lack of aggressive tactics on the part of Pfizer, Cyanamid, Bristol, Squibb and Upjohn stands out starkly against a backdrop of conspiratorial contact, proven by direct and circumstantial evidence, culminating in the quiet smothering of competition. *Although the record reveals individual pieces of evidence susceptible to varying inferences the total impact of these respondents' conduct leads inescapably to the conclusion of a conspiracy in restraint of trade.*⁷⁷

Merely because the documents in this case do not amount to a signed and sealed written contract to fix prices does not mean that they may

⁷⁷ As indicated, the ruling of the hearing examiner was to the contrary. But we find the language of *U.S. v. U.S. Gypsum Co., et al.*, 333 U.S. 364, 395 (1947) especially appropriate here:

"The government relied very largely on documentary exhibits, and called as witnesses many of the authors of the documents. Both on direct and cross-examination counsel were permitted to phrase their questions in extremely leading form, so that the import of the witnesses testimony was conflicting. On cross-examination most of the witnesses denied that they had acted in concert in securing patent licenses or that they had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact."

This holding was recently reiterated and confirmed by the Third Circuit:

"The appellee argues that the findings may not be disturbed unless clearly erroneous. See Rule 52(a), 28 U.S.C.A. We do not agree that the "clearly erroneous" test is applicable on the present appeal. The findings of fact made by the trial court were based on a comparison of the exhibits and uncontradicted testimony of a single witness, and the inferences drawn from the evidence. It has been uniformly held by this Court, and others, that under these circumstances the findings of fact are reviewable on appeal, free of the impact of the said rule. *Sears, Roebuck and Co. v. Johnson*, 219 F. 2d 590, 591 (3d Cir., 1955); *Beurose Fabrics Corp. v. Rosenstein*, 183 F. 2d 355, 358 (7th Cir., 1950). Accord *Merchants National Bank and Trust Co. v. United States*, 246 F. 2d 410, 417 (7th Cir., 1957), cert. den. 355 U.S. 881 (1957), reh. den. 355 U.S. 920 (1958); *In re Kellett Aircraft Corp.*, 186 F. 2d 197, 200 (3d Cir., 1950); *Orvis v. Higgins*, 180 F. 2d 537, 539, 540 (2d Cir., 1950), cert. den. 340 U.S. 810 (1950). The argument advanced by the appellee is without merit." (*Surgical Supply Service, Inc. v. Sol H. Adler*, Slip Opinion, 3d Cir. — June 28, 1968, Pp. 4-5.)

be dismissed as of no probative weight. Certainly, the firms who authored them may offer an explanation. But explanation is not the equivalent of innocence. And so we turn to an examination of that documentary evidence supporting our conclusion that respondents have entered into a conspiracy violative of Section 5.

4. We begin with the evidence relative to the conduct of Bristol, Squibb and Upjohn at the time the two latter firms entered the tetracycline market. These firms hoped to acquire licenses under any patent Pfizer might receive. Bristol was fully aware, however, that Pfizer would never grant a license to a firm that would cut prices, and Pfizer regarded Squibb as one of the worst price cutters in the industry (CX 1056C). Certainly Pfizer would be more favorably disposed to licensing firms that would not destroy the value of its patent by extensive price cutting. Taking into consideration these circumstances, the only reasonable inference to be drawn from the following documentary evidence is that Bristol insisted on its two bulk customers adhering to the established prices.⁷⁸

Numerous intra-corporate memoranda prepared by Squibb's sales officials demonstrate that insofar as its tetracycline products were concerned, Squibb suddenly became obsessed with a desire to correct its "loose business practices" and to live down a reputation as a price cutter. On September 17, 1954, the day Squibb began marketing tetracycline under the trade name Steclin, the Squibb Manager of Marketing, Heberger, sent the following message to all representatives of his firm:

The Steclin pricing schedule must be adhered to strictly. Steclin is not to be involved in any special terms used to meet competitive situations on other antibiotic products.

Steclin should be sold direct in every case possible. When a handling credit situation must apply we will arrange 10% handling credit only on a drop shipment basis.

We have had some reports of competitive prices of Tetracycline products at variance with public schedules. Please send along to your branch promptly any

⁷⁸ The testimony of officials of Bristol, Squibb and Upjohn, together with documents obtained from these firms, show that at the time Squibb and Upjohn began buying tetracycline in bulk from Bristol there was at least a tacit understanding among these firms that they would sell tetracycline at the then existing price level. Bristol initially sold in bulk at \$1,000 per kilogram but promised to lower this price to \$350 in order to give Squibb and Upjohn a 3 to 1 profit ratio between their cost and the market price. Such assurance could have been given only if there was an understanding that all would adhere to the established price. That the ratio between cost and market prices was to be maintained and that the CCS price was to be uniform is evident by a memorandum prepared some three years later by a Squibb official. The following comment was made therein with respect to a low bid by Upjohn to a CCS institution: "Now since Upjohn buys their tetracycline from the same source as Squibb, either they are getting it at a better price or Bristol should be informed of this bid." (CX 252)

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specific information regarding such deviations you run into on your territory. (CX 204)

The following month Heberger stated that "Squibb cannot be officially connected with any price maneuver on Steclin which can be construed as cutting the price" and that "There can be no compromise with our position of maintaining prices on this product." (CX 207) And in November he said, "[I]t is our fixed policy not only to avoid price cutting on Steclin but to avoid any practice which might lay us open to such accusation." (CX 210)⁷⁹

Of even greater significance than the aforementioned memoranda are letters written by Squibb and Upjohn concerning an order obtained by Squibb from Los Angeles County Hospital. On April 27, 1955, Heberger wrote:

I was disturbed to learn that we were the successful bidder to Los Angeles County because we bid on Tetracycline 250 Mg. capsules \$22.49 per 100, less 2% discount. It is nice to get a Steclin order finally from Los Angeles County *but I have my fingers crossed, anticipating certain reactions to what we did, which may not be good.* [Emphasis added.] (CX 213)

On April 6, 1955, Upjohn's Los Angeles, California branch manager wrote to Upjohn's Price Determination Department Manager, as follows:

As requested, we are enclosing the results of the bids at Los Angeles County Hospital:

864 Tetracycline Caps. 250 Mg. went as follows:

Pfizer.....	\$22.49, 2% 15th proximo
Squibb.....	22.49, 2% open
Lederle.....	22.49, net
Bristol.....	22.49 net

Homer Hammond feels Squibb will get the bid with an open 2% time limit * * *.

* * * * *

We will forget that one. On the Panmycin it looks like Squibb scuttled our ship. *I wonder if Bristol will complain to them as they did with us.* [Emphasis added.] (CX 473)

These letters are evidence of an understanding among the three firms (Bristol, Squibb and Upjohn) that they would not deviate from estab-

⁷⁹ Memoranda prepared three years later show that there was no deviation in Squibb's policy of avoiding price competition. In a memorandum prepared on October 22, 1957, a Squibb official stated that Squibb would be competitive on penicillin and streptomycin products and that it would be "willing to meet or beat anything Pfizer quoted." (CX 250) This memorandum further stated, "We cannot do this on the broad spectrum, but on our own Penicillin and Streptomycin products we can." Evidence of this type showing that respondents themselves were aware of the fact that tetracycline prices were noncompetitive is not consistent with the examiner's finding of extensive and substantial price competition.

lished prices. Moreover, they show that Bristol was trying to keep Squibb and Upjohn in line. There is also evidence in this connection that Squibb was keeping track of Bristol's deviation and had obtained from Bristol explanations for each of them. A document in Squibb's files entitled "*Bristol Price Variations*" (emphasis added) listed the names of eight institutional accounts, the price reduction or "free goods" deal made to each and the reason therefor. (CX 308) For example, the Squibb list on Bristol's price variations shows that a bid of \$19.76 by Yants Pharmacy of Bakersfield, California of Bristol products to the State of California, was "*unauthorized*"; that a one-for-one "free goods" deal to Jefferson Hospital of Philadelphia was a "*mistake*"; and that Mark Surgical Supply for University Hospital of Augusta, Georgia, received a ten percent discount because it was a "problem account". It is, of course, possible that Yants Pharmacy could have informed a Squibb representative that Bristol had not authorized it to bid \$19.76. It is unlikely, however, and we do not believe that Jefferson Hospital informed Squibb that a reported "free goods" deal was a "mistake" or that Mark Surgical Supply for University Hospital told Squibb that it was a "problem account". (There is nothing in the record to indicate that Squibb considered Mark a problem account). It is also unlikely that the writer of the document was guessing here since elsewhere in the document he used the word "probably" to indicate doubt as to the accuracy of an explanation. The Squibb document also states that Bristol's "cost of free goods and samples" during a seven month period was 7.5 percent. It would also seem unlikely that Squibb could obtain from its own field personnel such complete information as to Bristol's total sales and its "cost of free goods and samples" that it could determine precisely (to one-half of one percent) the cost of the latter or that it would even attempt to make such a determination. We are convinced, for the foregoing reasons, that the explanation for Bristol's "variations" and the information as to the cost of "free goods" and samples were obtained by Squibb from Bristol.

Cyanamid's and Pfizer's involvement in the price-fixing conspiracy is manifest in the following documents.

On May 27, 1954, the Cyanamid Chicago Regional Manager sent the following message to his sales manager:

Apparently Pfizer and Roerig [a sales division of Pfizer] are abiding by reduction of samples because the number of calls from all reports from the field since my return from Absecon, have been practically none. (Emphasis added.)
(CX 598B)

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And, on June 17, 1954, he wrote:

Within the last thirty days, complaints from the field regarding the Pfizer and Roerig operations have been practically nil. From all indications, it is presumed that these competitors *are adhering to the operation that was reported by Mr. Wendt* [Cyanamid's Director of Sales] at the Regional Manager's Meeting. (Emphasis added.) (CX 594A)

About one year later the same Cyanamid representative made the following comment with respect to the furnishing of free tetracycline to Michael Reese Hospital, Chicago, Illinois:

Approximately *one year ago*, we were furnishing this same institution material for clinic use through Dr. Kagan, Chief of Pediatrics. *This procedure was stopped due to a report by Pfizer to Mr. Wendt.* (Emphasis added.) (CX 595)

The record also shows that in March 1955, shortly before a fourteen month period of noncompetitive bidding to the Veterans Administration, a Cyanamid representative reported that Pfizer was undercutting Cyanamid and "everybody" on bid prices to certain CCS hospitals. He then stated in the report that "This should be checked into and *prices arranged* as we have done on the VA setup." (Emphasis added.) (CX B558)

Another Cyanamid representative stated on July 30, 1955:

If Pfizer is trying to hold the price line, would it be helpful to collect some copies of bids showing the low-cut bids by Pfizer's accounts so that Pearl River [Cyanamid] could show them to Pfizer officials? (CX 579B)

Both Cyanamid and Pfizer, however, were concerned over bulk sales by Bristol, since both believed that additional marketers of tetracycline could disrupt the stabilized price structure. Their views on this subject are clearly revealed by conversations between Pfizer's officials and Schwartz, president of Bristol; by Pfizer's announced intention to "stop" Bristol, after the latter began selling in bulk to Squibb and Upjohn; by statements of Cyanamid's officials before the Patent Office; and by Cyanamid's suit to stop Bristol shortly after Bristol began selling tetracycline in bulk in September, 1954. (See Findings 8, 11, 16 and 17.)

All the firms were in touch with each other, from the settlement of the first interference, throughout the prosecution of the second interference, during Pfizer's patent infringement suit, continuing through the licensing arrangements and thereafter.

As early as May 1954, Bristol, which just recently had entered the market, was exchanging price lists with Upjohn, its customer and competitor; Bristol was assured that " * * * there will be no question as to your receiving the proper pricing information."

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MAY 24, 1954.

Mr. OWEN BAUGHMAN,
General Sales Department,
The Upjohn Company,
Kalamazoo, Michigan:

I am in receipt of your very nice letter of May twentieth, and in reply I would like to suggest that the supplements and revisions to the catalog you have earmarked for Mr. W. A. Owen in Syracuse be changed to:

Manager, Sales Service Dept.
Bristol Laboratories, Inc.
Syracuse 1, New York.

By doing it this way, the material will be delivered to the proper person.

We are contemplating including a loose-leaf pricing schedule in the Therapeutic Manual, and at that time there will be no question as to your receiving the proper pricing information.

However, until that is done, I am enclosing our latest pricing schedule. This in turn is due for revision shortly, as it is currently full of stickers containing additional pricing information.

I believe that currently we have sufficient of your catalogs. Again, thank you for your very nice letter.

Very truly yours,

BRISTOL LABORATORIES, Inc.
PAUL T. REES, Sales Manager.

(CX389)

Then in November 1954, after the dissolution of the second interference—Upjohn, Bristol's customer sent Cyanamid its "domestic catalog".

NOVEMBER 29, 1954.

A Domestic Catalog was mailed today to:
Lederle Laboratories Div.,
American Cyanamid Co.,
Att: Mr. Robert S. Andrews,
International Sales Education,
30 Rockefeller Plaza,
New York 20, N.Y.

Will you please add the above to your mailing list, to receive new and replacement pages as they are issued.

(CX391)

Again in June of 1955, in the midst of Pfizer's struggle to oust Bristol, Squibb and Upjohn from any role in the tetracycline market, H. H. Kibbe, Manager of the Pfizer "Pricing Department" wrote to his counterpart at the Upjohn Company:

Under separate cover, we are sending you a copy of the new Pfizer Laboratories loose-leaf Price Schedule. When new products are added to our line, you will receive supplemental price pages in the form of "Pfizer Scripts", a new series of price and product information folders. These pages, when inserted in the proper sequence as indicated, will keep your price list up to date.

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We would like you to mail a copy of your current catalog to the writer's attention and will appreciate your placing your name on our mailing list for new product and price change information.

Thank you for your prompt attention.

H. H. KIBBE.

(CX392)

The reply from Upjohn was as follows:

JUNE 9, 1955

Thank you very much for sending us a copy of the new Pfizer Laboratories loose-leaf price schedule. We will also look forward to receiving the 'Pfizer Scripts' and will see that they are inserted promptly to keep your price list up to date: Information folders should be directed to my attention.

We have mailed you a copy of the Upjohn catalog, and your name has been placed on our mailing list so that you will receive reprinted pages as they are prepared.

(CX393)

Then on January 18, 1956, Bristol's Sales Service Department wrote to Upjohn as follows:

Thank you very much for your prompt attention and reply to my letter of January 13th. In regard to your mailing list concerning Bristol Laboratories, Inc., you may remove Mr. W. A. Owen's name from the list. Mr. Owen is no longer connected with the Sales Department. We will appreciate your listing

Bristol Laboratories, Inc.
630 Fifth Avenue
New York, New York
and

Bristol Laboratories, Inc.
Sales Service Department
P.O. Box 657
Syracuse, New York

for additional information which you may distribute in the future.

Two (2) Bristol Therapeutic Manuals will be sent to Mr. H. E. Shepard promptly and we have added Mr. Shepard's name to our mailing list.

Two (2) new pages for the Therapeutic Manual have been issued since June 1955. I have asked that these be mailed to your attention. (CX395)

In 1957, Mr. Kibbe of Pfizer, once more contacted Mr. Shepard of Upjohn to insure that both firms had an up to the minute knowledge of each others pricing practices.

PFIZER LABORATORIES,

July 24, 1957.

Under separate cover we are sending you a complete new set of price pages for your Pfizer Laboratories loose-leaf catalog. Kindly remove all pages from your present cover and insert this refill.

When new products are added to your line, you will receive announcements in the form of "Pfizer Scripts", a new series of price and product information folders. These pages when inserted in the proper sequence will keep your copy of our price list up to date.

Thank you for your cooperation.

(CX 400)

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The entry of Squibb and Upjohn into the tetracycline market created some problems, but not ones as serious as those anticipated by Cyanamid and Pfizer. Both of the newcomers were endeavoring to adhere to established prices, but the mere increase in the number of sellers increased the likelihood of price variations. For example, the record shows that Squibb and Upjohn were giving CCS prices to a hospital which Cyanamid had classified as NPA. A Cyanamid memorandum (CX 581) recommended that Squibb and Upjohn be contacted with reference to their classification of this hospital. The record also shows that even though all the respondents may have been aware of the mutual benefits to be derived by avoiding price competition, none of them could be sure that it could always depend on the others to adhere to the prevailing price without continued surveillance and conspiratorial action. This was particularly true in hospital and federal markets where large spot sales could be captured by small price reductions.

An agreement among the five respondents, Pfizer, Cyanamid, Bristol, Squibb and Upjohn, not to deviate from published prices was therefore necessary to insure uniformity of price quotations.

Shortly before the tetracycline patent infringement suit was settled, Cyanamid's Director of Sales wrote the following letter to Bristol's Director of Sales:

11/22/55.

Dear DICK:

I am enclosing the most recent prices on all of our Achromycin (Cyanamid's trade mark for tetracycline) prices, together with what we call a Trade Class chart. This Trade Class chart is our standard procedure for classifying accounts for our Lederle Purchase Plan and our handling charge policy.

Our branches are instructed to follow this chart with great precision. Basically, except for the subject of our discussion Friday afternoon, there are no deviations. I might say that the branch offices do not report to the Sales Department but rather to the Treasurer's Office, so that the opportunity for special situations is non-existent.

Our Dominion price for 250 mg. has been and will continue to be \$17.01. This price applies to the Department of Defense Production and the Department of Veterans Affairs. Our price to the Canadian Provincial Department is \$25.50.

The name of the hospital survey group is Davee, Koehnlein & Keating at One North LaSalle Street, Chicago, Illinois.⁶⁹

Sincerely,

⁶⁹This letter, found by a Commission attorney in Bristol's files, was in a mutilated condition with the identity of the sender removed therefrom. Bristol's explanation of the existence of the document and its condition prompts us to react to Bristol's explanation in a manner similar to Mr. Justice Jackson's reaction to the majority opinion in the second *Chenery* case: "I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'" *S.E.C. v. Chenery Corp.*, 332 U.S. 194, 214 (1947).

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We think it clear from the text of this letter (CX 328) that the writer was referring to *all* of Cyanamid's Achromycin prices in the first two paragraphs thereof, thus, both the prices in the United States and Canada. Furthermore, there was no evidence introduced to indicate that the policies referred to in the first two paragraphs were limited to Canada or that these policies were not equally applicable in the United States—for example, "that the branch offices do not report to the Sales Department but rather to the Treasurer's Office, so that the opportunity for special situations in non-existent." It was only in the third paragraph that the writer specified Canadian prices.

The most significant feature of this document is that it contains assurances to Bristol that Cyanamid would adhere to its published prices. Certainly Cyanamid would not give such assurances to Bristol without an understanding that it would not be undercut by Bristol. Clearly both firms must have agreed not to deviate from the published prices.

In the third paragraph the writer discusses Cyanamid's price for 250 mg. capsules to agencies of the Canadian government. The Dominion price was secret information, but Cyanamid not only furnished it to Bristol but again gave assurance that the price "will continue to be \$17.01." It is also of some significance in this connection that Pfizer was also bidding \$17.01 to the Canadian government.⁸¹

The conclusion is also inescapable that Cyanamid would not have given such secret information to Bristol unless it had received assurance that Bristol would not undercut this price.

Within a few weeks the infringement suit was settled, and Pfizer licensed Bristol, Squibb and Upjohn to sell under its patent. An awareness or recognition of an agreement on prices is reflected in various documents such as the following memoranda and letters written after settlement of the aforesaid infringement suit.

On December 16, 1955, the Squibb Manager of Marketing wrote:

On Bid No. 635 for 100's of tetracycline 250 mg. Lederle's product was offered at \$21.08 per 100. *In order to properly record this violation I must know whether this was a direct bid by Lederle, or whether the bid was made through a dealer.* (Emphasis added.) (CX 220.)

On April 5, 1956, the same official wrote:

In checking back over your recent report on Tetracycline Bids to the King County Hospital, I notice that Joseph Hart and Northwest Medical quoting

⁸¹ The examiner erroneously found that Cyanamid and Pfizer were bidding at different prices since Pfizer had bid \$16.67 and Cyanamid had bid \$17.01. Cyanamid's bid of \$17.01, however, less its usual 2% discount amounts to \$17.01 less \$.34 or \$16.67.

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on the Pfizer product cut the price to \$20.23 and \$20.44 respectively. Bracken quoting on the Lederle product quoted \$21.00.

* * * * *
 You will notice that all three dealers quoted within the frame work of their 10% handling credit. *We can only assume that it was a decision made by the dealers and that there is no official approval of what they are doing.* Of course, our own bid must be strictly in accord with the schedule. (Emphasis added.) (CX 222)

The following sales memorandum was prepared on May 11, 1957, by a Bristol official:

On a bid that opened on 5-10-57 for the Ohio State University Hospital which called for a 10-100 Tetracycline Phosphate Complex, both Bristol and Upjohn conformed to the state price whereas Squibb bid it at 22.04 net. I fully realize that 22.04 net is theoretically the same as 22.49 less 2%, and on this particular bid it amounts to the same thing. However, supposing the bid had called for 100-100 or 150-100 which they have been buying of the HC1 Salt, then Squibb would have been awarded the bid because they would have been .02 or .03 less than our bid.

I am only calling this to your attention Charlie in order to stop whatever precedent may occur in the future. This is a very technical point, but as you know, .02 or .03 can make the difference whether you are awarded the bid or not. The bid or Inquiry No. is 2791-D-61510, and was signed by Paul Wherry, one of the Squibb representatives.

I hope this does not happen in the future, *and if we can nip it in the bud I am sure that it will not be tried elsewhere.* (Emphasis added.) (CX 843.)

5. In addition to the evidence referred to above, there are also in the record other documents which establish beyond doubt that respondents did not compete pricewise and that they deliberately confined their rivalry in the tetracycline market to areas other than price. In view of this evidence, certain inferences drawn by the hearing examiner from a shift in market shares is without foundation. For example, he has drawn an inference from a shift in the shares of the retail market held by Cyanamid and Pfizer to Bristol, Squibb and Upjohn that there was price competition and that no price fixing conspiracy existed among the five firms. The record shows, however, and respondents have conceded, that the prices to retailers were uniform throughout the period relevant to this proceeding. Consequently, the shift in shares in the retail market could not have been caused by price differences or price competition and the shift might have occurred whether or not these prices were fixed by agreement.

When Bristol, Squibb and Upjohn entered the tetracycline market, selling the same product at the same price as that charged by Cyanamid and Pfizer, some shift in market shares could reasonably be expected. While the "lead time" in tetracycline sales enjoyed by Cyanamid and Pfizer may have given these firms a significant initial

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advantage over Bristol, Squibb and Upjohn, no one, except the hearing examiner, has seriously suggested that it constituted an absolute barrier to sales by the new entrants in the market. Under the circumstances, changes in market shares were bound to occur. Moreover, the record shows that respondents did compete in promoting their respective brands of tetracycline in many ways short of actual price competition. The examiner, however, has completely ignored the existence of other forms of competition in drawing the inference that the shift in market shares was caused by price competition. At best the evidence of a shift in market shares is but one "neutral" factor.

The importance of other competitive methods is best demonstrated by respondents' own writings. To illustrate, the following statement from a report by Bristol Laboratories to Bristol-Myers on April 25, 1955, emphasizes the role of the "detail man":

The chief market for our penicillin has always been the hospital. This was true because penicillin sales were largely sales of injectable items. Furthermore, purchases were generally quantity purchases. The price situation was such that on these quantity purchases, the company's willingness to meet price cuts of competitors rather than the salesman's ability was the final determining point in our getting or losing a sale.

Tetracycline sales, on the other hand, are overwhelmingly prescription sales. Our price is no lower than the prices of competition. Sales result when the detail man convinces a physician that our product and service offers advantages over that of someone else. The salesman has thus become the key factor in the case of injectable penicillin. (CX 370B.)

The lack of emphasis on price competition is shown by the following memorandum prepared by Upjohn shortly after it entered the tetracycline market:

It has been brought to our attention that you are inferring or directly stating to the physician that the Upjohn Company is going to reduce, lower or bring the price down on Panmycin. This, I am sure, is the farthest point in our minds * * *.

I urge you to refrain from implying or directly stating that it is our intention to reduce the price and that we make no mention of our doing so in our details.

We should have no reason to assume that the price could or would be reduced in the near future. With the price and market already established, I feel we need not use the price discussion as the cardinal point in our detail * * *. (CX 390.)

and the following letter concerning CCS prices prepared by a Squibb official in 1957:

Concerning the bid which will be opened on the 18th proposal #125478 I am wondering about the price of .67 net you quoted on 24 vials of Steclin IM 100 mg. Regardless of the amount involved we have never been able to drop

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the mills in connection with Tetracycline IM. In other words, we quote .6713 net and not .67.

This is a matter of considerable concern because our price would be lower than that of our major competitors were we to drop the mills.

Will you please advise me concerning your authority for this .67 price? (CX 244).

XIV

CONCLUSIONS AS TO THE PRICE FIXING CHARGE AS TO CYANAMID, BRISTOL, SQUIBB, UPJOHN AND PFIZER

We have examined with care each document and the entire transcript of record. Being aware of the seriousness of a price fixing charge, we have not blithely assumed that casual comment and chance remarks amount to conspiratorial contact. To the contrary, we have examined all conflicting evidence and the reasonable inferences to be drawn therefrom. We can only come to one conclusion—that respondents, Cyanamid, Pfizer, Bristol, Squibb and Upjohn conspired to fix and maintain prices.

There is of course little evidence of any *express* agreement to do what the law forbids but no such “evidence is required, nor is the Commission required to accept the denials of those charged with the conspiracy, merely because there is no direct evidence to establish it * * *.” *Bond Crown & Cork v. Federal Trade Commission*, 176 F. 2d 974, 979 (4th Cir., 1949), and as was emphasized recently by the Supreme Court: “* * * judicial inquiry is not to stop with a search of the record for evidence of purely contractual arrangements * * *. Whether the conspiracy was achieved by tacit agreement or by acquiescence * * * coupled with assistance in effectuating its purpose is immaterial”.⁵²

Admittedly, we do not have a record with the “True Confessions” of each respondent of its role in the price conspiracy. We have a record of both direct and circumstantial evidence interspersed with documents, letters and memoranda exchanged between the key sales and pricing department managers of the various respondents, and intra-corporate documents referring to prior inter-corporate contacts

⁵² *United States v. The Singer Manufacturing Company*, 31 U.S. L. Week 4674 at p. 4680, quoting and citing with approval from *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, at 723 (1944).

Moreover, this Commission itself has been sustained as a fact finder when it relied upon one single hearsay document to prove a conspiracy. As the court composed of Judges L. Hand, Frank and Swan stated in that case, “[i]t is true that * * * [the] memorandum is hearsay; but it is persuasive hearsay and the Commission is not bound to follow the strict rules of evidence which prevail in courts of law. (*John Bene & Sons v. Fed. Trade Com.*, 299 Fed. 468 (CCA 2).)” See *Phelps Dodge Refining Corporation v. F.T.C.*, 139 F. 2d 393, 397 (1943).

on prices, price uniformity and "violations" of price uniformity. *Cf. Schine Theaters v. United States*, 334 U.S. 110 at 117 (1948).

* * * neither knowledge of the conspiracy alleged nor participation therein need be proved by *direct* evidence, even in criminal prosecutions where the rule of proof is more strict than in civil conspiracy cases." *Flint Kote Co. v. Lysford*, 246 F. 2d 368 (9th Cir., 1957), cert. denied, 355 U. S. 835. (Emphasis Added.) And in *Paoli v. U.S.*, 352 U.S. 232 (1957) the Supreme Court declared:

Participation in a criminal conspiracy may be shown by circumstantial as well as direct evidence.

Speaking in more colorful terms the Ninth Circuit said in *C-O Two Five Equipment Co. v. United States*, 197 F. 2d 489, 494 (9th Cir., 1952):

A conviction resting solely upon circumstantial evidence is not an innovation. It is we think well established that the proof and evidence in an antitrust conspiracy case is in most cases circumstantial. Proof of a formal agreement is unnecessary, and were the law otherwise such conspiracies would flourish; profit rather than punishment would be the reward.

Nor can we accept respondents' contention that the conspiracy must be completely proven by direct evidence. Even in criminal cases "circumstantial evidence such as [does not] exclude every reasonable hypothesis other than that of guilt", may be the basis of a finding of guilt. *Holland v. United States*, 348 U. S. 121, 139 (1954).

In addition we have been alert to "the dangers of transference of guilt from one to another across the line separating conspiracies", *Cf. Kotteakos v. U.S.*, 328 U.S. 750, 776 (1946). Moreover, in contrast to *Kotteakos*, *supra*, we conclude that there is but one conspiracy and in this one conspiracy "* * * the guilt or innocence of each defendant [has been] determined by [us] separately". See *Blumenthal v. United States*, 332 U.S. 535, 560 (1947). And once the conspiracy is established "a relatively small amount of evidence connecting a particular defendant will suffice * * *." *Morton Salt Company v. United States*, 235 F. 2d 573, 580 (10th Cir., 1956). Finally, we wish to make it clear that this is not a case of "conscious parallelism" *Cf. Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954). Here we find an active conspiracy in which all the respondents shared in the ill gotten fruits originally secured by Pfizer at the Patent Office.

In conclusion, we find that all five of the respondents, Cyanamid, Bristol, Squibb, Upjohn and Pfizer, conspired to fix and stabilize prices in the prescription NPA and CCS markets. That a conspiracy of this nature is a violation of Section 5 is beyond cavil: See *Federal*

Trade Commission v. Motion Picture Advertising Service Co., 334 U.S. 392, 395 (1953).

XV

DISCUSSION OF REMEDIES

We turn now to the problem of an adequate remedy. By reason of the conspiracy found herein, respondents have restrained price competition among themselves. Accordingly, the final order contained herein requires each respondent to cancel existing price lists and independently to determine new prices based on its own manufacturing and overhead costs and desired margin of profit.

As a necessary prelude to free and effective competition in the tetracycline market, one possible remedy is an order against Pfizer and Cyanamid enjoining them from refusing to give licenses under their tetracycline and Aureomycin patents. Courts have long deemed a compulsory license decree an appropriate remedy to antitrust misuse of patents. *Hartford Empire Co. v. United States*, 323 U.S. 386 (1945); *United States v. National Lead Co.*, 332 U.S. 319 (1947); *United States v. United States Gypsum Co.*, 340 U.S. 76 (1950). Although such decrees usually include a provision allowing the patentee to collect reasonable royalties, it is by no means settled that compulsory royalty-free licensing (or an injunction against enforcement of the patent) is beyond a court's discretion in all cases. In *Hartford Empire Co. v. United States*, *supra*, the Court refused to grant the government's request for a royalty-free decree and indicated that such remedy was not within a court's power unless so provided by Congress. But in *United States v. National Lead Co.*, *supra*, at 338, the Court expressly left open this question (and the question of constitutionality of such a decree) for consideration in future cases.

The matter has not yet been authoritatively settled, but some courts have proceeded on the assumption that they have such authority. The District Court in *United States v. General Electric Co.*, 115 F. Supp. 835 (D. N.J., 1953) found the defendants had restrained trade in the sale of electric lamps. The court ordered dedication of all existing patents on the lamps with this explanation: "To compel the completely free use of these patents is not to impose upon General Electric and other defendants penalties for misuse of patents and violation of the antitrust laws, but rather to check the intrusion of advantages thereby gained into the mechanics of competition in the lamp industry." The court decided that the defendants should not be given the advantage of reasonable royalties, since many patents were involved and requiring the smaller operators "to shoulder royalties * * * could

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prove to be the very factor that would push them out of the competitive circle of the market." *Id.* at 844. See also *United States v. American Can Company*, 1950-1951 Trade Cases, Par. 62,679 (N.D., Cal., 1950) and *United States v. Radio Corporation of America*, 1959 Trade Cases, Par. 69,459 (E.D. Pa., 1959) (Consent Decree).

It has been suggested that in compulsory license decrees the defendant be allowed to impose royalties when and if it can convince the court that the effect of its illegal activity has been fully dissipated. See *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 256 (1955). Also, we think the decisions make it clear that compulsory disclosures of know-how and technical assistance are proper adjuncts to a compulsory licensing mandate when the circumstances demand it. See, e.g. *United States v. National Lead Co.*, *supra*.

This Commission "is clothed with wide discretion in determining the type of order that is necessary to bring an end to the unfair practices found to exist". *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 428 (1957). We think that under the applicable decisions and considering the nature of Pfizer's and Cyanamid's misconduct before the Patent Office, this Commission has adequate authority to require a royalty-free license "if it is necessary to pry open to competition a market that has been closed by [respondents'] illegal restraints." (*International Salt Co., Inc. v. United States*, 332 U.S. 392, 401 (1947).)

We feel it our duty to consider carefully the alternative forms of remedy available to suppress the effects of these respondents' actions. For this reason we are not now issuing a final order on the future use of tetracycline and Aureomycin patents but desire complaint counsel and respondents to submit their own respective proposed orders in conformity with our decision together with reasons in support thereof. A separate order accompanies this decision setting forth the questions to be discussed.

Commissioner Anderson concurs in part and dissents in part. Commissioner Elman's position in this case is set forth in a separate opinion.

OPINION

AUGUST 8, 1963

By ANDERSON, Commissioner, concurring in part and dissenting in part:

I concur in the result reached by the Commission in this proceeding. However, I feel constrained to say that, in my opinion, it is only by

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the narrowest margin that the evidence supports the allegation as to price fixing by Squibb and Upjohn.

It is also my view that Paragraph 1 of the order to cease and desist is far too broad. In the first place, we have found that respondents have "engaged in unfair methods of competition by conspiring to fix and maintain the selling price of tetracycline" but our order relates to all antibiotics, both broad and narrow spectrum. Secondly, the order, by the inclusion of the words "knowingly common course of action," would prohibit respondents from engaging in pricing practices falling far short of those alleged in the complaint and found to be unlawful. For the first time, to my knowledge, it appears that we are prohibiting consciously parallel behavior, even though such behavior does not stem from agreement, tacit or express, but merely the independent decision of one firm to follow the price leadership of another.

OPINION

AUGUST 8, 1963

By ELMAN, *Commissioner*:

Mr. Justice White, concurring recently in a case not wholly dissimilar to the instant case, said: "[C]learly collusion among applicants to prevent prior art from coming to or being drawn to the [Patent] Office's attention is an inequitable imposition on the Office and on the public. In my view, such collusion to secure a monopoly grant runs afoul of the Sherman Act's prohibitions against conspiracies in restraint of trade * * *." *United States v. Singer Mfg. Co.*, 31 U.S. L. Wk. 4674, 4682 (citations omitted). Here we have not collusion, but deliberate material misrepresentations to prevent prior art from coming to or being drawn to the Patent Office's attention, as the keystone of an effort to secure a monopoly grant; not a conspiracy in violation of Section 1 of the Sherman Act, but an attempt to monopolize a substantial market in violation of Section 2 of that Act and Section 5 of the Federal Trade Commission Act.

As the Commission's opinion and findings convincingly demonstrate, respondent Pfizer deliberately misrepresented to the patent examiner the state of the prior art bearing upon the patentability of tetracycline, and its misrepresentations were material to its obtaining a patent on tetracycline. If Pfizer's conduct before the Patent Office amounted to fraud, the patent procured thereby would be cancellable in an appropriate proceeding. *United States v. American Bell Telephone Co.*, 128 U.S. 315, 370. (This would not mean, of course, that tetracycline was unpatentable, but only that Pfizer's patent on tetra-

cycline was invalid.) But the Commission need not, and, as I understand its opinion, does not, determine in this Section 5 proceeding whether Pfizer's patent is invalid for all purposes and under all conditions.

The evidence of record demonstrates beyond cavil that Pfizer procured the patent for the purpose of monopolizing the manufacture of tetracycline, or, what amounts to the same thing, of permitting the manufacture of tetracycline by others only on terms acceptable to Pfizer. The patent was obtained in order to prevent competition in the manufacture and distribution of tetracycline. Pfizer well knew that if tetracycline, like penicillin, could be freely manufactured and sold by others on a competitive basis, its price would fall steeply just as the price of penicillin had fallen in the recent past. By procuring a patent on tetracycline, and thereafter licensing its manufacture selectively, Pfizer created, and succeeded in maintaining, a non-competitive price structure in the tetracycline industry—and, as a result, the price of tetracycline has remained at the uniform high level established when it was first produced.

In my opinion, Pfizer's conduct, viewed in its entirety in the setting of the tetracycline market, violated Section 2 of the Sherman Act and therefore Section 5 of the Federal Trade Commission Act.

To be sure, one who, in attempting to achieve monopoly power in an industry through obtaining and then exploiting a patent, does no more than prosecute successfully a patent application in the manner prescribed by law, does not violate the antitrust laws. Such an "attempt to monopolize", unaccompanied by collusion or fraud, is privileged by the patent laws. But Pfizer cannot find shelter in the patent laws for its attempt to monopolize the tetracycline market, because in prosecuting its application for a patent, Pfizer breached the legal duty it owed the Patent Office of full and fair disclosure of material facts. The short of this case is that Pfizer's attempt to monopolize the manufacture of tetracycline could not succeed unless a patent were issued to it; in attempting to secure the patent, Pfizer deliberately made material misrepresentations concerning the prior art; its conduct, being "an inequitable imposition on the Office and on the public," could not be legitimized by anything in the patent laws, and consequently stands forth as a plain violation of Sections 2 and 5. And this is so whether or not the patent itself be deemed invalid by reason of Pfizer's wrongful conduct in acquiring it. The point here is that such conduct makes unavailable to Pfizer any justification or defense, to the charge of unlawful attempted monopolization, predicated on the patent laws.

Furthermore, since the "unfair methods of competition" proscribed by Section 5 are not confined to those made unlawful by the Sherman Act, it is not necessary that a violation of Section 2 be found. See *Federal Trade Commission v. Motion Picture Advertising Service Co.*, 344 U.S. 392. Pfizer's conduct comes sufficiently within the general range of the evils which Section 2 was designed to remedy as to constitute an unfair method of competition within the meaning of Section 5.*

My conclusion that Pfizer has violated Section 5 does not, of course, rest upon the premise that the prosecution of a patent application before the Patent Office in circumstances giving rise to an inference of "unclean hands", "inequitableness", "bad faith", and the like constitutes, without more, an unfair method of competition in violation of Section 5; nor do I view the Commission's decision as based on so sweeping a ground. Not every patent is commercially valuable or confers on the patentee the power to monopolize or to restrain competition in a substantial market. Implicit in the disposition of this case, as I see it, is a recognition that tetracycline is a unique and valuable product, commercially as well as therapeutically; and its manufacture and sale compose a substantial market. An attempt to monopolize such a market is a violation of Section 5, and no less so because the monopolistic scheme embraces the securing of a patent by fraud or misrepresentation. Pfizer's conduct, in its totality, constituted such an illegal attempted monopolization. But our concern, it must be emphasized, is not with unfairness, as such, in the prosecution of patent applications before the Patent Office. This Commission was established to preserve and protect *competition*, and frauds or misrepresentations occurring in proceedings before the Patent Office become our concern only to the extent that they affect competition.

Pfizer's violation of Section 5 justifies an order limiting Pfizer's free enjoyment of its patent in such fashion as to establish and maintain in the tetracycline industry conditions favorable to competition. Certainly the order should compel Pfizer, at the very least, to license its patent on equitable terms to all firms that wish to enter the tetracycline market. If effective relief along these lines should be directed, the serious questions involved in the price-fixing part of this case will become almost academic. As the Commission in its opinion seems to recognize, the basic factor making for price uniformity in the tetra-

* Respondent Cyanamid's misrepresentations to the patent examiner, which were designed to enable Pfizer to obtain its patent for the purpose of fostering an anticompetitive market structure from which Cyanamid along with Pfizer would reap benefits, seem to me also to violate Section 5 and justify an order respecting the Cyanamid patent on Aureomycin insofar as Aureomycin is the raw material from which tetracycline is produced by the deschlorination process.

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cycline industry is not any conspiracy or agreement among respondents, but the economic structure of the industry, which is the consequence of Pfizer's patent. As a result of Pfizer's success in obtaining a patent, and its selective licensing thereunder, the industry, both in its manufacturing and marketing aspects, contains very few firms; in a word, it is oligopolistic. In such an industry, economists tell us, each firm may decide individually not to engage in substantial price competition, even when demand for its products slackens, because each firm realizes that its price cut will be quickly matched by its competitors, resulting in diminished profits for all. The structure of such an industry, then, will compel or invite non-competitive pricing independently of the existence of overt agreement among competitors. There may or may not be an agreement among respondents, unlawful under Section 1 of the Sherman Act, to pursue an industry-wide policy of non-competition in price; but plainly it is the market structure built upon Pfizer's wrongfully procured patent, and not any actual agreement, that has closed the door to competition, and will tend to keep the door closed even if the agreement is enjoined.

If the Commission, by an order designed to overcome Pfizer's attempt to monopolize, opens the industry to competition, new firms are bound to enter and in that event the industry's oligopolistic structure will rapidly crumble. When this happens, the salutary purposes of this proceeding will be accomplished, and the necessity or appropriateness of relief directed against any price-fixing agreement among the present firms in the industry, *i.e.*, the respondents herein, will disappear. The alleged price-fixing agreement here is tailored to the existing structure of the industry, and only the existing members of the industry are alleged to be parties to it; once that structure changes by order of the Commission, the existing agreement will be deprived of its efficacy. Accordingly, in my view of the case it is unnecessary to reach, and I express no opinion upon, the Commission's finding of a price-fixing or price-stabilizing conspiracy, and its proposed order based upon such finding.

FIRST TWO PARAGRAPHS OF FINAL ORDER AND DIRECTIONS FOR FILING
OF ADDITIONAL BRIEFS WITH PROPOSED ORDER *

AUGUST 8, 1963

The Commission having rendered its decision in this proceeding, granting the appeal of counsel supporting the complaint, vacating and setting aside the initial decision and making its own findings as to

* The effective date of pars. 1 and 2 of Part I was stayed by Commission's order of Sept. 27, 1963.

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the facts, conclusions and order in lieu of findings as to the facts, conclusions and order contained in the initial decisions; and

The Commission having found that respondents Chas. Pfizer & Co., Inc., American Cyanamid Company, Bristol-Myers Company, Bristol Laboratories, Inc., Olin Mathieson Chemical Corporation, and The Upjohn Company have engaged in unfair methods of competition by conspiring to fix and maintain the selling price of tetracycline:

I. FINAL ORDER

1. *It is ordered*, That respondents Chas. Pfizer & Co., Inc., American Cyanamid Company, Bristol-Myers Company, Bristol Laboratories, Inc., Olin Mathieson Chemical Corporation, The Upjohn Company, and their respective officers, agents, representatives and employees, in connection with the offering for sale, sale or distribution, in commerce, between and among the several states of the United States and in the District of Columbia, of antibiotics, do forthwith cease and desist from entering into, cooperating in, carrying out, or continuing any conspiracy, planned common course or knowingly common course of action, understanding, combination or agreement between or among any two or more of said respondents, or between any one or more of said respondents and any other person* or persons not a party hereto, to do or perform any of the following acts, practices or things:

(A) Raising, fixing, stabilizing or maintaining prices or terms or conditions of sale;

(B) Discussing, conferring on or exchanging information for the purpose or with the effect of raising, fixing, stabilizing or maintaining prices, or discounts, or terms or conditions of sale, or of securing adherence by respondents or other persons to prices, terms or conditions of sale;

(C) Submitting collusive or rigged bids to purchasers or potential purchasers.

2. *It is further ordered*, That respondents American Cyanamid Company, Bristol-Myers Company, Bristol Laboratories, Inc., Chas. Pfizer & Co., Inc., Olin Mathieson Chemical Corporation and The Upjohn Company shall, within sixty (60) days after the date on which this order shall become final, individually and independently:

(A) Review its then prevailing prices for antibiotics;

(B) Determine new prices for antibiotics based on its own manufacturing and overhead costs, the margin of profit individually desired, and other lawful considerations; and

* "Person" throughout this order means any individual, partnership, or corporation.

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(C) Cancel existing prices, price lists, price sheets, price announcements and in place of its then prevailing prices establish the new prices determined under (B) above, which prices shall become effective not later than sixty (60) days after the effective date of this order. Nothing contained herein shall prevent any respondent from thereafter deviating from, modifying or otherwise changing the new prices or new price lists as established for any lawful purpose.

It is further ordered, That each respondent named herein shall file with the Commission within sixty (60) days after service of this order, a report in writing under oath, signed by respondent, setting forth in detail the manner and form of its compliance with this order.

II. DIRECTIONS FOR FILING OF ADDITIONAL BRIEFS WITH PROPOSED ORDER

1. As we do not believe that sufficient argument has been directed to the question of what form of order should be issued regarding future assertion of rights by Pfizer under its tetracycline patents and by Cyanamid under its Aureomycin patents, counsel supporting the complaint will submit within twenty days after service of this decision a proposed form of order regarding these patents. The proposed form of order should be accompanied by a memorandum giving reasons in support thereof. In particular, the Commission desires a discussion centering on the following questions:

(A) As to the tetracycline patents, should Pfizer be permitted to continue to enforce them or ordered to cease and desist from enforcing them for a term of years sufficient to dissipate the accumulated effects of its past conduct? Was Pfizer's conduct preceding the issuance of the patents sufficiently unfair or inequitable as to require dedication of all its rights to the public? Will a requirement of reasonable-royalty licensing for a term of years provide adequate relief to pry the market open to competition again, and if so, what mechanics would be appropriate for effectuating such relief?

(B) As to Cyanamid's Aureomycin patents and the deschlorination and fermentation processes for making tetracycline, what relief is necessary and appropriate in view of the considerations referred to above?

(C) Should the respondents be ordered to provide know-how, cultures, and other technical or technological assistance to other competitors in order to restore effective competition to the market?

It is further ordered. That counsel supporting the complaint, within twenty days after service of this order, submit a proposed form of order with accompanying memorandum regarding those issues set forth herein relating to tetracycline and Aureomycin patents. Within twenty days of service of complaint counsel's proposed order respondents Chas. Pfizer & Co., Inc. and American Cyanamid Company may each file an alternative form of order, together with a supporting memorandum. Counsel supporting the complaint may then file within ten days of service a statement in reply thereto. Upon consideration of all materials submitted the Commission will enter a final order.

By direction of the Commission, Commissioner Anderson concurring in part and dissenting in part. Commissioner Elman's position in this case is set forth in a separate opinion.

OPINION ACCOMPANYING FINAL ORDER

DECEMBER 17, 1963

By HIGGINBOTHAM, *Commissioner*:

Accompanying this opinion is a final order deemed necessary to stop the unfair trade practices we found to exist in our decision of August 8, 1963. Specifically, in that decision we found that respondent Chas. Pfizer & Co. had prevented the Patent Office from making an accurate appraisal of the patentability of tetracycline, an important broad spectrum antibiotic, and that it used deliberate misrepresentations and unlawful withholding of information in securing a basic patent on that product. We held that this conduct and Pfizer's subsequent attempt to prevent intrusion of competition into this market, which attempt was successful by and large,¹ together with non-competitive pricing practices, represent an "unbroken chain of anti-competitive tactics which constitute a continuing unfair method of competition." We also found that respondent American Cyanamid made similar false statements to the Patent Office with knowledge that these representations would increase the probability of a patent issuing to Pfizer. We held that Cyanamid's receipt of a license under the Conover patent represented an illegal attempt to share the monopoly with Pfizer. We also found that all the respondents gave each other assurances on tetracycline prices which constituted agreements to stabilize the price at the same high level at which other broad

¹Bristol-Myers Company and its subsidiary Bristol Laboratories (both hereinafter referred to as Bristol) and their two bulk customers, Upjohn and Squibb (a division of Olin Mathieson) entered the tetracycline market believing that Pfizer's patent was of doubtful validity. Lengthy and costly disposition proceedings ensued for nearly a year until Pfizer capitulated and granted royalty-bearing licenses to these respondents.

spectrum antibiotics had been sold since 1951. We specifically found that the above acts and practices are unfair methods of competition and unfair acts and practices in interstate commerce within the meaning of § 5 of the Federal Trade Commission Act.

Instead of issuing a completed final order as is our usual procedure, we issued two paragraphs of a final order dealing with the price fixing violations. We called for proposed forms of order and additional briefs on the question of patent relief since we felt it our duty to consider carefully the alternative forms of remedy available to suppress the effects of Pfizer's and Cyanamid's actions.² Briefs were filed and respondents filed Petitions for Reconsideration of the first two paragraphs of our order. Oral argument on the issue of remedy and other motions was held on November 22 and December 2, 1963.

We will first take up the respondents' objections and proposals relating to the provisions in our order of August 8 which deal with price fixing.

I

Respondents' first objection is to the inclusion of the words "knowingly common course of action" in paragraph 1 of the order which forbids respondents from:

* * * entering into, cooperating in, carrying out, or continuing any conspiracy, planned common course or knowingly common course of action, understanding, combination or agreement between or among any two or more of said respondents, or between any one or more of said respondents and any other person or persons not a party hereto, to do or perform any of the following acts, practices or things:

(A) Raising, fixing, stabilizing maintaining prices or terms or conditions of sales; * * *.

After careful consideration, we have decided that the words "knowingly common course of action" should be deleted. Paragraph 2 of our order, which requires respondents *independently* to determine new prices and price lists, is an alternative means of breaking up the collusive price structure. We think that price redetermination is all that should be or need be done here to create the "breathing spell" sorely needed in this industry.³ We are also persuaded by respond-

² We specifically limited the issues to be covered in the briefs to the future use of Pfizer's tetracycline patents and Cyanamid's Aureomycin patents. Complaint counsel's proposed order would open up tetracycline patents owned by respondent Bristol.

³ In the past, the Supreme Court has upheld this Commission's attempt to create "a breathing spell during which independent pricing might be established without the hangover of the long-existing pattern of collusion". *Federal Trade Commission v. National Lead*, 352 U.S. 419, 425 (1957).

ents' arguments that "knowingly common course of action" is an imprecise phrase that may engender difficulties of interpretation by those who are subject to the order. *Cf. Federal Trade Commission v. Henry Broch & Co.*, 368 U.S. 360, 367-368 (1962).

Respondents request that paragraphs 1 and 2 be modified so as to be applicable only to tetracycline or tetracycline in dosage form.⁴ These paragraphs as originally drawn would be applicable to all antibiotics. Since the price fixing evidence is directed only to tetracycline and does not involve tetracycline sold for veterinary use or for animal feed supplement, respondents' requests are reasonable and will be granted. We are not limiting the order, however, to "tetracycline sold in dosage form for human consumption on the prescription of a physician" as proposed by some of the respondents, as we think the limitation "on prescription of a physician" narrows the order unnecessarily. Accordingly, this part of the final order is changed so as to apply to "tetracycline sold in dosage form for human consumption." This includes tetracycline and products containing tetracycline sold by respondents to the trade, including hospitals and government agencies, and regardless of whether the product is to be used on prescription of a physician.

Respondents next request the insertion of a proviso which would allow them to use fair trade agreements pursuant to the McGuire Act, amending § 5(a) of the Federal Trade Commission Act.⁵ Recently, in other cases, we have, upon request, inserted such provisos in cases where horizontal price-fixing was found. See, *e.g.*, the final orders in *Revlon, Inc.*, Docket No. 7175 (March 22, 1963) [62 F.T.C. 968]; *Sun Oil Company*, Docket No. 6934 (November 22, 1963) [p. 1371 herein]; *Atlantic Oil Company*, Docket No. 7471 (November 22, 1963) [p. 1407 herein]. As there is no finding in this case of a misuse or potential misuse of fair trade agreements, respondents' request is granted.

⁴ Bristol asks that the order be limited to "tetracycline"; Upjohn proposes "tetracycline for human use"; American Cyanamid proposes "finished tetracycline pharmaceutical products for human use"; and Squibb and Pfizer suggest "tetracycline sold in dosage form for human consumption on the prescription of a physician."

⁵ The McGuire Fair Trade Act provides in part:

"Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale."

Respondents object to paragraph 2 on the ground that the Commission has no authority to require price redetermination. Respondents contend that this Commission cannot require any affirmative acts, but is limited to ordering one engaged in violating § 5 of the Federal Trade Commission Act to "cease and desist" from continuing to engage in that type of violation. We do not think that Congress intended that our cease and desist power should be so literally construed.

The Supreme Court has made it clear that this Commission has discretion in its choice of remedy to adequately cope with unlawful practices. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952); *Federal Trade Commission v. National Lead*, *supra*, at 430 n. 7. As explained above, our order is a means of stopping respondents from continuing to adhere to an established pattern of prices that was illegally maintained over a number of years. Although we recognize the novelty of this type of order, we consider it necessary to dissipate the effects of respondents' illegal actions. See also *Pan American Airways v. United States*, 371 U.S. 296, 312 n. 17 (1963); *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 129-131 (1963).

In accordance with a suggestion made by American Cyanamid, we are adding a proviso to paragraph 2 to the effect that a price redetermination need not be made (1) if respondent has filed an affidavit and proof with the Commission that it has already (before the effective date of the order) revised, determined and announced prices in a manner that satisfies the requirements of paragraph 2, or (2) if respondent submits satisfactory proof that prior to the effective date of the order there has been a substantial change in the price structure of tetracycline from what the record discloses was the pricing of tetracycline as of July, 1958. Our reason in adding this proviso is to allow any respondent the opportunity to take advantage of price changes, either its own or industry-wide, which have occurred or will occur before the effective date of our order and which are not in the record before us now. The Commission will examine any proof of price changes or redeterminations so submitted in order to determine whether they are of the nature that will obviate the necessity of requiring respondents to determine new prices.

II

Under Part II of our order of August 8, 1963, we asked for proposed forms of order concerning future use of Pfizer's and Cyanamid's patents. Upon considering the briefs and oral arguments of

counsel for all parties, we have determined that Pfizer must be restrained from further using its tetracycline patent in an endeavor to foreclose competition in the manufacture and sale of tetracycline. The record clearly shows, and we have found, that Pfizer obtained its basic patent on tetracycline by unfair means, excluded potential entrants from the tetracycline market and, together with Cyanamid and Bristol, controlled the manufacture and sale of this major antibiotic.

Pfizer argues that Cyanamid would, in any case, have been able to enjoin outsiders from manufacturing and selling tetracycline and thus Pfizer cannot be held responsible for any such foreclosure of competition. This argument is really conjectural as it overlooks the possibility that, were it not for Pfizer's patent, other companies might have successfully endeavored to make tetracycline in a manner that would avoid infringement of Cyanamid's Aureomycin patents. Indeed, as Cyanamid was most anxious to see a product patent on tetracycline issued to either itself or to Pfizer, it is evident that it thought that its Aureomycin patents could not always be effective in blocking the manufacture of tetracycline. Furthermore, the Duggar Aureomycin patent will expire in 1966, whereas Pfizer's tetracycline patent will not expire until 1972. Thus, even assuming that Cyanamid could exclude others from making tetracycline by asserting its Duggar patent, Pfizer would still have absolute control over the making, using, and selling of tetracycline for a substantial period of time after the Duggar patent expired.

Complaint counsel take the position that our order should forbid Pfizer from securing any benefits whatsoever from the tetracycline patent. Pfizer argues on the other hand that it should at least be allowed to enforce the deschlorination process claims because the misrepresentations found by the Commission did not affect the Patent Office's determination of their patentability.⁶ We think that, on balance, the proper remedy here is that Pfizer should be ordered to grant licenses to any domestic applicant on at least the same terms it has licensed any other respondent in this case. The minimum royalty in a manufacturing license heretofore granted by Pfizer is 2½ percent royalty of net sales.⁷ We think this is a reasonable figure that may be included in licenses granted by Pfizer under our order. The rec-

⁶ Pfizer also argues that certain composition of matter claims were unaffected by any misrepresentations. The record shows, however, that all the product claims were obtained by Pfizer in an illegal manner.

⁷ This license provision was in the cross-licensing agreement between Pfizer and Cyanamid of January 11, 1954 (CX 77). The term "net sales" in our order should be construed as being synonymous with the term "Net Sales Value" used in that agreement.

ord does not show that a royalty-free compulsory licensing order, or its equivalent, is necessary to open the door to newcomers. As we state in our opinion of August 8, 1963, this action is not a proceeding to cancel a patent, but is antitrust in nature. Our objective is to remove restraints on competition that have arisen from unfair trade practices. (See the Commission Opinion of August 8, 1963, at page 1804, and Commissioner Elman's separate opinion at page 1892.) Complaint counsel's proposed order is not necessary, in our opinion, to achieve that result.

We wish to make it clear at the same time that nothing herein should be construed as imparting any validity to the Conover tetracycline patent. Nor does our order abrogate in any way existing agreements between or among any of the respondents concerning the patent covered by this part of the order. The other respondents herein may qualify as "domestic applicants" under the terms of our order, but we will leave them to private remedies as to whether they may cancel existing license agreements or supply contracts.

Our final order also requires Cyanamid to license on similar terms any domestic applicant under its Aureomycin patents to the extent that the applicant may manufacture and use Aureomycin for the purpose of making and selling tetracycline. This part of the order does not deprive Cyanamid of the right to stop other parties from selling the patented product Aureomycin, but seeks merely to restrain Cyanamid from using these patents to monopolize tetracycline.⁸

Cyanamid argues that this order cannot be justified because there is no evidence that it has misused its Aureomycin patents in violation of the law. We think that, contrary to Cyanamid's contention, the record does disclose such a misuse. Cyanamid aided Pfizer in procuring the tetracycline patent by making misrepresentations of fact concerning its Aureomycin products and processes. The information given the Patent Office—that there was no evidence of the existence of tetracycline in Aureomycin broths or products—involved matters which were peculiarly within Cyanamid's domain of knowledge since it was the exclusive manufacturer of Aureomycin by virtue of these patents.

Even if this is not a "misuse" of patents as that term is commonly used in antitrust law, *cf. Mercoind Corporation v. Mid-Continent Investment Co.*, 320 U.S. 661 (1944) and *Morton Salt Co. v. Suppiger*,

⁸ Cyanamid on at least one occasion has used its basic Aureomycin patent in an attempt to exclude competition in tetracycline. Cyanamid sued Bristol in the Fall of 1954 and settled the suit in January 1955, upon the condition that Bristol pay it 5 percent royalties on tetracycline sales. Cyanamid alleged that Bristol was using Aureomycin processes and that small amounts of Aureomycin were being produced.

312 U.S. 488 (1942), we believe that Cyanamid's actions warrant this type of order.⁹ We have found that Cyanamid played a contributory part in inducing the Patent Office to issue a patent on tetracycline. It then compounded the deception it had used by accepting a license from Pfizer¹⁰ and sharing with Pfizer the benefits of the protective shield afforded by that patent.¹¹ Without the cross-license from Cyanamid to Pfizer under Cyanamid's Aureomycin patents, Pfizer could not have used the deschlorination process in making tetracycline. The patented Aureomycin product and processes thus played a vital role in the scheme of things. Although the Commission did not find a conspiracy between Pfizer and Cyanamid to mislead the Patent Office and secure a legal monopoly, their actions and common purpose taken together spell out a combination in restraint of trade as specifically charged in Paragraph 9 of the complaint.¹²

It is also clear to us that Cyanamid's actions have not only restrained trade in tetracycline but have deterred competition in the development of new and improved technology. Cyanamid's use of its Aureomycin patent to prevent intrusion into or to control the tetracycline market may have been legal in 1954 when it sued Bristol under its Duggar patent, but similar use today would be manifestly unfair since during the intervening years it has benefited, together with Pfizer, in the near monopolization of tetracycline research and technology. Had there not been the deterring effect of Pfizer's tetracycline patent, other firms might have engaged in research and developed a means of manufacturing tetracycline that would not infringe Cyanamid's Aureomycin patents.¹³ Our order allows Cyan-

⁹ A court is not limited to instances of patent misuse in employing compulsory licensing decrees. See, e.g., *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 351 (D. Mass. 1953):

"Defendant is not being punished for abusive practices respecting patents, for it engaged in none, except possibly two decades ago in connection with the wood heel business. It is being required to reduce the monopoly power it has, not as a result of patents, but as a result of business practices."

See also "Patent Licensing Under Antitrust Judgments," Report of the Subcommittee on Patents, Trademarks, and Copyrights of the Committee on the Judiciary (1960), 86th Cong., 2d Sess.

¹⁰ This acceptance of a license undoubtedly served to strengthen Pfizer's patent. For a discussion of the anti-competitive device of accepting licenses under patents of doubtful validity see Vaughan, *The United States Patent System: Legal and Economic Conflicts in American Patent History*, 205-211 (1959).

¹¹ When Cyanamid received a license under the tetracycline patent, Cyanamid knew from statements made by Pfizer officials that Pfizer did not intend to license third parties.

¹² That a "combination in restraint of trade" may exist without an overt agreement is now well established. *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

¹³ Bristol at one time (n. 8 *supra*) claimed that it was not using Aureomycin processes in its fermentation of tetracycline. Cyanamid contested this by filing an infringement suit. Bristol and Cyanamid settled the matter out of court.

amid to retain a monopoly in selling Aureomycin but restrains Cyanamid from using these patents to monopolize tetracycline. Similar relief was provided in *United States v. General Electric Co.* 115 F. Supp. 835 (D. N.J. 1953) where the court opened up patents on incandescent lamps, even though some of the defendant patent holders were only peripherally associated with the monopolization found in that case. The court reasoned at pp. 844, 846:

To compel the completely free use of these patents is not to impose upon General Electric and other defendants penalties for misuse of patents and violation of the antitrust laws, but rather to check the intrusion of advantages thereby gained into the mechanics of competition in the lamp industry.

* * * The "B" licensees as well as General Electric benefited from the illegal arrangement described in the opinion, and it is no coincidence, therefore, that they now provide stronger competition to General Electric than the firms which were not involved in the conspiracy. One reason for their success was access to General Electric patents relating to incandescent lamps in addition to whatever patents they themselves developed. It is reasonable to attempt to place the independent lamp manufacturers in as good a position to compete by making available to them all the patents that were available to the licensees. To this end, the former "B" licensees should be required to dedicate their patents. * * *

It is for this reason also that we have included a provision requiring Cyanamid and Pfizer to disclose the know-how and technical information relating to the manufacture of chlortetracycline and tetracycline that these two companies exchanged in 1954. The record shows that Pfizer needed information and supplies from Cyanamid concerning the fermentation of Aureomycin. Cyanamid furnished Pfizer with samples of fermentation media, *S. aureofaciens* cultures,¹⁴ written copies of "Standard Operating Procedure for the Production of Bulk Chlortetracycline," blueprints of equipment and layouts, and access to their plants (CX 78A through M). The exchange of know-how enabled Pfizer and Cyanamid to dominate the market and served as a means for the accomplishment of the unlawful restraints. The requirement that outsiders be given access to technical matter is not new in antitrust law. In *United States v. National Lead Co.*, 332

¹⁴ The record shows a necessity for ordering Cyanamid to sell to applicants cultures of the production strains that were handed over to Pfizer. These production strains were not placed on public deposit when Cyanamid obtained its Duggar and Niedercorn patents. Although there is a requirement in Patent Office procedure that an applicant for a fermentation process must make available to the public a culture of the microorganism used in his process, Cyanamid deposited a very weak microorganism. In fact, the record shows that Niedercorn used a different and superior strain of microorganism in the fermentations described in his patent (Tr. 6432-38). As a consequence, Cyanamid has been able to obtain patents and at the same time keep secret the vital ingredient of the processes covered by the patents. Cf. 35 U.S.C. Sec. 112; *Schreiber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 57 (1938).

U.S. 319, 354-357 (1947) the Court upheld a decree that required disclosure of technical information used by the patentees in connection with the production of titanium pigments. The Court pointed out that the defendants in that case had secured a monopoly on technical information relating to the manufacture of that product by the exchange of know how among themselves.¹⁵ See also *United States v. General Electric Co.*, 115 F. Supp. 835, 853-855 (D. N.J. 1953); *United States v. Imperial Chemical Industries*, 105 F. Supp. 215, 227 (S.D. N.Y. 1952).

As with Pfizer's patent, our order requires Cyanamid to license domestic applicants on substantially the same terms that it licensed Pfizer in January of 1954 to manufacture chlortetracycline as a starting material to make tetracycline.¹⁶ Our order should not be construed as abrogating any existing agreement between Cyanamid and other parties, although we wish to make it clear that Bristol, as well as the other respondents, may qualify as "domestic applicants" under our order.

Pfizer has submitted a proposed licensing order which would afford only a select group of persons the privilege of receiving a license from Pfizer. Pfizer would limit the issuance of licenses to persons engaged in the manufacture of ethical drugs in the United States prior to January 1, 1961, and who intend to manufacture tetracycline in the United States. This would of course exclude not only many newcomers but would exclude persons who sell tetracycline manufactured abroad and imported into this country. Pfizer avows that the purpose of this restriction is to ensure that tetracycline will be made by companies with experience in the manufacturing of drugs and which can be expected to produce a safe and effective product. We reject Pfizer's proposal. Such a provision would severely limit the effectiveness of our order which is designed to create freedom of competition in the sale of this most important, but highly priced antibiotic. We leave to the Food and Drug Administration and other federal and state government agencies the task of overseeing the quality and

¹⁵ Pfizer and Cyanamid exchanged know-how relating to the manufacture of tetracycline by the deschlorination of chlortetracycline. It is true that they did not possess a monopoly of technical information on all tetracycline processes, since Bristol independently devised its own fermentation process. Our order is confined, however, only to technical information concerning the deschlorination process. Since Bristol was not found to have engaged in unfair practices before the Patent Office, we are not adopting complaint counsel's proposal that this respondent be ordered to license its tetracycline patents and disclose know-how connected with the direct fermentation of tetracycline.

¹⁶ Our order allows Cyanamid to charge up to 2½ percent royalty, which is the royalty rate contained in Cyanamid's license to Pfizer. We consider this a reasonable royalty that Cyanamid may impose on licensees under our order.

purity of tetracycline through the enforcement of laws and regulations which are specifically designed for that purpose.

Our order is not intended, however, to permit harassment by fly-by-night operators who have no bona fide intent to manufacture and sell tetracycline. For that reason, we are granting Pfizer's request that any applicant for a license must pay the licensor \$2,500 upon issuance of a license or licenses, which amount shall be applied against future royalties.

Pfizer has submitted a form of license to be included in our order. We see nothing objectionable about the accounting and termination provisions therein. However, we are leaving such details to be worked out by respondents and applicants for a license. In case of dispute on such mechanics which the parties cannot settle, application may be made to this Commission to resolve the matter through our general compliance procedures. Those conditions and terms which we find necessary to protect the interests of the parties should not be left to negotiation and thus are specifically required by our order.

We do not think that the decision in *Federal Trade Commission v. Eastman Kodak Co.*, 274 U.S. 619 (1927), cited by Pfizer and Cyanamid, compels us to forego patent and know-how relief which is necessary to open the tetracycline market to competition. *Eastman Kodak* must be viewed with the insight provided by the Supreme Court in *Pan American Airways v. United States*, 371 U.S. 296 (1963). There, in construing Sec. 411 of the Federal Aviation Act the Court recognized in administrative agencies the authority to issue injunctive-type orders.¹⁷ The Court specifically noted that "this section [Sec. 411] was patterned after Sec. 5 of the Federal Trade Commission Act", and thus presumably the equitable powers and authority to "order divestiture"¹⁸ found in Sec. 411 are inherent in those of Sec. 5:

We have heretofore analogized the power of administrative agencies to fashion appropriate relief to the power of courts to fashion Sherman Act de-

¹⁷ Sec. 411 of the Federal Aviation Act, 49 U.S.C. Sec. 1381 provides:

"The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition."

¹⁸ The Court noted: "We need not now determine the ultimate scope of the Board's power to order divestiture under Sec. 411. It seems clear that such power exists at least with respect to the particular problems involved in this case." 371 U.S. at 312. Certainly the licensing requirement of our order wherein respondents are paid royalties is a far less harsh relief than is divestiture.

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crees. *Federal Trade Comm'n v. Mandel Bros.*, 359 U.S. 385, 392-393. Authority to mold administrative decrees is indeed like the authority of courts to frame injunctive decrees * * * subject of course to judicial review * * * [T]he power to order divestiture need not be explicitly included in the powers of an administrative agency to be part of its arsenal of authority, as we held only the other day in *Gilbertville Trucking Co. v. United States*, 371 U.S. 115. Cf. *Federal Trade Comm'n v. Eastman Kodak Co.*, 274 U.S. 619. [371 U.S. at 312 n. 17]

III

Complaint counsel have proposed further relief in the form of compulsory licensing of all patents relating to tetracycline and Aureomycin, compulsory sale of bulk tetracycline, exclusion of present trade names, and prohibition of acquisition of assets and patents from other corporations engaged in the manufacture of antibiotics. We have examined these proposals but do not find sufficient evidence in the record to warrant such an encompassing order. Because of our disposition of this matter, there is no necessity to rule on the motions filed by Bristol, Squibb, and Upjohn to strike from complaint counsel's proposed order any reference to these respondents.

On September 27, 1963, upon request of respondents Bristol-Myers Company and Bristol Laboratories, Inc., we stayed the effective date of Paragraphs 1 and 2 of Part I of the order of August 8, 1963, "until further notice by this Commission." Upon service on respondents of this decision and Final Order, the Commission's order of stay will be vacated. In order to avoid complications of procedure and jurisdiction in case of an appeal, all provisions of our order are to go into effect at the same time and the time for filing a petition for review under Sec. 5(c) of the Federal Trade Commission Act shall begin to run from the date of service of the accompanying Final Order, which Final Order supersedes all previous orders.

FINAL ORDER

DECEMBER 17, 1963

1. *It is ordered*, That respondents Chas. Pfizer & Co., Inc., American Cyanamid Company, Bristol-Myers Company, Bristol Laboratories, Inc., Olin Mathieson Chemical Corporation, The Upjohn Company, and their respective officers, agents, representatives and employees, in connection with the offering for sale, sale or distribution, in commerce, between and among the several states of the United States and in the District of Columbia, of tetracycline,* do forthwith

* "Tetracycline" as used in Paragraphs 1 and 2 of this order means tetracycline sold in dosage form for human consumption and any compound, combination, mixture or other form thereof.

cease and desist from entering into, cooperating in, carrying out, or continuing any conspiracy, planned common course of action, understanding, combination or agreement between or among any two or more of said respondents, or between any one or more of said respondents and any other person ** or persons not a party hereto, to do or perform any of the following acts, practices or things:

(A) Raising, fixing, stabilizing or maintaining prices or terms or conditions of sale;

(B) Discussing, conferring on or exchanging information for the purpose or with the effect of raising, fixing, stabilizing or maintaining prices, or discounts, or terms or conditions of sale, or of securing adherence by respondents or other persons to prices, terms or conditions of sale;

(C) Submitting collusive or rigged bids to purchasers or potential purchasers;

Provided, however, That nothing contained herein shall be construed as prohibiting any resale price maintenance contracts which any of the respondents may enter into in conformity with Section 5 of the Federal Trade Commission Act, as amended by the McGuire Act (Public Law 542, Chapter 745, 82nd Cong., 2nd Sess., approved July 14, 1952).

2. *It is further ordered,* That respondents American Cyanamid Company, Bristol-Myers Company, Bristol Laboratories, Inc., Chas. Pfizer & Co., Inc., Olin Mathieson Chemical Corporation and The Upjohn Company shall within sixty (60) days after the date on which this order shall become final, individually and independently:

(A) Review its then prevailing prices for tetracycline.

(B) Determine new prices for tetracycline based on its own manufacturing and overhead costs, the margin of profit individually desired, and other lawful considerations; and

(C) Cancel existing prices, price lists, price sheets, price announcements and in place of its then prevailing prices establish the new prices determined under (B) above, which prices shall become effective not later than sixty (60) days after the effective date of this order. Nothing contained herein shall prevent any respondent from thereafter deviating from, modifying or otherwise changing the new prices or new price lists as established for any lawful purpose;

Provided, however, That a price redetermination need not be made in accordance with the above by any respondent (1) if respondent has filed an affidavit and supporting evidence with

** "Person" throughout this order means any individual, Partnership, or corporation.

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the Commission that it has, previous to the effective date of this order, revised, determined and announced prices in a manner that satisfies the requirements of the above provision, or (2) if respondent submits satisfactory evidence that prior to the effective date of this order there has been a substantial change in the price structure of tetracycline that obviates the necessity of enforcing the above provision.

3. *It is further ordered*, That respondent Chas. Pfizer & Co., Inc. grant to any domestic applicant making written request therefor, a non-exclusive, non-discriminatory license to make, use, and sell tetracycline under all claims of United States Patent 2,699,054. Said licenses granted here-under shall be for the full, unexpired term of said patent and shall contain no restriction or limitation, except that such licenses may contain provisions in a form customary in such patent licenses, allowing the licensor to collect royalties of not more than two and one-half ($2\frac{1}{2}$) per cent of the net sales of tetracycline manufactured or sold under said licenses, providing for the inspection of books and records by independent auditors to determine the correctness of any royalty payment, and providing for the cancellation of the licenses at the option of the licensor upon failure of the licensee to permit such inspection or to pay royalties due and payable. Said licenses shall provide that in the case of the licensor granting or having granted more favorable terms to any other licensee, the licensee under said license shall be entitled to equal treatment; *Provided, however*, That respondent may require any such applicant to pay upon acceptance of a license an amount not exceeding \$2,500 which shall be applied against future royalty payments.

4. *It is further ordered*, That respondent American Cyanamid Company grant to any domestic applicant making written request therefor, a non-exclusive, non-discriminatory license to make chlortetracycline for conversion into tetracycline, or to make by direct fermentation and to sell a mixture containing tetracycline and not more than six (6) per cent of chlortetracycline, under all claims of United States Patents 2,482,055 and 2,609,329. Said Licenses granted hereunder shall be for the full, unexpired term of the patent or patents licensed and shall contain no restriction or limitation on the licensee's right to make or use chlortetracycline in connection with the manufacture and sale of tetracycline as aforesaid, except that such licenses may contain provisions, in a form customary in such patent licenses, allowing the licensor to collect royalties of not more than two and one-half ($2\frac{1}{2}$) per cent of the net sales of tetracycline manufactured under said licenses, providing for the inspection of books and records by

independent auditors to determine the correctness of any royalty payment, and providing for the cancellation of the licenses at the option of the licensor upon failure of the licensee to permit such inspection or to pay royalties due and payable. Said licenses shall provide that in the case of the licensor granting or having granted more favorable terms to any other licensee, the licensee under said license shall be entitled to equal treatment; *Provided, however*, That respondent may require any such applicant to pay an amount not exceeding \$2,500 which shall apply against future royalty payments under any patent or patents licensed hereunder.

5. *It is further ordered*, That respondents Chas. Pfizer & Co., Inc. and American Cyanamid Company each refrain from making any assignment, sale, or other disposition of any of the patents required to be licensed hereunder which would deprive it of the power to issue licenses pursuant to this order unless said respondent requires as a condition of such disposition that the purchaser, assignee, or licensee shall observe the provisions of this order with respect to such patent and that the purchaser, assignee, or licensee file with the Commission a written undertaking to be bound by such provisions; *Provided, however*, That one or both of said respondents may dedicate any such patent, patents, or a general patent license to the general public in lieu of issuing licenses pursuant to the provisions of Paragraphs 3 and 4 above.

6. *It is further ordered*, That respondent American Cyanamid Company furnish to any person licensed under chlortetracycline patents pursuant to Paragraph 4 of this order, and making written request therefor, whatever technical information and know-how that American Cyanamid Company has in the past furnished Chas. Pfizer & Co. relating to the manufacture and use of chlortetracycline, said technical information and know-how to include a furnishing of viable *S. aureofaciens* cultures that are identical to or equivalent to any cultures furnished Chas. Pfizer & Co. The information to be made available hereunder shall be made available without charge other than the expense to respondent of furnishing such information; *Provided, however*, That respondent American Cyanamid Company may require any such licensee to agree to keep said technical information and know-how confidential.

7. *It is further ordered*, That respondent Chas. Pfizer & Co. furnish to any person licensed under United States Patent 2,699,054 pursuant to Paragraph 3 of this order, and making written request therefor, whatever technical information and know-how that Chas. Pfizer & Co. has in the past furnished American Cyanamid Company relating

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to the manufacture of tetracycline by the deschlorination process. The information to be made available hereunder shall be made available without charge other than the expense to respondent of furnishing such information; *Provided, however,* That respondent Chas. Pfizer & Co. may require any such licensee to agree to keep said technical information and know-how confidential.

8. *It is further ordered,* That respondents American Cyanamid Company and Chas. Pfizer & Co. shall within thirty (30) days after the effective date of this order file with the Commission a written description of the know-how and technical information required to be furnished under Paragraphs 6 and 7.

It is further ordered, That each respondent named herein shall file with the Commission within sixty (60) days after the effective date of this order, a report in writing under oath, signed by respondent, setting forth in detail the manner and form of its compliance with this order.

It is further ordered, That the Commission's order of stay in this matter dated September 27, 1963, be, and it hereby is, vacated.

IN THE MATTER OF

HARRY E. STRAUSS ET AL. TRADING AS CAPRA GEM
COMPANY

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

Docket 8509. Complaint, June 18, 1962—Decision, Dec. 18, 1963

Order requiring Philadelphia sellers of synthetic stones to the public, to cease representing falsely in advertising and otherwise their products as "authentic", "Capra Gem", "Capra Gems are 7¼ on the Mohs hardness scale", and "surpass the brilliance of diamonds", and that their synthetic stones were precious or semiprecious stones.

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 Capra Gem Com-

*Order of Sept. 14, 1962, amended the complaint as follows:

It is ordered, That the complaint herein be amended by deleting the name of the never-existent corporation, Capra Gem Company, Inc., and any reference to its corporate officers, and inserting in lieu thereof the individual respondents Harry E. Strauss and Frank E. Luckenbach, trading as partners under the name of Capra Gem Company at 5901 York Road, Philadelphia, Pennsylvania.

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pany, Inc., a corporation, and Harry E. Strauss and Frank E. Luckenbach, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues it complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Capra Gem Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal office and place of business located at 1618 West Olney Avenue in the city of Philadelphia, State of Pennsylvania.

Respondents Harry E. Strauss and Frank E. Luckenbach are individuals and are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

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

PAR. 3. In the course and conduct of their business, respondents Capra Gem Company, Inc., Harry E. Strauss and Frank E. Luckenbach now cause, and for some time last past have caused, their said synthetic stones, when sold, to be shipped from their place of business in the State of Pennsylvania to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said synthetic stones in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the sale of their synthetic stones, respondents have made certain statements and representations with respect to the nature of the synthetic stones offered for sale and sold by them, in advertisements in magazines of national circulation and by other means, of which the following are typical:

Authentic
Capra Gem
Capra Gems are $7\frac{1}{4}$ on the Mohs hardness scale
surpass the brilliance of diamonds
Pictorial representations that the synthetic stone is blue white

PAR. 5. Through the use of the aforesaid statements, respondents represent that their said synthetic stones are gems, are authentic and natural stones, are $7\frac{1}{4}$ on the Mohs hardness scale, surpass the brilliance of diamonds, and through the use of pictorial representations,

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represent that the synthetic stones are blue white in color. Through the use of the word "gem" in the corporate name and otherwise in advertising to designate their product, respondents represent directly or by implication that said synthetic stones are precious or semiprecious stones and that respondents are engaged in the sale and distribution of precious or semiprecious stones.

PAR. 6. Said statements and representations are exaggerated, false, misleading and deceptive. In truth and in fact, said synthetic stones are not authentic or natural stones, are not $7\frac{1}{4}$ on the Mohs hardness scale, are not equal to and do not surpass the brilliance of diamonds, are not blue white, are not precious or semiprecious, and are not gems. Furthermore, respondents are not engaged in the sale and distribution of precious or semiprecious stones.

PAR. 7. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals engaged in the sale of diamonds, imitation and synthetic stones.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead 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' synthetic stones by reason of said erroneous belief.

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

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

Mr. William F. Sullivan, Obermayer, Rebmann, Maxwell & Hippel, for respondents.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

JANUARY 17, 1963

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on June 18, 1962 issued its complaint charging Capra Gem Company, Inc., a corporation, and Harry

E. Strauss, and Frank E. Luckenbach, individually and as officers of said corporation, with violation of Section 5 of the Federal Trade Commission Act. During the prehearing conference herein of August 21, 1962, it was stipulated on the record that the complaint be amended, and by order dated September 14, 1962, the complaint was amended to charge Harry E. Strauss and Frank E. Luckenbach, individuals and partners trading as Capra Gem Company, with the aforesaid violation of Section 5 of the Federal Trade Commission Act.

The complaint as issued alleges respondents to have been engaged for some time last past in the interstate sale and distribution directly to the public of synthetic stones. Respondents are further alleged to have made statements and representations in advertisements in magazines of national circulation and by other means for the purpose of inducing the purchase of the said stones, which were and are exaggerated, false, misleading and deceptive to the purchasing public. Respondents in such connection are alleged to have stated and represented that said synthetic stones are gems, are authentic and natural stones, are $7\frac{1}{4}$ on the Mohs hardness scale, surpass the brilliance of diamonds, and through the use of colored pictorial representations, that said synthetic stones are blue-white in color. Through use of the word "gem" in their trade name and in said advertising to designate their product, respondents are also alleged to have represented directly or by implication that said synthetic stones are precious or semi-precious stones and that respondents are engaged in the sale and distribution of precious or semi-precious stones.

Answer to the complaint both admitting and denying various of the allegations of the complaint was filed July 19, 1962. Respondents' answer admits that said stones are synthetic and manufactured rather than mined or found in nature, but denies that they are "synthetic stones" in the sense that they are man-made or manufactured versions of stones which are chemically and organically similar to natural stones. Respondents' answer alleges that natural stones of the kind dealt with by respondents are not found in nature and that respondents' product is not a synthesized or manufactured version of any stone which exists in nature. Said answer admits respondents to have made certain advertising statements as alleged in the complaint for the purpose of inducing the sale of their product, but avers that such statements must be viewed in the full context in which they appear rather than as individual statements in their own right. It is denied that through use of the word "gem" that respondents have represented their product to be a precious or semi-precious stone.

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Respondents' answer further denies that they have pictorially or otherwise represented their product is blue-white in color, and also alleges the discontinuance in their advertising as of various past dates, of the term "authentic", use of the product rating of $7\frac{1}{4}$ on the Mohs hardness scale, and the statements that their product is more brilliant than or surpasses the brilliance of a diamond. Respondents' answer avers the use of the term "authentic" and the aforesaid product rating to have been valid, and alleges that their product is a gem within every legitimate meaning of the word "gem", that it is in fact a semi-precious stone, and that respondents are engaged in the sale and distribution of semi-precious stones. It is finally averred that respondents are in substantial competition only with others engaged in the mail-order sale and distribution of rutile stones, and that the imposition upon respondents of the relief prayed for in the complaint without similar action against their competitors engaged in identical acts and practices, will work an extreme hardship and injustice to respondents.

Following the prehearing conference held herein on August 21, 1962, and made part of the record by agreement of respective counsel, a hearing was held in New York, New York on October 22 and 23, 1962. During said hearing, respondent Harry E. Strauss; Victor A. Lambert, President, Lambert Brothers, Jewelers, Lexington Avenue and 60th Street, New York, New York; William P. Lusk, President, Tiffany & Company, Jewelers, 727 Fifth Avenue, New York, New York; and George R. Crowningshield, Gemmologist, Director of the New York office and the Gem Trade Laboratory, Gemmological Institute of America, 580 Fifth Avenue, New York, New York, appeared and testified as witnesses and the case-in-chief was thereafter closed. Presentation of respondents defense immediately followed with respondent Harry E. Strauss being recalled, and Mitchell P. Rosnov, Jeweler and Gemmologist, 719 Sampson Street, Philadelphia, Pennsylvania, appearing and testifying as a witness and following which the case for the defense was closed.

Respective counsel were afforded full opportunity to be heard, to examine and cross-examine all witnesses, and to introduce such evidence as is provided for under Section 4.12 (b) of the Commission's Rules of Practice for Adjudicative Proceedings. The record exhibits marked for identification and received in evidence in this proceeding are Commission exhibits 1 through 18 and respondents' exhibits 1, 2, 17 and 18. Respondents' exhibits marked for identification 3 through 16 and 19 through 21 were rejected. During the hearing of October

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Findings

23, 1962, official notice was requested and taken of Rule 39, Federal Trade Commission Trade Practice Rules for the Jewelry Industry, promulgated June 28, 1957. Official notice was also requested and taken of respondents' rejected exhibits 19 through 21 during the oral argument held herein on December 19, 1962.

Respondents' rejected exhibits are subject to Section 4.12 (f) of the Commission's Rules of Practice for Adjudicative Proceedings which provides that rejected exhibits, adequately marked for identification, shall be retained in the record so as to be available for consideration by any reviewing authority.

Proposed findings of fact, conclusions and supporting briefs were filed by respective counsel, and counsel supporting the complaint submitted a proposed order to cease and desist. Proposed findings and conclusions submitted and not adopted in substance or form as herein found and concluded are hereby rejected.

After carefully reviewing the entire record in this proceeding as hereinbefore described, and based on such record and the observation of the witnesses testifying herein, the following findings of fact and conclusions therefrom are made, and the following order issued.

FINDINGS OF FACT

1. Harry E. Strauss and Frank E. Luckenbach are individuals and partners trading as Capra Gem Company, with their principal office and place of business located at 5901 York Road, Philadelphia, Pennsylvania.

2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of synthetic stones to the public.

3. In the course and conduct of their business, respondents Harry E. Strauss and Frank E. Luckenbach now cause, and for some time last past have caused, their synthetic stones, when sold, to be shipped from their place of business in the State of Pennsylvania to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said synthetic stones in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of their business, and for the purpose of inducing the sale of their synthetic stones, respondents have made certain statements and representations with respect to the nature of the synthetic stones offered for sale and sold by them, in advertise

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ments in magazines of national circulation and by other means, of which the following are typical:

(a) MORE DAZZLING THAN DIAMONDS
CAPRA
GEMS

the glamour * * *
the look * * *

the romance of real diamonds * * * AT 1/30th THE COST

Hand-Set!

Hand-Polished!

Hand-Selected! More

Refractive Than Diamonds

according to independent testing
company. Just \$27 for a 1-carat
CAPRA GEM including Federal
tax compared to a 1-carat diamond
stone costing approximately \$1000.
Within the Price of Any Budget

FREE BOOKLET * * *

Get all the facts * * * FREE * * * in our beautifully illustrated catalog!
Shows you a wide selection of men's and women's styles plus prices, settings and
EASY PAYMENT PLANS! Write today * * * no obligation * * * no
salesman will call!

SEND NO MONEY

Capra Gems Co., Dept. DC-21, P.O. 5145, Phila. 41

Name.....
Address.....
City..... Zone..... State.....

(b) yours for 1/30th the cost of diamonds!
authentic

CAPRA GEMS

"more dazzling than diamonds"

* * * hand-cut, hand-polished, hand-selected

Get full facts, FREE, on the most
amazing discovery by modern science—
CAPRA GEMS. A miracle of science
described in recent issues of

Saturday Evening Post and Reader's Digest.

They're more dazzling than diamonds,
yet cost much less. CAPRA GEMS'
refractive quality is actually higher than
diamonds! Brilliantly beautiful,
dazzling CAPRA GEMS are hand cut,
hand polished and hand selected * * *
priced within the reach of all who
love fine gems. A 1-carat diamond stone
costs you approximately \$1000. A

comparable choice selected, 1-carat
 CAPRA GEM is yours for \$27, federal tax included
 * * * and can be bought on small easy payments.
 GET THE FACTS NOW * * * Valuable illustrated
 booklet shows a wide selection of men's and
 women's rings. Gives full details, including
 prices and settings * * * shows all CAPRA GEMS
 actual size. Limited supply, so send today
 without delay. No charge, no obligation. Get
 all the facts on CAPRA GEMS * * *
 more dazzling than diamonds.

**SEND NO
 MONEY!
 MAIL TODAY**

CAPRA GEM CO., Dept. EQ-31 P.O. 5145,
 Phila. 41, Penna.

Name.....

Address.....

City..... State.....

5. Prospective purchasers responding to such advertising as shown in 4 (a) and (b) above, are forwarded various sales brochures or catalogs illustrating and pricing respondents' products which can be purchased as unset stones or set in a mounting purchased from respondents as a completed ring.

One such brochure or catalog bears on its outside cover a large colored pictorial representation of what appears to be an unset round brilliant cut blue-white diamond. Inside this brochure or catalog are the following statements and representations, among others:

The Capra Gem story is a fascinating story of the genius of man. It is a tribute to the years of research and scientific development which has resulted in the purification and re-crystallization of a natural mineral, extracted from the earth. It is the belief of many scientists that diamonds were formed thousands of years ago by the intense heat of the earth which crystallized carbon. Thus, the Capra Gem, a radiant man-made gem of unequalled brilliance, is created by a scientific technique of heat, crystallizing to a superior radiance. The Capra Gem is "more dazzling than a diamond".

Capra Gems are 7¼ on the "Mohs" hardness scale (a diamond has the hardness of 10 on the "Mohs" scale) making it most suitable for ring wear.

Scientific tests have shown that Capra Gems are even harder than most birth stones, and should last a full lifetime under normal wear.

unset, individual Capra Gems * * * More Brilliant than Diamonds at 1/30th the cost!

The Capra Gem is processed just like a diamond of the finest quality. It is individually hand-cut and oriented with full 58 facets—the exact number found in fine, full-cut diamonds. Then, every Capra Gem is expertly polished to bring out its captivating brilliance and sparkle.

A higher degree of light refraction makes The Capra Gem more radiant, more fiery than a diamond. A Capra Gem has a refractive index of between 2.62 and 2.90, while a diamond's refractive index is 2.42. This equals 15% more brilliance in the Capra Gem than the finest diamond of similar size.

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Another of respondents' sales brochures or catalogs sent to prospective purchasers states and represents, among other things:

No need to wait any longer to enjoy the prestige that goes with owning a brilliant Capra Gem ring creation.
equal the beauty and surpass the brilliance of diamonds

Still another of respondents' sales brochures or catalogs sent to prospective purchasers contains the following statement or representation, among others, attributed by the respondents' to have been made in various alleged "fact-finding" magazines with relation to respondents' product:

SATURDAY EVENING POST Nov. 20, 1948 issue:

"The prospects are exciting for women who like rare jewels because when cut and polished the gem becomes more brilliant than a diamond * * * as radiantly colorful as the most rare of precious gems."

6. Respondent Harry E. Strauss, is a partner of Frank E. Luckenbach, trading as Capra Gem Company, 5901 York Road, Philadelphia, Pennsylvania. The business of said company has been conducted since 1953 and consists of the mail-order sale direct to the purchaser of said company's products. Sales are made in all the States of the United States with the annual sales of said products totaling approximately \$300,000.

Mr. Strauss identified respondents' numerous advertisements and other sales material in evidence as exhibits in this proceeding, including the unset sample of respondents' synthetic stones also submitted as an exhibit. The witness testified that respondents' synthetic stones were sold both unset and set in ring mountings. As to the synthetic material from which respondents' stones were made, the witness stated he was not expert enough to give the chemical formula, but that the popular name is titania rutile.

Respondents do not buy the raw material from which the stones are made, but purchase their stones after they have been cut and polished into the finished product. Respondents were stated to purchase the finished stone at between \$6.50 and \$7 per carat and to sell an unset 1-carat stone for \$24.55 to the consumer purchaser. The respondents' advertised price for said stone was said to be \$27 which sum would include the excise tax of 10%.

Where such stone is sold set in a ring mounting, the additional purchase price would vary depending on the necessary gold and work involved in making the mounting, which is also purchased from outside sources. It was stated to cost from \$1.75 to \$2 to have a 1-carat stone set in a ring mounting (Comm. Ex. 17, style no. 701) and the cost of said mounting to respondents was stated to be about \$10, with

the complete ring then being advertised by respondents for \$18, which price would include the 10% excise tax.

On recall in the presentation of respondents' defense, the witness testified that he supervised the design and content of respondents' advertising since its inception and that such advertisements were placed in magazines and newspapers. The witness stated the magazines were so many that he could not possibly remember them, but that a few of the larger ones were Diners' Club, Esquire, American Home, House Beautiful, Argosy and others. Respondents' customers are secured by this direct advertising to the public, according to the witness. When prospective purchasers respond to such advertisements, they are then sent respondents' brochures or catalogs and accompanying order blanks with other sales material.

The witness estimated that under respondents' product return program, about five or six thousand returns had been made, and that of this number, about three thousand people had written letters explaining the reason for such return. The reasons given by such dissatisfied customers for such returns, included broken engagements, changed circumstances, and, according to the witness, the most common reason, "For the reasons that the merchandise does not live up to the expectation."

The witness further elaborated on the failure of the merchandise to live up to expectations:

Some people say it's too yellow, * * * and some people, come to think of it, say they have had the ring appraised from their local jeweler and have been convinced that they can do better in their local jewelry store.

The witness further testified to having eliminated the word "authentic" from respondents' advertising and to have substituted therefor the word "man-made" which did not previously appear therein. The word "brilliant" was also stated to have been eliminated and replaced with the words "more dazzling than diamonds". The product rating of $7\frac{1}{4}$ on the Mohs hardness scale was also stated to have been reduced in respondents' advertising to a rating of 7 on the said scale. This change in certain words and representations which perhaps standing alone might each be taken as literally true, would not appear to operate, however, to change the expected illusion in the prospective purchaser's mind created by the context of respondents' overall sales promotion and advertising plan.

Mr. Strauss stated he first became interested in marketing synthetic rutile because of articles he had read in various magazines, and that at such time, he had read no technical books or referred to any other books in such connection. Since then, the witness stated he had con-

ferred "with people who cut this material" and read books which deal with synthetic rutile, but "I don't know the exact titles of them."

Respondents' exhibits marked for identification and offered in alleged support of the testimony of this witness and rejected, are 3-A and B, from Reader's Digest, October, 1950; 4-A-E, from Consumers' Reports, November, 1950; 5-A and B, from Consumer Research Bulletin, November, 1952; 6-A and B from Good Housekeeping, December, 1957; 7-A-D, from the Saturday Evening Post, November, 1948. Further offered and rejected as alleged proof of public understanding are respondents' exhibits marked for identification 8-A and B, from Science Digest, December, 1945; 9-A and B, from Science Digest, December, 1951; 10-A-D, from Science Illustrated, July, 1948; 11-A-F, from Popular Science Monthly, October, 1950; 12-A-G, from Business Week, January, 1949, 13-A and B, from Science Digest, October, 1947; 14 A-I, from Fortune Magazine, August, 1950; 15-A and B, from Time Magazine, February, 1951; 16 A-D, Jewelers Circular Keystone, July, 1949. Respondents' exhibit 17, being pages 943, 944, and 992 of Webster's Third International Dictionary, 1961, and exhibit 18 being page 504 of the American College Dictionary, 1956, were received in evidence. Further marked for identification and offered and rejected are 19-A-F, from the Encyclopedia Britannica; 20-A-D, from the Encyclopedia Americana; and 21-A and B, from the World Encyclopedia. With reference to the foregoing exhibits 19, 20 and 21, official notice was requested and taken.

7. Mr. Victor A. Lambert, is the president of Lambert Brothers, Jewelers, Lexington Avenue and 60th Street, New York, New York. Mr. Lambert has been a jeweler and has examined gems since 1914. According to the witness, the word "gem" is a very elastic word, and as used by Lambert Brothers' staff, or people they associate with, a gem indicates a very rare specimen. It was stated that all sapphires, rubies, or diamonds are not gems. A gem would be a very occasional specimen, one that is far finer in quality than another specimen.

This description was said to depend on many years of experience and knowledge of the industry and the degree of honesty of description the particular merchant operates under in describing a specimen as a gem. During the course of his business over the years, the witness testified to having met with other members of the jewelry industry and discussed the word "gem", and their thinking was stated to correspond with that of the witness as to such meaning and application of the term or word "gem".

The witness stated it to be his opinion that the trade today is not governed by past dictionary definitions, and further, that he had not

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read for a long while various dictionary definitions and encyclopedia articles on use or defining of the word "gem", and that he was not certain the industry's opinion would coincide with such. The witness believed the industry position shows a more recent understanding of a confusing problem and if gemmologists were to describe synthetic stones as gems, the witness would not agree, nor would he agree if a dictionary contained such a definition. The witness stated he relied to a great extent on The Federal Trade Commission Trade Practice Rules for the Jewelry Industry for his position on the proper use of the word "gem".¹

The witness testified to operating a retail store and being there daily and regularly, and that to a great extent he dealt with the public personally, and, according to the witness:

I think the public is thoroughly confused. I think the public has been led to believe that many things are gems which are not gems. You asked me what the public thinks, and this covers the country, and from knowledge that I have around the country in addition to New York, I don't think the public knows, to a great extent, what a gem is. I think they depend a great deal on the place and how it is sold to them and described to them.

Gems, according to the witness, could include precious and semi-precious stones. A gem, however, according to the witness, must be "strictly a genuine stone", that is, "Produced by nature, not artificially or man made." It was the opinion of the witness that the public definitely would not accept synthetics as gems. The witness, upon

¹ Rule 39—MISUSE OF WORDS "GEM," "REPRODUCTION," "REPLICA," "SYNTHETIC," ETC.

(a) It is an unfair trade practice to use the word "gem" or similar terms to describe, identify, or refer to a pearl, cultured pearl, diamond, ruby, sapphire, emerald, topaz, or other product of the industry, which does not possess the beauty, symmetry, rarity, and value necessary for qualification as a gem.

(b) It is an unfair trade practice to use the word "gem" as descriptive of any synthetic industry product unless the product meets the requirements of paragraph (a) of this rule and unless such word is immediately accompanied, with equal conspicuity, by the word "synthetic," or by some other word or phrase of like meaning, so as clearly to disclose the fact that it is not a natural gem.

(Note: Use of the word "gem" with respect to cultured pearls and synthetic stones should be avoided since few cultured pearls or synthetic stones possess the necessary qualifications to properly be termed "gems." Imitation pearls, imitation diamonds, and other imitation stones cannot be described as "gems" under any circumstance. Not all diamonds or natural stones, including those classified as precious stones, possess the necessary qualifications to properly be termed "gems.")

(c) It is an unfair trade practice to use the words "reproduction," "replica," or similar terms, to describe, identify, or refer to a cultured or imitation pearl, or to any imitation of precious or semi-precious stones.

(d) It is an unfair trade practice to use the word "synthetic" as descriptive of cultured or imitation pearls, or to use the word "synthetic" with the name of any natural stone as descriptive of any industry product, unless such industry product has essentially the same optical, physical, and chemical properties as the stone named.

Promulgated by the Federal Trade Commission June 28, 1957.

examining respondents' product (CX-4D), stated it was definitely not a gem.

Precious stones, it was stated, would include the diamond, ruby, sapphire, emerald, and possibly several others, considered by the industry to be precious stones because of their origin and value. Semi-precious stones would include, among others, turquoise, aquamarine, topaz, alexandrite, garnet, and amethyst. Some semi-precious stones because of texture, color, rarity and value might evolve on occasion into the precious stone category. For example, certain fine quality topaz, according to the witness. While Lambert Brothers sold some synthetic stones such as amethyst and rubies, the witness testified, "we would never think of using the word 'gem' with anything synthetic or produced by man."

Lambert Brothers does not sell synthetic rutile and the witness does not feel that the public accepts synthetics as gems, and upon examining the respondents' product in evidence, it was stated, based on his trade experience, that it was definitely not a gem because it was synthetic and man made. Based further on his trade experience and contact with members of the public, the witness testified the public would not classify respondents' product as a gem, and "I can't imagine any jeweler with a reputation who would consider this a gem."

The witness could not recall the last time he sold a synthetic stone and stated he relied on general trade and industry experience and his retail store experience as to what public defines as a synthetic stone. The witness testified he did not think he knew what the public definition of the word "gem" would be, stating that "the public has been so confused by misleading descriptions over the years they don't know what they are looking for. I think they think a gem is something fine in most cases."

8. Mr. William P. Lusk, is the president of Tiffany & Company, Jewelers, 727 Fifth Avenue, New York, New York. Mr. Lusk has been a jeweler and has examined gems for the past 35 years. According to the witness, the following was necessary to qualify as a "gem":

Well, gems are very, very fine, unusual specimens of precious stones, and perhaps occasionally of semi-precious stones, and they are always a product of nature, but to be gems they have to be cut and polished by man. What I am saying here is that I would never consider a rough stone a gem because you don't know what it is going to be by the time you get it finished. I would say also that these gems have got to have certain qualities, certain factors about them, beauty, naturally, and durability, and they have got to be rare within the mineralogical class that they belong to. They have to have value in all currencies. In other words, they have to be recognized as having value all over the world.

As to the definition of the term of word "gem" used by the jewelry trade, the witness testified not much reliance would be placed on text book and dictionary definitions, but a great deal of reliance would be placed on association with each other and individual experience. The witness further stated that he would consult trade or jewelers' dictionaries, as distinguished from lay dictionaries, when required in his dealings with the trade and the public. Whereupon a definition from a jewelers' dictionary was read to the witness by respondents' counsel and the witness was asked if such was a correct definition. To this the witness replied:

No, I don't think it is, because it omits one very important factor, and that is that the stone should be natural.

The witness testified he could cite no particular reliable source in writing for his disagreement with the definition read to him, and further in such regard that "My say-so is about all I can point to in this room, but I want to point out that my say-so is based on what I believe to be the opinions of the great majority of respectable people in the trade."

The witness testified to dealing with the public off and on over a period of 35 years and that the word "gem" would have more than one meaning to the public. With reference to the various meanings the public might ascribe to the word "gem", the witness stated, "It is very hard for me to answer this question, sir, because, frankly, I think the public's been had." The witness stated the term to have been used so loosely that many people would have no idea what it means, but that there is a section of the public which would have a pretty good idea what the term "gem" means. The witness explained that most people do not have occasion to think about the use of the term "gem", but that there are some people who did stop to think about it and would feel that a gem must be "not only a natural stone, but also one that has value and has all the other attributes of beauty, durability and so on."

As to the basis for the witness's opinion of what the public variously considers a "gem" to be, it was stated that "I think the public gets its ideas partly from dictionaries, but not to a very great extent, because the public doesn't dash to a dictionary every time they see a word they don't understand." According to the witness, "if you look at practically any definition of the word "gem" in the dictionary, the genesis is that if you have five dictionaries you get five definitions." The witness added another source readily available to the public other than dictionaries and encyclopedias with reference to the meaning of the word "gem", would be to ask questions of people in the industry.

With reference to the public understanding of the term "gem", the witness testified that in connection with sales at his store, that he had on some ten or twelve occasions over the past six months discussed such matter and found the understanding of "gem" to have been what he had previously stated with regard to the general public at large. With reference to the term "synthetic gem" the witness stated, "Well, this one I don't think I have ever discussed with many people, because to me it's so ridiculous I wouldn't bring it up."

The witness considered the use of "synthetic" in connection with "gem" to be a contradiction in terms and a misuse of language. The witness testified that as a retail jeweler and from his experience in the trade, that there is a substantial part of the public that has a pretty positive idea as to what the term "gem" means, and that this substantial part of the public would definitely feel that no synthetic stone could be considered a gem, "Because the public feels that there is something essentially precious about a fine stone. And a precious stone is generally—I mean, people think of a precious stone as being a gem, people think the word precious and gem are apt to go together. I believe that there is a substantial part of the public that would feel, does feel, that a stone has got to be a product of nature if it is going to be considered a gem. It's precious, something that comes out of the earth. It's not something that was created in a laboratory, and I think a substantial part of the public understands this."

According to the witness, Tiffany's handles both precious and semi-precious stones, but does not sell synthetic rutile nor any synthetic or imitation stones. Upon examining respondents' product (Comm. Ex. 4-D) under a ten-power loupe, the witness stated it was not a gem: "Because of a lot of things. In the first place it's synthetic. In the second place, it hasn't got anything like the value that you would require of a gem. It's not a rare stone. It hasn't got the durability that a gem should have, and it hasn't got the beauty." The witness added, based on his experience and contact through the years with the public, "I think a substantial part of the public, who knew what it was, would consider it not a gem."

9. Mr. George Robert Crowningshield, Gemmologist, is the Director of the New York Office and the Gem Trade Laboratory, Gemmological Institute of America, 580 Fifth Avenue, New York, New York. Mr. Crowningshield is a fellow of the Gemmological Association of Great Britain; an honorary certified gemmologist with the certified Gem Society, and a fellow with distinction of the Gemmological Society of Great Britain; and a member of the board of directors of the Gemmological Association of Canada. The record in

this proceeding contains a list of the professional writings of this witness.

The Gemmological Institute of America was stated to be a non-profit organization founded in 1931 for the education of the jewelry industry, and the Gem Trade Laboratory is a function of the Institute which serves to identify precious stones, pearls and their imitations for the public and said industry. Part of the laboratory's work was stated to be the examination of thousands of precious stones, pearls and their reproductions.

The witness stated, "The qualifications of a gem, which means that we don't see very many, would be extremely fine examples of natural stones which have, because of their beauty, rarity and, consequently, their value, make them outstanding from the ordinary run-of-the-mill stones of the same species or variety."

The witness had examined synthetic rutile and stated it did not qualify as a gem. Synthetic rutile was stated to be a very light yellow in color and made of crystallized titanium dioxide. According to the witness, it could not qualify as a "gem" because "it lacks the rarity, and the consequent cost which one associates with a gem, and it is also a synthetic material."

Synthetic rutile was stated to have more fire than a diamond, but not to be as brilliant as a diamond. According to the witness, the terms "fire" and "brilliance" are not interchangeable, and fire is not a part of brilliance. By fire is meant the return to the eye of light that has been broken into the colors of the spectrum, and brilliance is the return to the eye of white light, or light that has struck the stone, unaltered by diversion or refraction. Because of the fact that synthetic rutile is nearly doubly refractive with eight times as much dispersion as a diamond, it was stated to be not as brilliant as a diamond.

The Mohs hardness scale was described as a scale used by mineralogists to test relative hardness, and in lay language, it tests the relative scratchability of one material as compared with another. The scale was chosen on the basis of the ability of stones to scratch stones below, but not above it in the scale, and the scale runs from 10, accorded to a diamond, the hardest of all by far, down to 1, which the witness stated would be graphite and about as soft as a fingernail. Quartz, said to be the commonest of all minerals in the earth's crust, is rated at 7, and this rating is more or less the delineating line for ring stones, because stones softer than quartz tend to lose their polish when in contact with quartz dust particles found in the atmosphere. The witness testified that he had observed no synthetic rutile that

would scratch quartz and then proceeded to make a test demonstration on respondents' product (Comm. Ex 4-D) using a piece of quartz for the purpose. The test result, observed under a Gemmolite microscope, clearly showed, according to the witness, that quartz, number 7 on the Mohs hardness scale, would scratch respondents' product in its finished form as sold to the public. The witness further added that certain stones were mid-way in hardness and that he had observed that peridot, which is given 6½ on the Mohs scale, at times will scratch synthetic rutile and at other times it will not.

The witness testified that he in part relied on other authors knowledgeable in the field of gemmology in the formulation of certain definitions, although there would be disagreement within any field, and also on the statements and rules of the Federal Trade Commission where applicable. With relation to use of the term or word "gem" in connection with synthetic materials, it was, according to the witness, the very lack of agreement in lay dictionaries as well as gem texts at the time the rules were formulated that prompted the Federal Trade Commission to ask for clarification. The witness further testified that he would not call a synthetic stone a gem, that he had never seen a synthetic stone that would qualify as a gem because it would lack rarity and be too easily duplicated, adding "I have not seen one which even the FTC regulations would qualify". According to the witness, "even if it was one of the finest synthetics ever seen, it would not have the true color of being a true gem. In accordance with the FTC regulations and in thinking about it in respect to being called as a witness, I have tried to recall if we have ever seen any man-made or man influenced product that you could call a gem, and about the only thing I can think of would be certain very, very fine cultured pearls."

The witness further testified that he could cite no author or any source which made the specific statement that a synthetic stone is disqualified by being synthetic from being also a gem. As to the propriety of the use of the term "synthetic" with the term "gem" the witness testified to having read a great number of definitions of the word "gem" and to have found them in conflict, and in this confused situation before the Federal Trade Commission rules, the witness stated it to be his opinion that this combination could have been proper. The witness went on to say, however, relative to the Federal Trade Commission rules defining the term "gem", that, "Without the rules it's a free-for-all" and "The rules, as I have said before, are an attempt to clarify a word which, misused, could glorify something in the eyes of the public."

10. Mr. Mitchell P. Rosnov, operates a wholesale importing and exporting, and a retail jewelry business, at 719 Sampson Street, Philadelphia, Pennsylvania. The witness received a political science degree from the University of Pennsylvania in 1955, and in 1960 graduated from a correspondence course on the techniques of appraising diamonds and the identification of gem stones conducted by the Gemmological Institute of America. The witness maintains a laboratory for such purpose at his place of business and does appraisal work on a fee basis for various banks, estates and auctioneering companies, as well as on a no-fee basis as an accomodation to fellow jewelers bringing in stones for identification and appraisal.

The witness testified to discussing the matter of gem stone identification and applicable terminology both with members of the jewelry trade and the customers who come to his place of business. The witness stated the trade to consider the definition of the term "gem" to be a very "loose definition" and that the jewelers coming to his establishment "term synthetics as well as genuine stones as gem stones, with that prefix or suffix attached to the word." With reference to any difference between the terms gem and gem stones, the witness stated "Well, I can't for certain say how the whole trade sees it, but a good bit of the trade do not make too much differentiation between the two."

As to the general consuming public, the witness stated he had occasion to explain to customers the difference between a synthetic stone and a natural stone and the properties of each. It was the testimony of the witness that the term "gem" was here again "a very loose term" and that "The public considers a proper use of the term 'gem' any material used as an ornament in jewelry, cut and fashioned," and further "They use this term in dealing with synthetics." Upon being asked whether there were members of the public that would not consider synthetic rutile to be a gem, the witness further answered, "Yes, I would say there are people who would not consider it to be a gem."

The witness examined respondents' synthetic rutile stone (Resp. Ex. 2) and stated it to be made of a synthetic material, titanium oxide, and to have a slightly yellowish cast, and to be cut very much similar to that of a brilliant cut diamond. The witness further testified that, based on what he had read in various books, dictionaries, and his prior lessons, he would consider respondents' synthetic rutile stone to be a "synthetic gem stone", stating "It has practically all the factors except the fact that it's a rare stone, in my opinion". The witness later equated rarity with value, and stated that some people would not consider such a stone a gem in the absence of such value.

With relation to whether or not the public would consider the use of the word "gem" with reference to a synthetic rutile stone as being proper, the witness finally stated his opinion on this point: "There is always some that do and some that don't." Adding, in response to further questioning, that it would be correct that there would be some that have all sorts of definitions as to the meanings of the word "gem", and that some people would feel that a "gem" would be a very rare and valuable stone.

11. While not having the force of substantive law, the guidance of Rule 39 of the Federal Trade Commission Trade Practice Rules for the Jewelry Industry, promulgated June 28, 1957, is not to be ignored. Compare, *In the Matter of Gimbel Brothers, Inc.*, Docket No. 7834, Opinion of the Commission, issued July 26, 1962 [61 F.T.C. 1051, 1061].²

Rule 39 of the above Jewelry Industry Trade Practice Rules of which official notice has been requested and taken, states it to be an unfair trade practice to use the word "gem" to describe, identify, or refer to any product of the industry in the absence of the beauty, symmetry, rarity, and value necessary for the product to qualify as a gem. Further, a synthetic product cannot qualify unless it meets such requirements, and the rule notes that the use of the word "gem" should be avoided in describing synthetic stones as few such stones possess the necessary qualifications to be termed "gems". The rule also states that the word "synthetic" cannot be used with the name of any natural stone as descriptive of any industry product, unless such industry product has essentially the same optical, physical, and chemical properties as the stone named.

Consistent with the above rule no finding could be herein made that respondents synthetic stones are "gems" or "synthetic gems". The testimony and evidence of record in this proceeding is to the contrary and unequivocally establishes that respondents synthetic stones do not possess the rarity and value necessary for qualification as a gem. Further, and as respondents' answer both admits and alleges, said synthetic stones are "manufactured rather than mined or found in nature" and are not a "version of any stone found in nature". As stated by respondents' counsel in the prehearing conference herein, "Rutile of gem quality is not found in nature. Rutile found in nature is usually a dark black and of no use for gem purposes."

Further, and as shown in finding number 6, *supra*, the testimony of the respondent witness establishes respondents' cost of a 1-carat

² See also, *Northern Feather Works, Inc. v. Federal Trade Commission* (1956) 234 F. 2d 335.

unset synthetic rutile stone as being from but \$6.50 to \$7, with the cost of the ring mounting being some 40% more, or about \$10 in the example therein cited. It is also noted in such connection, that the respondent witness, in relating some of the reasons given by numerous customers for returning respondents' merchandise, because it was stated not to live up to expectations, further testified in part, " * * * And some people, come to think of it, say they have had the ring appraised from their local jeweler and have been convinced they can do better in the local jewelry store."

For purchasers of respondents' products not so convinced, this admission by the witness would appear to establish both the existence of substantial competition and the unfair diversion of probable trade in similar or other products from local jewelry stores which might have been patronized by such purchasers, in the absence of respondents' hereinbefore described advertising and sales promotion plan.

12. In *Haskelite Manufacturing Corporation v. Federal Trade Commission* (1942) 127 F. (2d) 765, the court stated with particular respect to the deceptive appearance of the product itself:

The process used by the petitioner to simulate woods does great credit to the ingenuity of the petitioner, and is so skillfully carried out that the physical exhibits shown us in court were distinguishable from the real wooden trays only after the most careful scrutiny. The trays themselves were the best evidence of the possibility of confusion. Without some warning, the trays of themselves are almost certain to deceive the buying public. The Commission had a right to consider this fact, so forcefully apparent upon an examination of the physical exhibits.

In *Charles of the Ritz Dist. Corp. v. Federal Trade Commission* (1944) 143 F. 2d 676, the court held:

That the Commission did not produce consumers to testify to their deception does not make the order improper, since actual deception of the public need not be shown in Federal Trade Commission proceedings. * * * Likewise it is not material that there was no consumer testimony as to the meaning of petitioner's representations.

In *Benton Announcements, Inc. v. Federal Trade Commission* (1942) 130 F. 2d 254, the court stated:

This is a petition to review an order of the Federal Trade Commission which directed the petitioner to "cease and desist" from using the words "engraved," "engraving," or "engravers" to describe their stationery or the process by which they make it. * * * The process is much cheaper than ordinary engraving, which the Commission described in the following finding. * * *

As to this finding the testimony was in conflict; but the Commission produced witnesses familiar with the craft who swore that to the ordinary buyer the word, "engraved," which the petitioner used to describe its stationery, meant the older process. The petitioner does not assert that these

witnesses did not give any support to the finding; it merely says they were not reliable because they disagreed among themselves, because the Commission should have accepted the more dependable testimony of the petitioner's own witnesses; and because in any event the meaning of the word must be determined by recourse to dictionaries. It is too well settled to require the citation of authority that the Commission's decision on conflicting evidence is final. As for dictionaries, words mean what people understand them to mean, and dictionaries are only one source; persons whose business carries them among the buyers of a product are certainly qualified sources of information as to the buyers' understanding of the words they hear and use.

In *Positive Products Co., et al. v. Federal Trade Commission* (1942), 132 F. 2d 165, the court stated:

Advertisements are intended not "to be carefully dissected with a dictionary at hand, but rather to produce an impression upon "prospective purchasers" (citing cases).

Prior to the above holding from the *Positive Products* case, the court had stated:

But the buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression on the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied.

In *Charles of the Ritz Dist. Corp. v. Federal Trade Commission*, *supra*, the court further stated:

There is no merit to petitioner's argument that, since no straight-thinking person could believe that its cream would actually rejuvenate, there could be no deception. Such a view results from a grave misconception of the purposes of the Federal Trade Commission Act. That law was not "made for the protection of experts, but for the public—the vast multitude which includes the ignorant, the unthinking and the credulous," and the "fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. * * * The important criterion is the net impression which the advertisement is likely to make upon the general populace. * * * And, while the wise and the worldly may well realize the falsity of any representations that the present product can roll back the years, there remains "that vast multitude" of others who, like Ponce de Leon, still seek a perpetual fountain of youth. As the Commission's expert further testified, the average woman, conditioned by talk in magazines and over the radio of "vitamins, hormones, and God knows what," might take "rejuvenescence" to mean that this "is one of the modern miracles" and is "something which would actually cause her youth to be restored." It is for this reason that the Commission may "insist upon the most literal truthfulness" in advertisements, and should have the discretion, undisturbed by the courts, to insist if it chooses "upon a form of advertising clear enough so that, in the words of the prophet Isaiah, "way-faring men, though fools, shall not err therein."

Commission's exhibit No. 4-D and respondents' exhibit No. 2 in evidence are physical specimens of respondents' unset and finished

synthetic rutile stones sold by mail direct to the purchaser either alone or set in a ring mounting. Respondents' said stones are not seen by the purchaser prior to receipt, and under visual observation by the untrained eye, they are imitative of and simulate the appearance of a commonly known and precious natural stone, the diamond. Such untrained visual observation will not disclose, however, that they are not natural stones, and further that upon being worn, they will not maintain the luster nor have the durability and resistance to damage inherent to a diamond.

Respondents advertising of said product such as exemplified by the advertisement in finding number 4(a), *supra*, in no way discloses to the prospective purchaser that the so-called Capra Gem is not a natural stone, but to the contrary it asserts "the glamour, the look, the romance of real diamonds." In addition, as further shown by the advertisement in finding number 4(b), *supra*, respondents affirmatively represent that Capra Gems are authentic.

Further as shown in finding number 5, *supra*, various follow-up statements and representations are contained in respondents sales brochures and catalogs sent to purchasers responding to the aforesaid advertisements. These statements and representations directly and indirectly compare and imply that the qualities of respondents' stones are such as to approach, or even to exceed, those of the natural precious stone, the diamond, and that such qualities can be obtained at a lesser bargain price upon purchasing respondents' products. The origin of respondents' stones are compared to those of the said natural precious stone, the diamond, in such a manner as to allege or imply, that by research and the development of a scientific technique of heat, a somewhat comparable counterpart stone can now be created by man.

In addition and on the cover of respondents' sales brochure or catalog which is Commission exhibit number 5 set forth in finding number 5, *supra*, there is pictured, in color, the apparent representation of a round, brilliant cut blue-white unset diamond emitting a blue-white light. This pictured implication invokes and strengthens the expected illusion in the purchaser's mind that Capra Gems, offered at allegedly 1/30th the cost of diamonds, are still comparable and substantially worth-while counterpart stones for, as is averred in the respondents' answer, the term blue-white has the connotation of a particular grading classification of diamonds. Said exhibits show the respondents further to claim:

It is a tribute to the years of research and scientific development which has resulted in the purification and re-crystallization of a natural mineral, extracted from the earth. It is the belief of many scientists that diamonds

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were formed thousands of years ago by the intense heat of the earth which crystallized carbon. Thus, the Capra Gem, a radiant man-made gem of unequalled brilliance, is created by a scientific technique of heat, crystallizing to a superior radiance.

Capra Gems are $7\frac{1}{4}$ on the "Mohs" hardness scale (a diamond has the hardness of 10 on the "Mohs" scale) making it most suitable for ring wear.

The Capra Gem is processed just like a diamond of the finest quality. It is individually hand-cut and oriented with full 58 facets—the exact number found in fine, full-cut diamonds.

No need to wait any longer to enjoy the prestige that goes with owning a brilliant Capra Gem ring creation.

equal the beauty and surpass the brilliance of diamonds

The prospects are exciting for women who like rare jewels because when cut and polished the gem becomes more brilliant than a diamond * * * as radiantly colorful as the most rare of precious gems.

In addition to the above, Commission exhibit No. 4-B sent to prospective purchasers recites "Your precious Capra ring" and respondents' Capra Gem guarantee states "Treat your Capra Gem like a diamond."

In *Federal Trade Commission v. Real Products Corporation, et al.* (1937) 90 F. 2d 617, the court held:

The existence of a public interest here may rest either on the deception suffered by the public * * * or the prejudice occasioned to competitors * * *. On either ground the public is entitled to be protected against unfair practices and its interest in such protection is specific and substantial. * * * Nor is it necessary that the product misrepresented be inferior or harmful to the public. The deceptive misrepresentation suffices. * * *

The principle * * * that potential competitors are equally to be protected with actual competitors, is an integral part of the law of unfair competition.

In *C. Howard Hunt Pen Co. v. Federal Trade Commission* (1952) 197 F. 2d 273, the court, citing *Federal Trade Commission v. Algoma Lumber Co., et al.* (1934) 291 U. S. 67, stated:

"The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else. * * * In such matters, the public is entitled to get what it chooses, though the choice may be dictated by caprice or by fashion or perhaps by ignorance."

With regard to the defense of a secondary public meaning attached to the challenged term alleged to be misused, the court further stated:

A high degree of proof was essential in establishing the defense of secondary meaning before the Commission. The very wording of petitioner's answer recognizes that, in the words of Mr. Justice Cardozo, it had to show that " * * * by common acceptance the description, once misused, has acquired a secondary meaning as firmly anchored as the first one." * * * It could not prevail if its evidence was of a quality " * * * short of establishing two meanings with equal titles to legitimacy by force of common acceptance." * * * We think that petitioner failed to establish the fact of secondary meaning under those governing principles.

Following a complete review and consideration of the entire record, it is unequivocally clear that the substantial weight of the probative acceptable testimony and evidence of record in this proceeding establishes that prior to the advent of the synthetic production by man of certain natural stones, the purchasing public of necessity could only have understood and accepted precious and semi-precious stones as being nothing other than natural stones. A substantial part of this public also would understand and have accepted the word "gem" as being descriptive only of a precious or semi-precious natural stone, and many would have understood and accepted the term "gem", when used as descriptive of any named natural stone, to mean a specimen of such stone of rarity or of particular or substantial value.

Capra Gems are not precious or semi-precious natural stones and could not qualify as "gems" under a requirement that they be natural stones of rarity and of particular or substantial value, or under a lesser requirement for such qualification that they must only be precious or semi-precious natural stones. The record herein does not establish a secondary meaning for the term "gem" to include the purchasing public's general understanding and acceptance of a "synthetic" stone as able of being or being a gem, nor does the record establish a secondary meaning for the term "synthetic" to include the purchasing public's general understanding and acceptance of a "synthetic" stone as able of being, or being a precious or semi-precious stone.

The record herein does establish, however, that Capra Gems are not blue-white in color and do not emit a blue-white light, which is a grade of quality ascribed to a natural precious stone, the diamond. Further, Capra Gems are not $7\frac{1}{4}$ on the Mohs hardness scale as respondents represent in comparing their stones to the rating of 10 on the Mohs scale accorded to the diamond, and Capra Gems do not, as respondents claim, equal or surpass the brilliance of a diamond upon comparison. Capra Gems are not stones of rarity or of particular or substantial value, and, while imitative of and simulating the appearance of a diamond, are not, as implied by respondents, a somewhat comparable synthetic counterpart stone created by a scientific technique of heat having values approaching those known and accepted by the purchasing public for the natural precious stone, the diamond. Respondents trading as Capra Gem Company are not engaged in the business of selling and distributing genuine gems or genuine precious or semi-precious stones as such are commonly known to and accepted by the purchasing public. The purchasing public has a preference

for the genuine over and above the imitation or simulation thereof as having a greater prestige and value.

In short and in final summary, it is found that the purchasing public has a preference for the genuine and unless adequately informed does not expect to obtain an imitation or ersatz substitute in exchange for its money. Further, and as to respondents' claim of discontinuance of certain representations made in the sale of their products, such claim in the full light of the complete context of respondents' advertising and sales promotion plan as hereinbefore shown, does not warrant the non-issuance of an order to cease and desist herein looking to and insuring an adequate guarantee of their future non-use. As regards respondents' protestation of business hardship if certain named mail-order seller competitors allegedly using like or similar advertising and sales tactics are not simultaneously also subjected to an order to cease and desist, such a pre-judgement of said seller competitors is not herein available and further is regarded as being without legal merit, in particular with reference to respondents' retail jewelry store competitors not herein shown to be engaged in the use of such misrepresentations in the sale of like, similar or alternative competitive products. See, *Clinton Watch Company v. Federal Trade Commission* (1961) 291 F. 2d 838, and the cases therein cited.

13. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals engaged in the retail sale to the public of diamonds, imitation and synthetic stones, both unset and set in ring mountings.

14. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and acts and practices as hereinbefore found and set forth in paragraphs 1 through 13, *supra*, 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' synthetic stones, both unset and set in ring mountings, by reason of said erroneous belief.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents.
2. The complaint herein states a cause of action, and this proceeding is in the public interest.
3. The aforesaid acts and practices of respondents, as hereinbefore

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found and set forth in Paragraphs One through Fourteen of the Findings of Fact, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER³

It is ordered, That Harry E. Strauss and Frank E. Luckenbach, individually and as partners trading as Capra Gem Company, or any other name or names, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of synthetic stones now designated as Capa Gems, or any imitation stone, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "authentic" to describe the aforesaid product or representing in any other manner that said synthetic stones are natural stones.

2. Representing directly or by implication that such stones are $7\frac{1}{4}$ on the Mohs hardness scale or misrepresenting in any manner the hardness of said stones.

3. Representing directly or by implication that such stones are equal to or surpass the brilliance of diamonds or misrepresenting in any manner the quality of said stones with regard to brilliance.

4. Representing directly or by implication, pictorially or otherwise, that such stones are blue white or emit a blue white color, or misrepresenting in any manner the color of said stones.

5. Using the word "gem" as a part of their trade name, corporate name, trade-mark or in any other manner implying that they are engaged in the sale and distribution of precious or semi-precious stones.

6. Using the word "gem" as descriptive of such stones; using the name of any precious or semi-precious stone in such context as to imply said stones are in any way a counterpart of the named stone; or using the name of any precious or semi-precious stone as descriptive of such stones unless such word or name is immediately preceded with equal conspicuity by the word "imitation".

³ In accord with the dictate of *Korber Hats, Inc., et al. v. Federal Trade Commission*, U.S.C.A., 1st Circuit, decided December 31, 1962.

OPINION OF THE COMMISSION

DECEMBER 18, 1963

By HIGGINBOTHAM, *Commissioner*:

This case is before us on exceptions to an initial decision by a hearing examiner that the respondents have violated § 5(a) of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45(a), in making certain representations in connection with the sale of their synthetic stones designated as "Capra Gems." The principal issue raised before us was the proper scope of the cease and desist order, specifically paragraph 5 thereof, which required the respondents to cease and desist from their use of the word "gem", a part of their trade name. The respondents' counsel made a number of concessions at oral argument before us,¹ and in the light thereof submitted a proposed order, under Rule 3.22(b), 16 CFR. § 3.22(b), providing for all of the relief against the respondent which the public interest calls for. We have determined to issue our own order, which constitutes a modified version of the order proposed by the respondent², in lieu of the order recom-

¹ The respondents opened oral argument as follows:

MR. SULLIVAN: This is before the Commission on a petition to review the initial decision of Hearing Examiner Eldon Shrup which, in general, forbids the Capra Gem Company from using the term "gem" in connection with either its corporate name or the product in which it deals. This appeal presents really only one question, and that is whether the respondent may use the word "gem". * * *

COMMISSIONER ELMAN: Does that mean that you are not objecting to the order insofar as it does not involve the use of the word "gem"?

MR. SULLIVAN: That is correct, sir. We could not at this stage of the game.

COMMISSIONER MACINTYRE: Would you have any objection to the order at all in connection with the use of the word "gem" if it required you to use the words "synthetic" or "man-made gem"?

MR. SULLIVAN: I don't believe that we would have an as serious objection to "man-made gem" as we would to the complete excision of this, and particularly whether or not to the corporate name, which is a terrible thing for a company, which has been in business for ten years, to be deprived of.

We have no objection to an order which requires a disclosure of the fact that this product is not * * * natural. That is quite clear, and to that we could not object and do not object. We are rather proud of that. We claim it to be a miracle of modern science, a man-made gem.

COMMISSIONER ELMAN: * * * use the word "gem" so long as it was clearly disclosed that it was not a natural stone.

MR. SULLIVAN: That is correct.

COMMISSIONER ELMAN: You would have no objection to that?

MR. SULLIVAN: No sir.

COMMISSIONER ANDERSON: You are opposed to excision of the word "gem" but are not opposed to qualification of the word "gem" so that it would say, as the several Commissioners have indicated, a "synthetic", or a "man-made", not a natural?

MR. SULLIVAN: Yes, sir. We have no objection whatever to an order that would be limited to compel us to disclose the fact that this is not a natural stone. There is no objection to that. Never has been.

² The first four paragraphs of the order are the same as those in the initial decision, and no objection to them is made. We have deleted paragraph 5, as proposed by the respondent, and modified paragraph 6 (now Paragraph 5) to permit other words of qualification than "imitation", in conformity with the applicable trade practice rules.

mended by the hearing examiner. We therefore vacate that order and the accompanying findings and initial decision. In lieu thereof we substitute our own findings of fact and conclusions of law as follows:

1. Harry E. Strauss and Frank E. Luckenbach, as individuals and partners trading as Capra Gem Company, are now and for some time have been engaged in the advertising, offering for sale, sale and distribution of synthetic stones to the public, in commerce.

2. In their advertising, the respondents have described their synthetic stones as "authentic," a term which to most members of the public carries the connotation that said synthetic stones are natural stones. The respondents have represented directly or by implication that such stones are $7\frac{1}{4}$ or harder on the Mohs hardness scale, which in fact they are not, and have otherwise misrepresented the hardness of said stones. The respondents have represented that their stones are equal to or surpass diamonds in brilliance, which in fact is untrue, and have otherwise misrepresented the quality of their stones with regard to their brilliance. The respondents have also falsely represented that their stones are blue-white or emit a blue-white color.

3. Respondents have used the word "gem" as descriptive of their product without clearly disclosing, at the same time, that their stones are not natural stones or natural gems, thereby implying that their stones are a counterpart of natural, precious or semi-precious gems or stones.

4. The acts and practices described in paragraphs 2-3 have tended to divert trade to the respondents from more scrupulous competitors, who refrained from the use of such misrepresentations in the sale of their goods.

5. The aforesaid practices constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce. The public interest required that an order be entered prohibiting their continuance.

In the course of the hearings, the examiner excluded from evidence excerpts from various books and magazine articles which referred to synthetic stones as "gems." He also prevented respondents' counsel from cross-examining the Commission's expert witnesses on the basis of such material. In both cases the examiner rested the exclusion on the hearsay rule. Even on the examiner's erroneous premise that the hearsay rule applies to administrative proceedings, see *John Bene & Sons, Inc., v. Federal Trade Commission*, 299 Fed. 468, 471 (2d Cir. 1924); 2 Davis, *Administrative Law*, ch. 14 (1958), these evidentiary rulings constituted error, since the respondents' evidence was material and competent, even under the hearsay rule. The examiner failed to distinguish between (1) third-party statements offered in evidence to

prove the truth of what they state and (2) third-party statements offered in evidence as verbal acts, where what is significant is whether they were in fact made, not their "truthfulness," which is hardly material in the verbal act context. See generally *Labor Board v. G. W. Thomas Co.*, 206 F. 2d 857 (9th Cir. 1953); *Paddock v. United States*, 79 F. 2d 872, 874 (9th Cir. 1935); *Bausch Machine Tool Co. v. Aluminum Co. of America*, 79 F. 2d 217, 220, 224 (2d Cir. 1935); McCormick, Evidence, § 226 (1954).

We have therefore considered the rejected evidence, and as indicated in Finding 3 we conclude that it is not inherently deceptive to style the respondents' products "gems," but whether the public is deceived depends on the entire context in which the term is used. The term is innocuous when accompanied by sufficient language of explanation that the product is a synthetic, man-made gem; it is deceptive when unqualified by some word or phrase which clearly discloses the fact that the product is not a natural gem. We therefore adopt the respondents' order as fully protective of the public interest, rephrasing it, however, as previously noted, to make it conform to the language of the trade practice rules. This order requires the respondents to use the word "gems" only in a manner consistent with our trade practice rules for the industry. Rules 37(b), 39(b), Federal Trade Commission Trade Practice Rules for the Jewelry Industry, 16 C.F.R. § 23.37(b), § 23.39(b). That is, whenever respondents refer to their products as "gems," they must place in conjunction thereto notice that the stones are synthetic. Such notice will protect the public and the respondents' competitors from deception and at the same time permit the respondents to market their goods in what they consider an effective merchandising manner. The latter, of course, must be subordinated to the former in cases of conflict, but none exists here. We see no need to damage whatever good will has accrued through respondents' advertising techniques to its trade name and find no necessity to excise "gems" from respondents' name.

The examiner's recommended order is vacated; a modified order will issue in lieu thereof.

Commissioner Anderson concurred in part and dissented in part.

By ANDERSON, *Commissioner*, concurring in part and dissenting in part:

I concur in the result reached by the majority except that I would not permit respondents to use the word "gem" as descriptive of their product or as part of their trade name.

FINAL ORDER

DECEMBER 18, 1963

This matter having been heard by the Commission on exceptions to the hearing examiner's initial decision, filed by the respondents, and on briefs and oral argument in support thereof and in opposition thereto; and

The Commission having rendered its decision ruling on said exceptions, and having determined that the initial decision should be vacated for the reasons expressed in the accompanying opinion, and the order modified accordingly:

It is ordered, That Harry E. Strauss and Frank E. Luckenbach, individually and as partners trading as Capra Gem Company, or any other name or names, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of synthetic stones now designated as "Capra Gems," or any imitation stone, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "authentic" to describe the aforesaid product or representing in any other manner that said synthetic stones are natural stones.

2. Representing directly or by implication that such stones are $7\frac{1}{4}$ on the Mohs hardness scale or misrepresenting in any manner the hardness of said stones.

3. Representing directly or by implication that such stones are equal to or surpass the brilliance of diamonds or misrepresenting in any manner the quality of said stones with regard to brilliance.

4. Representing directly or by implication, pictorially or otherwise, that such stones are blue-white or emit a blue-white color, or misrepresenting in any manner the color of said stones.

5. Using the word "gem" as descriptive of such stones unless it is clearly disclosed that such stones are not natural stones or natural gems; using the name of any precious or semi-precious stone in such context as to imply said stones are in anyway a counterpart of the named stones; or using the name of any precious or semi-precious stone as descriptive of such stones unless such word or name is immediately preceded with equal conspicuity by the word "synthetic" or "imitation", or by some other word or phrase of like meaning, so as clearly to disclose the fact that it is not a natural stone.

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It is further ordered, That the respondents, Harry E. Strauss and Frank E. Luckenbach, individually and as partners trading as Capra Gem Company, shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission, Commissioner Anderson concurring in part and dissenting in part.

IN THE MATTER OF

W. B. SNOOK MFG. CO., INC., ET AL.

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

Docket C-632. Complaint, Dec. 18, 1963—Decision, Dec. 18, 1963

Consent order requiring Palo Alto, Calif., manufacturers of silver recovery units to cease representing falsely in advertising brochures and other promotional material that their "Rotex model X-4" silver recovery unit would under all conditions of operation recover 95 percent or more of the silver released into X-ray or film clearing or fixing solutions.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the W. B. Snook Mfg. Co., Inc., a corporation, and Walter B. Snook, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent W. B. Snook Mfg. Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 751 Loma Verde Avenue, in the city of Palo Alto, State of California.

Respondent Walter B. Snook is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

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PAR. 2. Respondents are now, and for some time last past have been, engaged in the manufacturing, advertising, offering for sale, sale and distribution of "Rotex" silver recovery units to distributors, retailers and others for resale to, and directly to, hospitals, medical and industrial X-ray and photographic processors, and others.

PAR. 3. 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 California 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. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents have made statements and representations in advertising brochures and other promotional material with respect to the efficiency of silver recovery of their products.

Typical and illustrative of the aforesaid statements and representations, but not all inclusive thereof, are the following:

The ROTEX will recover over 95% of the silver released into solution by the processed film

* * * * *

SAVES 95% of silver in solution.

* * * * *

The X-4 is basically for the manual developing process. It may be inserted in the tank during non-operating hours or in a tailing tank at any time. It has a high current density for rapid silver recovery and will take out 95% of the silver from one gallon in approximately an hour.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import not specifically set out herein, respondents represent, directly or by implication, that their Rotex model X-4 silver recovery unit will under all conditions of operation recover 95% or more of the silver released into X-ray or film clearing or fixing solutions.

PAR. 6. In truth and in fact, respondents' Rotex model X-4 silver recovery unit will not under all conditions of operation recover 95% or more of the silver released into X-ray or film clearing or fixing solutions. It will recover substantially less than 95% when operated in connection with automatic processing equipment.

Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were, and are, false, misleading and deceptive.

PAR. 7. By the aforesaid practices, respondents place in the hands of others means and instrumentalities by and through which they may mislead purchasers of respondents' products as to the efficiency of silver recovery of their products

PAR. 8. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms and individuals in the sale of silver recovery units of the same general kind and nature as those sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead purchasers into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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 W. B. Snook Mfg. Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws

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Order

of the State of California, with its office and principal place of business located at 751 Loma Verde Avenue, in the city of Palo Alto, State of California.

Respondent Walter B. Snook is an officer of said corporation and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents, W. B. Snook Mfg. Co., Inc., a corporation, and its officers, and Walter B. Snook, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of silver recovery units, or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that their Rotex model X-4 silver recovery unit, or any other silver recovery unit of similar construction irrespective of its designation, will recover any stated percentage or amount of silver released into X-ray or film clearing or fixing solutions, unless (1) the stated percentage or amount does in fact reflect the percentage or amount of silver actually recoverable by the unit, and (2) there is clear disclosure of the required conditions of operation, including the type of processing equipment, whether automatic or manual, with which the unit is to be used to achieve such percentage or amount of recovery.

2. Misrepresenting, in any manner, the amount or percentage of silver that their silver recovery units will recover from X-ray or film clearing or fixing solutions.

3. Placing any means or instrumentalities in the hands of others whereby they may mislead and deceive purchasers of respondents' products as to the efficiency of silver recovery 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.

Complaint

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IN THE MATTER OF

AUSTIN BISCUIT CORPORATION ET AL.

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

Docket 7730. Amended Complaint, May 23, 1963—Decision, December 20, 1963

Consent order requiring a corporation in Baltimore engaged in packaging crackers, cookies, peanut butter sandwiches, salt peanuts, etc., and selling them, principally through vending machines, in 5¢ and 10¢ packages, along with the corporation which acquired its assets and business in January 1961, and continued its challenged activities, to cease discriminating in price in violation of Sec. 2(a) of the Clayton Act by such practices as paying rebates based on a schedule of cumulative monthly purchases and, later, on a single order quantity discount schedule with an additional discount to vending machine purchasers favoring their products, as specified.

AMENDED AND SUPPLEMENTAL COMPLAINT

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

PARAGRAPH 1. Respondent Austin Biscuit Corporation, sometimes hereinafter referred to as Austin, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 2930 Washington Boulevard, Baltimore, Maryland.

PAR. 2. Respondent Fairmount Foods Company, sometimes hereinafter referred to as Fairmount, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3201 Farnam Street, Omaha, Nebraska.

PAR. 3. Austin was incorporated in 1939 as Austin Packing Company, and has been engaged since that time in the business of packaging, distributing and selling crackers, cookies, peanut butter sandwiches, salted peanuts and related products. Purchasers of such products from Austin resell such products principally through vending machines. Such products have been packaged to resell at retail for 5¢ and 10¢ per package.

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Austin has operated one plant which is located in the city of Baltimore, Maryland, and has had access of warehouse space in the city of Chicago, Illinois. From these two points Austin has shipped its products to various purchasers. In the year 1958, total sales by Austin were in excess of \$3,000,000.

In the year 1959, the name Austin Packing Company was changed to Austin Biscuit Corporation, although the operation and location of the business continued without other change.

PAR. 4. Fairmont has been engaged, for many years, either directly or through wholly owned subsidiaries or both, in the business of manufacturing, processing, distributing and selling dairy products, including milk, cream and butter and in the business of distributing and selling eggs, poultry and miscellaneous frozen foods.

During the month of June 1960, Fairmont acquired all the outstanding capital stock of Austin and thereafter exercised control over the operations of Austin. During the month of December, 1960, Fairmont directed that Austin be dissolved as a corporation, that the assets of Austin be acquired by Fairmont and that the liabilities of Austin be assumed by Fairmont. Since January, 1961, the business formerly conducted by Austin under the names Austin Packing Company and Austin Biscuit Corporation has been operated, under the control of Fairmont, under the name "Austin Biscuit Company, Division of Fairmont Foods." Fairmont is the legal successor to the business formerly conducted by Austin and has acquired all rights, title and interest in said business.

Since December, 1960, the former president of Austin has been employed by Fairmont as manager of Austin Biscuit Company, Division of Fairmont Foods.

PAR. 5. Said respondents, in the course and conduct of their respective businesses, have been engaged, and respondent Fairmont is now engaged, in commerce, as "commerce" is defined in the amended Clayton Act. They have sold and distributed their products, and Fairmont now sells and distributes its products, to purchasers located in States other than the State of origin of shipment and, either directly or indirectly, have caused such products, when sold, to be shipped and transported from the State of origin to purchasers located in other States. There has been a constant course and flow of trade and commerce in such products between respondents and purchasers located in other States, and there is now a constant course and flow of trade and commerce between Fairmont and purchasers located in other States. Such products have been and are now sold for use, consumption or resale within the United States.

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PAR. 6. In the course and conduct of its business in commerce, Austin has sold its products, and Fairmont now sells the products formerly marketed by Austin, to purchasers some of whom are in competition with each other, and with customers of competitors of respondents in the purchase, resale and distribution of such products.

PAR. 7. Austin, either directly or indirectly, since 1955 had been discriminating in price between different purchasers of such products by selling the said products to some purchasers at substantially higher prices than the prices at which Austin sold products of like grade and quality to other purchasers some of whom were in competition with the less favored purchasers in the purchase, resale and distribution of such products.

Since June, 1960, Fairmont has been and is now discriminating in price between different purchasers of products formerly marketed by Austin in the same manner and by the same means.

PAR. 8. As an example of the practices alleged herein, Austin, on or about October 15, 1958, inaugurated a discount schedule which provided for the receipt of rebates by purchasers; such rebates were based on cumulative monthly purchases. That rebate schedule is set forth below:

Volume of purchases:	Percent of rebate
\$200.00 to \$499.99.....	1
\$500.00 to \$999.99.....	1½
\$1,000.00 to \$1,999.99.....	2
\$2,000.00 to \$2,999.99.....	2½
\$3,000.00 to \$3,999.99.....	3
\$4,000.00 and over.....	3½

Said rebate schedule was continued by Austin until its capital stock was acquired by Fairmont and was continued thereafter by Austin under the control of Fairmont until approximately August, 1961.

As a further example of the practices alleged herein, Austin, under the control of Fairmont, during or about August, 1961, inaugurated a schedule of single order quantity discounts which is used in the sale of its products. That discount schedule is set forth below:

Single order purchase:	Discount (percent)
\$00.00 to \$49.99.....	0
\$50.00 to \$99.99.....	1
\$100.00 to \$149.99.....	2
\$150.00 to \$199.99.....	2½
\$200.00 to \$249.99.....	3
\$250.00 and over.....	3½

An additional discount of 1% is granted to those purchasers who operate vending machines and who either continuously display at least one Austin brand product in all of such purchaser's vending

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machines or purchase at least two varieties of Austin brand products in each order.

This single order quantity discount schedule inaugurated in or about August 1961, has been continued since then and to the present time.

PAR. 9. The effect of the discriminations in price, as alleged above, may be substantially to lessen competition or tend to create a monopoly in the line of commerce in which the purchasers receiving the preferential prices are engaged, or to prevent, injure or destroy competition between and among the purchasers of such products from respondents.

PAR. 10. The discriminations in price, as hereinbefore alleged, are in violation of the provisions of subsection (a) of Section 2 of the Clayton Act, as amended.

ORDER ACCEPTING AGREEMENT CONTAINING ORDER TO CEASE AND DESIST

This matter having come before the Commission upon the hearing examiner's certification of the agreement between the parties containing a consent order to cease and desist, and it appearing that the agreement that has been entered into affords an adequate basis for an appropriate disposition of this proceeding and should be accepted, and that the Commission itself should initially decide this matter, and forthwith issue its decision and order:

The agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent Austin Biscuit Corporation was a corporation existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 2930 Washington Boulevard, in the city of Baltimore, State of Maryland. The corporate name of said respondent was changed from Austin Packing Company prior to the institution of this proceeding. Respondent Fairmont Foods Company is a corporation existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3201 Farnam Street, Omaha, Nebraska. Respondent Fairmont Foods Company is the corporate successor to respondent Austin Biscuit Corporation.

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

It is ordered, That respondent Austin Biscuit Corporation, formerly Austin Packing Company, a corporation, and respondent Fairmont Foods Company, a corporation, and their officers, representatives, agents and employees, directly or through any corporate or

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other device in connection with the sale and distribution of crackers, cookies, peanut butter sandwiches, salted peanuts, and related products, in commerce, as "commerce" is defined in the Clayton Act, do forthwith cease and desist from:

Discriminating in price by selling such products of like grade and quality to any purchaser at prices higher than those granted to other purchasers, who in fact compete with the unfavored purchaser in the resale and distribution of such products.

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

IN THE MATTER OF

ROYAL CROWN COLA CO.

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

Docket 8295. Complaint, Mar. 2, 1961—Decision, Dec. 23, 1963

Order requiring a manufacturer of beverage concentrates which were sold to independent franchised bottlers for processing into beverages for sale to retailers, to cease violating Sec. 2(d) of the Clayton Act by such practices as paying a retail grocery chain with headquarters in Jacksonville, Fla., the sum of \$1,474.30 as compensation for advertising furnished in connection with the sale of respondent's product, while not making comparable allowances available to the chain's competitors.

COMPLAINT

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

PARAGRAPH 1. Respondent Royal Crown Cola Company* is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its office and principal place of business located at Columbus, Georgia.

* Respondent's correct name is Royal Crown Cola Co.

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Initial Decision

PAR. 2. Respondent is now and has been engaged in the manufacture, sale and distribution of carbonated beverages, beverage powders and beverage concentrates. Respondent sells and distributes its products to franchised bottlers, wholesalers and retailers, including retail chain organizations.

PAR. 3. Respondent sells and causes its products to be transported from its principal place of business in the State of Georgia to customers located in other States of the United States. There has been at all times mentioned herein a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

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

PAR. 5. For example, in the year 1960, respondent contracted to pay and did pay to Winn-Dixie Stores, Inc., a retail grocery chain with headquarters in Jacksonville, Florida, the amount of \$1,474.30 as compensation or as an allowance for advertising or other services or facilities furnished by or through Winn-Dixie Stores, Inc., in connection with its offering for sale or sale of respondent's products. Such compensation or allowance was not made available on proportionally equal terms to all other customers competing with Winn-Dixie Stores, Inc., in the sale and distribution of respondent's products of like grade and quality.

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

Mr. Eugene Kaplan supporting the complaint.

Mr. Quinn O'Connell and *Mr. William H. Savage*, attorneys for respondent *Royal Crown Cola Co.*, and *Mr. Willis Battle*, Columbus, Georgia, and *Weaver & Glassie*, Washington, D. C., for respondent.

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER

APRIL 30, 1962

This proceeding was commenced by the issuance of a complaint on March 2, 1961, charging the respondent, Royal Crown Cola Co., (er-

roneously named in the complaint as Royal Crown Cola Company) with violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13) in the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, without making such payments available to all other competing customers on proportionally equal terms. As an example of this practice, the complaint alleges the respondent in 1960 paid Winn-Dixie Stores, Inc., a retail grocery chain, the amount of \$1,474.30 as compensation or as an allowance for advertising furnished by or through Winn-Dixie Stores, Inc., in connection with its offering for sale or sale of respondent's products without proportionally equal payments to all other customers competing with Winn-Dixie Stores, Inc., in the sale and distribution of respondent's products.

Respondent in its answer and amended answer admitted that it contracted to pay and did pay to Winn-Dixie Stores, Inc., the amount of \$1,474.30 alleged in the complaint for the placing of advertisements for bottled Royal Crown Cola in thirty-nine newspapers published in the States of Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina and Tennessee, and that no allowance was made available to customers competing with Winn-Dixie Stores, Inc., but that of the sum of \$1,474.30 paid Winn-Dixie Stores, Inc., only approximately \$50 (or other small sum) represented payment for advertising in Columbus, Georgia, newspapers which circulate also in Phenix City, Alabama, to promote the sale of bottled Royal Crown Cola sold from its bottling plant in Columbus, Georgia, to stores in Columbus, Georgia, West Georgia, Phenix City, Alabama, and its environs. Respondent further affirmatively alleged that the balance of said sum of \$1,474.30 was paid for advertisements within areas where respondent makes no sales of bottled beverages to Winn-Dixie Stores and its competitors, but that such payment was made on behalf of, and pursuant to agreement with, the independent Franchised Bottlers of Royal Crown Cola who operate bottling plants in such areas. As an additional defense, respondent alleges that such payment was made from respondent's cooperative advertising fund which it maintains with its Franchised Bottlers, that the affected Bottlers had approved the expenditure, and that respondent does not control the fund. Under these circumstances, respondent alleges that the payment to Winn-Dixie Stores was not an advertising allowance by respondent, but rather an allowance by the Franchised Bottlers of Royal Crown Cola.

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A Pre-Hearing Conference was held in this matter on November 16, 1961, at which time, among other things, a tentative stipulation of facts was drafted which subsequently with modifications was entered into at the initial hearing held in this matter on January 31, 1962. At the hearing on January 31, 1962, additional testimony and other evidence were offered in support of the complaint and in opposition to the allegations set forth therein. Proposed findings of fact, conclusions of law, briefs and reply briefs were filed by counsel supporting the complaint and by counsel for respondent.

Consideration has been given to the proposed findings of fact, conclusions of law and briefs submitted by the parties, and all proposed findings of fact not hereinafter specifically adopted are rejected. Based upon the entire record and his observation of the witness, the Hearing Examiner makes the following findings as to facts, conclusions drawn therefrom and order.

FINDINGS OF FACT

1. Respondent, Royal Crown Cola Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Columbus, Georgia.

2. Respondent is now and has been engaged in the manufacture, sale and distribution of carbonated beverages, beverage powders and beverage concentrates. Respondent sells and distributes its products to franchised bottlers, wholesalers and retailers, including retail chain organizations as hereinafter discussed.

3. Respondent has engaged and is now engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from its principal place of business in the State of Georgia to customers located in other States of the United States.

4. Respondent, *inter alia*, owns and operates a bottling plant located at Columbus, Georgia. Said plant produces bottled Royal Crown Cola and Royal Crown Cola syrup. Respondent also has a plant at Columbus, Georgia manufacturing Royal Crown Cola in cans. Bottled and canned Royal Crown Cola is sold to approximately 2,500 retailers in Columbus, Georgia, Phenix City, Alabama, and the territories immediately surrounding these cities. During 1960 total sales from the Columbus, Georgia bottling plant amounted to \$1,452,082.90.

5. Winn-Dixie Stores, Inc. (operating in some areas as "Kwik-Chek"), and its subsidiaries constitute a retail grocery chain doing

business in Southeastern United States with its principal place of business at 5050 Edgewood Court, Jacksonville 3, Florida.

6. In 1960, respondent, Royal Crown Cola Co., paid amounts totaling \$1,474.30 to Winn-Dixie Stores, Inc. and its subsidiaries in connection with the latter's Anniversary Sale, which was held from February 29, 1960 through March 12, 1960. The request for participation was made in the form of brochures sent directly by Winn-Dixie Stores, Inc., Jacksonville, Florida to respondent at Columbus, Georgia, inviting the recipient to participate in newspaper advertising to be carried throughout the Southeastern United States and enclosed forms to be filled out. After securing the approval of its Franchised Bottlers in the areas concerned, respondent completed and returned these forms to Winn-Dixie Stores, Inc., Jacksonville, Florida or one of that company's division headquarters' offices located throughout the Southeast. In addition to indicating the number of column inches desired, the form requested a list of the items to be featured. The only item respondent requested to be featured was "R. C. Cola". Winn-Dixie Stores, Inc., billed respondent from its Jacksonville, Florida; Greenville, South Carolina; Raleigh, North Carolina, as well as other division offices and respondent made payment by checks issued from its Columbus, Georgia office to Winn-Dixie Stores, Inc., Greenville, South Carolina; Winn-Dixie Montgomery, Inc., Montgomery Alabama; Winn-Dixie Stores, Inc., Raleigh, North Carolina, and Winn-Dixie Stores, Inc., Jacksonville, Florida.

7. The cities in which the newspaper advertisements appeared and the subsidiary sales divisions of Winn-Dixie in such areas are as follows:

Winn-Dixie Stores, Inc. (Jacksonville Division) 5050 Edgewood Court, Jacksonville 3, Florida:

Orlando, Florida
Jacksonville, Florida
Gainesville, Florida
Sanford, Florida
Tallahassee, Florida

Winn-Dixie Montgomery, Inc., Montgomery, Alabama:

Anniston, Alabama
Huntsville, Alabama
Montgomery, Alabama
Columbus, Georgia

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Meridan, Mississippi
 Pensacola, Florida
 Panama City, Florida
 Atlanta, Georgia

Winn-Dixie Stores, Inc. (Raleigh Division) P.O. Box 5487,
 Raleigh, North Carolina:

Raleigh, North Carolina
 Salisbury, North Carolina
 Albermarle, North Carolina
 Durham, North Carolina
 Fayetteville, North Carolina
 Greensboro, North Carolina
 Goldsboro, North Carolina
 Henderson, North Carolina
 Winston-Salem, North Carolina
 Greenville, North Carolina
 Florence, South Carolina

Winn-Dixie Greenville, Inc., P.O. Box 840, Greenville, South
 Carolina:

Anderson, South Carolina
 Charleston, South Carolina
 Columbia, South Carolina
 Greenville, South Carolina
 Orangeburg, South Carolina
 Rock Hill, South Carolina
 Spartanburg, South Carolina
 Laurens, South Carolina
 Sumter, South Carolina
 Asheville, North Carolina
 Hickory, North Carolina
 Shelby, North Carolina
 Augusta, Georgia
 Johnson City, Tennessee
 Gainesville, Georgia

Respondent was supplied with tear sheets of the aforesaid advertisements and was advised that the same or similar advertisements were carried in the named cities throughout that territory. The Columbus, Georgia newspaper which carried the advertisement is also circulated in Phenix City, Alabama.

8. Respondent sells Royal Crown Cola, Nehi, Upper Ten, and Par-T-Pak to the following Winn-Dixie stores in Columbus, Georgia

and Phenix City, Alabama, from its Columbus, Georgia bottling plant:

1001 Broadway, Columbus, Ga.—No. 481

2611 Lumpkin Road, Columbus, Ga.—No. 488

Cross Country Shopping Center, Columbus, Ga.—No. 484

1210 Broad Street, Phenix City, Ala.—No. 413

Sales to these four stores for the year 1960 amounted to 9,865 cases of Royal Crown Cola in bottles and cans totalling approximately \$10,500 in dollar volume. During the same period of the Winn-Dixie Anniversary Sale, respondent sold Royal Crown Cola in bottles and cans to competitors of the above-listed stores in both cities and surrounding territory. Competitors of each of the respective stores existed throughout the entire area. Such competitors were not offered payments or given any benefits or anything in lieu thereof proportionally equal to those benefits paid Winn-Dixie Stores in connection with its Anniversary Sale.

9. Respondent sells from its Columbus, Georgia bottling and canning plants Royal Crown Cola in cans and bottles to Buddy's Food Center and Edmond's Grocery located in Phenix City, Alabama. During the year 1960, respondent entered into the following promotions:

(a) For the period September 1-3, 1960, respondent refunded Buddy's Food Center the sum of 6¢ for each carton of Royal Crown Cola sold during said period. The total amount paid Buddy's Food Center by respondent was \$85.14 by check for the promotion of Royal Crown Cola.

(b) During the period December 9-10, 1960, respondent agreed with Edmond's Grocery to supply, and did supply, each customer with one quart bottle of Royal Crown Cola for each carton of six bottles of 10 oz. Royal Crown Cola purchased at said store. For the promotion of Royal Crown Cola respondent paid Edmond's Grocery a total of \$21 in the form of cases of quart size bottles of Royal Crown Cola.

10. During these same periods, respondent sold Royal Crown Cola in bottles and cans from its plants in Columbus, Georgia, to competitors of Buddy's Food Center and Edmond's Grocery in Phenix City, Alabama. Such competitors were not offered payments or given any benefits or anything in lieu thereof proportionally equal to the benefits given these two customers.

11. Respondent, in addition to manufacturing and selling Royal Crown Cola to the aforesaid Winn-Dixie stores and others in bottles and cans from its Columbus, Georgia bottling and canning plants,

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also operates several other plants and divisions. Its principal product is a concentrate or flavor ingredient used in the ultimate manufacture of carbonated soft drinks which is sold from its Columbus, Georgia concentrate plant exclusively to its Franchised Bottlers throughout the United States. Respondent also manufactures at three plants located in Florida, Georgia and Illinois a finished carbonated beverage packed in cans which is sold to its Franchised Bottlers. A third division of respondent manufactures at Columbus, Georgia an instant soft drink powder known as Bev-Rich which is sold through brokers to retail outlets including many Winn-Dixie stores throughout the Southeastern United States. Orders for Bev-Rich are filled, shipped and billed directly to such Winn-Dixie stores. Respondent also manufactures in Columbus, Georgia at its canning plant a canned carbonated drink for Winn-Dixie stores under their private label called "Chek". In addition to Royal Crown Cola in bottles and cans, respondent manufactures at its Columbus, Georgia bottling plant beverage products under the registered trade names of "Nehi", a line of flavor beverages; "Upper Ten", a lemon carbonated beverage, and "Par-T-Pak", which are sold to retailers including the aforesaid Winn-Dixie stores in the Columbus, Georgia and Phenix City areas.

12. Respondent's principal business is the manufacture, at Columbus, Georgia, of beverage concentrates or flavor ingredients which are used in the production of bottled soft drinks. The major users of the concentrates are independent bottling plants which purchase such concentrates from respondent pursuant to a "License and Franchise" agreement. Respondent has approximately 450 such Franchised Bottlers. The relationship between respondent and its Franchised Bottlers is governed by the "License and Franchise" agreement which gives the bottler the right to purchase concentrates, to use respondent's trade marks, and to market the products within a restricted and exclusive territory. This agreement also gives respondent the right to insure that the nature and quality of the beverage produced by the Franchised Bottlers conforms to rigid standards of quality set by respondent, that the products sold bear respondent's trade names and use standard bottle caps, bottles, labels and cartons prescribed by respondent, that the Franchised Bottlers actively build and maintain a full volume of patronage for Royal Crown beverages and cooperate with respondent in its plans for building, maintenance and expansion of such sales; and that the Franchised Bottlers shall make a written monthly report of the number of cases of Royal Crown beverages sold and submit annual financial statement covering their plant operations. Respondent may cancel the agreement after notice if the

production of Royal Crown beverages by the Franchised Bottler is not satisfactory to respondent. In order to insure the nature and quality of the beverages produced by the Franchised Bottlers, respondent has the right to and does through its representatives and employees make frequent inspections of its Franchised Bottlers' plants. The Franchised Bottlers are separate and independent legal and business entities; respondent contributes none of its Franchised Bottlers' capital, nor does it otherwise give them financial aid; Franchised Bottlers purchase their bottling equipment, bottles, caps and raw materials such as sugar from independent manufacturers in which respondent has no interest and for which respondent receives no payment for the privilege of making bottles or caps bearing respondent's trade mark or trade name; and respondent underwrites none of the losses which a Franchised Bottler may incur. Respondent has no control over the prices charged by the Franchised Bottlers, nor over the terms and conditions of their sales. Respondent seldom deals directly with customers of its Franchised Bottlers in promoting the sale of "R. C. Cola".

13. Respondent places its beverage concentrate in various sized containers to which they affix a label containing explicit instructions for mixing. A one-gallon container of concentrate according to respondent's instructions when mixed will yield 230 24-bottle cases of ten-ounce bottles of "R. C. Cola", 192 24-bottle cases of twelve-ounce bottles of "R. C. Cola" and 144 24-bottle cases of sixteen-ounce bottles of "R. C. Cola". Respondent sells the beverage concentrate to the Franchised Bottlers and is paid solely on the basis of the number of gallons sold. However, in view of the strict quality control maintained by respondent over the manufacturing process of its Franchised Bottlers, respondent's sales of beverage concentrate bear a fixed relationship to the sales of bottled "R. C. Cola". Consequently, respondent has a direct pecuniary interest in the promotion and sale of "R. C. Cola" not only by its Franchised Bottlers to retailers but in the sale by such retailers to the consuming public.

14. As a result of this mutual interest in retail sales and pursuant to the "License and Franchise" agreement expressly providing for cooperation in expanding sales, respondent has established a cooperative advertising fund based on a formula related to the volume of the Franchised Bottlers' concentrate purchases from respondent during the preceding year and to which fund the respondent and the Bottler contribute in equal shares. It is from this fund that respondent made the payments totalling \$1,474.30 to Winn-Dixie Stores, Inc., in connection with the latter's Anniversary Sale. Of this sum, \$78 repre-

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sents the portion allocable to its Columbus, Georgia bottling plant for the advertisements of Winn-Dixie's four stores in that area carried in the Columbus, Georgia newspaper. The remaining \$1,396.30 was apportioned among its respective Franchised Bottlers for advertisements of Winn-Dixie stores in their areas carried in newspapers in approximately 38 cities and was charged to their respective shares of the cooperative advertising fund.

In addition to the above-mentioned cooperative advertising fund, respondent expends considerable sums on other advertising programs in promoting the sale of Royal Crown Cola and its other products.

CONCLUSIONS

The evidence of record supports the following conclusions:

1. Winn-Dixie Stores, Inc., and its subsidiaries constitute a unitary retail grocery chain doing business throughout Southeastern United States. Several retail outlets of Winn-Dixie Stores, Inc., purchase directly from respondent its products in bottles and cans known as "Royal Crown Cola", "Nehi", "Par-T-Pak", and "Upper Ten". Winn-Dixie Stores, Inc., also purchases directly from respondent "Bev-Rich" and "Chek". Under these circumstances Winn-Dixie Stores, Inc., is a customer of respondent within the meaning of Section 2(d) of the Clayton Act, as amended.

Buddy's Food Center, Phenix City, Alabama, and Edmond's Grocery, Phenix City, Alabama are also customers of respondent.

2. The respondent in 1960 made promotional payments to Winn-Dixie Stores, Inc. totalling \$1,474.30. Respondent is admittedly engaged in interstate commerce. Respondent ships "Royal Crown Cola" and other products in the course of such commerce from its Columbus, Georgia plant to Winn-Dixie's retail outlet in Phenix City, Alabama. It also ships in the course of such commerce "Bev-Rich" and "Chek" from its Columbus, Georgia plants to Winn-Dixie's retail outlets throughout Southeastern United States. The promotional payments were solicited by Winn-Dixie Stores, Inc., from its Florida headquarters office to respondent in Georgia; invoices and payment by check for such promotions were sent from Georgia to Florida and other states. Under these circumstances the promotional payments of \$1,474.30 to Winn-Dixie Stores, Inc., were made by respondent in the course of such commerce as that terminology is used in Section 2(d) of the Clayton Act, as amended. *Matter of Shreveport Macaroni Manufacturing Company, Inc.*, Docket No. 7719, Opinion of the Commission, January 24, 1962 [60 F.T.C. 196, 202].

The promotional payments of \$85.14 to Buddy's Food Center and \$21 to Edmond's Grocery as set forth above in Finding No. 9 were likewise made in the course of such commerce.

3. Respondent sells its product Royal Crown Cola to competitors of Winn-Dixie Stores, Inc., Buddy's Food Center and Edmond's Grocery. Such competitors were not offered payments or given any benefits or anything in lieu thereof proportionally equal to the benefits given these three customers.

4. Respondent sells "Royal Crown Cola" in bottles and cans manufactured in its Columbus, Georgia plants to four Winn-Dixie retail outlets in the Columbus, Georgia and Phenix City, Alabama areas. "Royal Crown Cola" the product promoted is a product manufactured, sold and offered for sale by respondent. Moreover, "Royal Crown Cola" in bottles is an item universal in nature. It is sold in distinctive and unique bottles prescribed by respondent, the bottle caps bear respondent's trademark, and the beverage itself must rigidly conform to a standard of quality prescribed and controlled by respondent. The beverage concentrate or flavor extract which is manufactured exclusively by respondent is the principal ingredient. The promotional advertising, whether on a cooperative basis with its Franchised Bottlers or by respondent, refers to the same product "Royal Crown Cola". Advertisements in one area directly and indirectly promote sales of that product everywhere due to the universal nature of that product. Increase in the volume of sales of the product "Royal Crown Cola" anywhere has a direct effect on respondent's volume of sales of its beverage concentrate. Under these circumstances "Royal Crown Cola" whether produced in respondent's Columbus, Georgia bottling plant or in its Franchised Bottlers' plants from the beverage concentrate supplied from respondent's Columbus, Georgia plant is a product or commodity manufactured, sold or offered for sale by respondent within the intent and meaning of Section 2(d) of the Clayton Act, as amended.

5. Respondent admittedly made separate, distinct and unrelated payments to three customers: Winn-Dixie Stores, Inc., Buddy's Food Center and Edmond's Grocery of \$1,474.30, \$85.14 and \$21 respectively, as compensation or in consideration for services furnished by such customers in connection with the handling, sale, or offering for sale of products sold to them by respondent, without making such payments or allowances available to all other competing customers on proportionally equal terms. The payments made by respondent are not negligible, inconsequential or unrelated to the public interest.

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Findings

Assuming arguendo that \$1,396.30 of the \$1,474.30 paid to Winn-Dixie Stores, Inc., was for the promotion of a product not manufactured or sold by respondent but by its Franchised Bottlers¹; the payments so reduced were not restricted to a single isolated incident or for a particular type of service or facility² but were made to three separate customers and consisted of three distinctly different methods of promoting respondent's product. In addition, there is no indication that the three payments were made inadvertently or outside the channels of respondent's regular course of business. In this view of the matter, the Hearing Examiner also comes to the conclusion that the payments even as reduced were not trivial and that this proceeding is in the public interest.³

6. The acts and practices of respondent, as proved, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended.

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

8. Respondent's request to narrow the scope of the order to bottled "Royal Crown Cola" is not warranted. *Matter of Vanity Fair Paper Mills, Inc.*, Docket No. 7720. Opinion of the Commission, March 21, 1962 [60 F.T.C. 568, 573]. As noted above, respondent's activities were not confined to one customer or one particular type of unlawful payments, but included a payment to one customer for newspaper advertising, a payment to another customer in the form of refunds to cover special promotions and a payment to still another customer to cover the cost of supplying free quart bottles of "Royal Crown Cola" to promote the sale of a carton of respondent's twelve-ounce bottles. Under these circumstances, the Hearing Examiner does not feel that a narrow order would "attain the objectives Congress envisioned" or provide "effectively to close all roads to the prohibited goal, so that its [the Commission's] order may not be by-passed with impunity." The Order, as hereinafter set forth, has a reasonable relationship to the unlawful practices found to exist. *F.T.C. v. Ruberoid Co.*, 343 U.S. 470 (1952); *P. Lorillard Company v. F.T.C.*, 267 F. 2d 439, 445 (CA 3, 1959), *cert. denied* 361 U.S. 923 (1959). In the latter case the court said:

The fact that these cases involved orders issued in the language of Section 2(a) of the amended Clayton Act should give us little pause for Section 2(d) is much narrower in scope and therefore orders framed in its language would be well within the permissible ambit of the Commission's discretion.

¹ A position not taken by the Hearing Examiner.

² *Cf. Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

³ *F.T.C. v. Klesner*, 280 U.S. 19 (1929).

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ORDER

It is ordered, That respondent, Royal Crown Cola Co., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the sale of carbonated beverages or powdered beverages in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

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

OPINION OF THE COMMISSION

DECEMBER 23, 1963

By DIXON, *Commissioner*:

This case is before us on respondent's appeal from the hearing examiner's initial decision finding it to have violated Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 38 Stat. 730 (1914), as amended, 49 Stat. 1526 (1936), 15 U.S.C. 13(d) (1958). Respondent corporation is engaged in the manufacture and sale of beverage concentrates, beverage powders, and carbonated beverages packaged in both bottles and cans.

After a short hearing, the hearing examiner filed an initial decision on April 30, 1962, holding that respondent had in fact violated Section 2(d) as charged. The order proposed by the hearing examiner would require the respondent to cease and desist from such violations "* * * in connection with the sale of carbonated beverages or powdered beverages * * * ." Respondent has appealed to the Commission on the sole ground that the order to cease and desist is too broad in its coverage in that no evidence of violation was adduced with respect to beverage powders (inadvertently referred to by the examiner as "powdered beverages").

The principal business of respondent is the manufacture of beverage concentrates which are used in the subsequent production of carbonated soft drinks. The concentrates are sold to independent franchised bottlers, who process them into beverages which they in turn

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Opinion

sell to retailers. In one area of the country, Columbus, Georgia, respondent operates its own bottling plant. This plant, except for the fact that it is owned and operated by the parent company, operates essentially as do the plants owned and operated by respondent's franchised bottlers. The Columbus bottling plant sells carbonated beverages to the retail trade in Columbus, Georgia, Phenix City, Alabama, and the surrounding territory. This is the only area in which the respondent itself sells canned or bottled carbonated beverages directly to the retail trade. All of the violations occurred in connection with the sale of carbonated beverages by the Columbus, Georgia, plant.

The respondent contends, and the record appears to support, that the beverage powder division of respondent's corporation is operated entirely separately from the respondent's other operations, including the operations of the Columbus bottling plant. This division, which respondent refers to as the Bev-Rich Company, is located in a separate building at an entirely different location from the other divisions of respondent corporation. It is separately operated by its own supervisory personnel. The product is distinctly different from the products manufactured in other divisions of the respondent. It is a soft drink powder to which the ultimate consumer adds water to produce a non-carbonated drink. The powder is marketed under a separate trademark, namely, "Bev-Rich". The method of marketing differs distinctly from that employed by respondent's other divisions. Beverage powder is sold only to retailers through food brokers who handle a general variety of food products for other principals. There was no evidence that the respondent had ever discriminated in the payment of advertising allowances to retailers purchasing its beverage powders. As a matter of fact, the only affirmative evidence on the point indicates that they have always been given on proportionally equal terms to all customers.

Under the above circumstances, where the basic violation was performed by a geographically confined operating division of the company, it does not seem appropriate to include within the scope of the order to cease and desist a widely different product marketed in an entirely different manner and on a national basis. Accordingly, the order of the hearing examiner will be modified, limiting its coverage to carbonated beverages.

While not excepted to by either party, the hearing examiner concluded, at page 1960 of his initial decision, that Royal Crown Cola, whether produced by respondent's Columbus bottling plant or by one of its franchised bottlers with concentrates supplied by respondent, is a product "* * * sold or offered for sale by respondent

Final Order

63 F.T.C.

within the intent and meaning of Section 2(d) of the Clayton Act, as amended." We are not certain of the exact meaning of this finding or conclusion, but, at the oral argument, it became apparent that neither counsel considered it as having the effect of making the order to cease and desist applicable to the sales of Royal Crown Cola to retailers by respondent's local franchised bottlers. Such being the case, we do not deem it appropriate to permit the statement to stand, for it may engender confusion and uncertainty as to the scope of the order to cease and desist.

Insofar as the initial decision is not consistent with what we have said here, it will be modified, and, as so modified, adopted as the decision of the Commission.

FINAL ORDER

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

The Commission, for the reasons stated in the accompanying opinion, having rendered its decision granting said appeal:

It is ordered, That the initial decision of the hearing examiner, excepting the last sentence in conclusion number 4 and the proposed order to cease and desist, which are set aside, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That in lieu of the order to cease and desist contained in the initial decision, the following be, and it hereby is, entered as the order of the Commission:

ORDER

It is ordered, That respondent, Royal Crown Cola Co., a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the sale of carbonated beverages in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondent as compensation or in consideration for any advertising or other services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of respondent's carbonated beverages, unless such payment or consideration is offered and otherwise made available on proportionally equal

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Complaint

terms to all other customers competing in the distribution or resale of such products.

It is further ordered, That respondent 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 set forth herein.

IN THE MATTER OF

THE PAPERCRAFT CORPORATION

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

Docket 8489. Complaint, June 4, 1962—Decision, Dec. 24, 1963

Order requiring a Pittsburgh, Pa., manufacturer of gift wrappings, ribbons and related products, to cease misrepresenting the size of rolls of gift wrapping papers by such practices as packaging the rolls in display boxes with two inches of empty space at either end, thus creating the false impression that the rolls were as wide as the containers.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Papercraft Corporation, a corporation, hereinafter referred to as the respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, The Papercraft Corporation, is a corporation organized and existing under the laws of the State of Pennsylvania, with its office and principal place of business located at 5850 Centre Avenue, Pittsburgh, Pennsylvania.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacture, offering for sale and sale of gift wrappings, ribbons and related products to distributors and retailers for resale to the consuming public.

PAR. 3. In the course and conduct of its business, the respondent now causes, and for some time last past has caused, its gift wrappings and related accessories when sold, to be shipped from its places of business in Pennsylvania to purchasers thereof located in various other