mented by this order, be, and it hereby is, adopted as the decision of the Commission.

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 said order.

Commissioner Elman dissenting, and Commissioner Reilly not participating for the reason that he did not hear oral argument.

IN THE MATTER OF

COUNTRY TWEEDS, INC., ET AL.

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

Docket 8085. Complaint, Aug. 24, 1960—Decision, May 21, 1964

Order modifying an order of November 29, 1962, 61 F.T.C. 1250, pursuant to a decision of U.S. Court of Appeals, Second Circuit, 326 F. 2d 144 (7 S.&D. 835), by eliminating from said order paragraph 4 which prohibited respondent from misrepresenting "in any manner" the quality of its cashmere.

MODIFIED ORDER TO CEASE AND DESIST

Respondents having filed in the United States Court of Appeals for the Second Circuit their petition to review and set aside the order to cease and desist issued herein on November 29, 1962; and the court having rendered its decision on January 3, 1964, and having entered its final decree on January 28, 1964, modifying, and as modified, affirming and enforcing said order to cease and desist; and the time for filing a petition for certiorari having expired and no such petition having been filed;

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the said final decree of the Court of Appeals to read as follows:

It is ordered, That respondents, Country Tweeds, Inc., a corporation, and its officers, and Marcus Weisman, 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 ladies' cashmere coats or any other merchandise, composed of fabrics of any kind, or products made therefrom, in

commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

a. That a comparative test of a fabric in respondents' merchandise with another fabric shows that respondents' fabric is the best quality produced or on the market when the test does not so show.

b. That an altered report of a test, comparative or otherwise, is a true and complete copy or reproduction of the report of such test.

2. Misrepresenting in any manner, by means of a test, comparative or otherwise, the quality of any merchandise offered for sale, sold or distributed by respondents or the quality of the fabric in such merchandise.

3. Misrepresenting the results of a test, comparative or otherwise, involving fabrics in their merchandise by altering the report of the test.

4. Furnishing means and instrumentalities to others whereby they may mislead the public as to any of the matters and things set out above.

IN THE MATTER OF

POST GRADUATE SCHOOL OF NURSING, INC., ET AL.

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

Docket 8566. Complaint, Apr. 25, 1963—Decision, May 21, 1964

Order dismissing, for failure to adduce evidence with respect to the content and worth of the courses concerned, complaint charging Chicago sellers of home study courses with advertising falsely that their courses would make persons completing them proficient auxiliary nurses and qualify them to secure employment as auxiliary nurses.

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 Post Graduate School of Nursing, Inc., a corporation, and Herbert L. Kellner, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appear-

ing 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 Post Graduate School of Nursing, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 131 South Wabash Avenue, in the city of Chicago, State of Illinois.

Respondent Herbert L. Kellner is an individual and is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of a correspondence course of instruction in auxiliary nursing. As used hereinafter the terms "auxiliary nurse" and "auxiliary nursing" shall mean or refer to all of those persons working in the nursing field below the level of a Registered Nurse and includes the job titles of practical nurse, nursing aide, hospital attendant, doctor's office nurse, baby nurse, nurse companion and other similar titles.

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

PAR. 4. In the course and conduct of their business, at all times mentioned herein, the respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of courses of instruction in auxiliary nursing.

PAR. 5. In the course and conduct of their business, respondents have disseminated and caused the dissemination of advertisements and other promotional material describing and extolling their said course of instruction, by the United States mail and by various other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in nationally circulated magazines, brochures, circulars and form letters, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of their said course of instruction in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. By means of statements contained in said advertisements and promotional material, disseminated as aforesaid, the respondents have represented, directly or by implication:

1. That persons completing respondents' said correspondence course of instruction in auxiliary nursing will thereby have become and will thereby be proficient and competent in the performance of the duties and functions of an auxiliary nurse.

2. That persons completing respondents' said correspondence course of instruction in auxiliary nursing will thereby have become and will thereby be an auxiliary nurse.

3. That persons completing respondents' said correspondence course of instruction in auxiliary nursing will thereby have become and will thereby be qualified and enabled to secure employment as an auxiliary nurse on general or private duty with hospitals, sanatoriums, institutions, individuals or similar or related places of employment.

PAR. 7. In truth and in fact:

1. Persons completing respondents' said correspondence course of instruction in auxiliary nursing will not thereby have become and will not thereby be proficient or competent in the performance of the duties and functions of an auxiliary nurse.

2. Persons completing respondents' said correspondence course of instruction in auxiliary nursing will not thereby have become and will not thereby be an auxiliary nurse.

3. Persons completing respondents' said correspondence course of instruction in auxiliary nursing will not thereby have become and will not thereby be qualified and enabled to secure employment as an auxiliary nurse on general or private duty with hospitals, sanatoriums, institutions, individuals or similar or related places of employment.

Said statements and representations were, therefore, false, misleading and deceptive.

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 said correspondence course from the respondents by reason of said erroneous and mistaken 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.

ORDER DISMISSING COMPLAINT

On April 25, 1963, the Commission issued a complaint charging that respondents had violated Section 5 of the Federal Trade Commission Act (15 U.S.C. 41) by representing, falsely, that persons completing respondents' correspondence course would thereby (a) become and be proficient and competent in the performance of the duties of an auxiliary nurse, (b) become and be auxiliary nurses, and (c) become and be qualified to secure employment as auxiliary nurses. After hearings, the examiner filed an initial decision on February 13, 1964, in which he found the allegations of the complaint had been proved, and ordered respondents to cease and desist from engaging in the misrepresentations charged in the complaint. The matter is before the Commission on respondents' appeal.

The Commission, having considered the briefs filed and having heard oral argument, has concluded that the testimony upon which the examiner relied was too general and not sufficiently specific to serve as the basis for an order against respondents. In order to support a specific finding of violation that respondents' correspondence course was valueless and deceptively advertised, evidence should have been adduced with respect to the content and worth of that course. Our conclusion does not imply that the testimony of the witnesses adduced by complaint counsel is in any respect inaccurate or not to be credited; it is, rather, that such testimony was not sufficiently closely tied to respondents' course to furnish an adequate predicate for an order to cease and desist. By dismissing this complaint for failure of proof, we do not, of course, resolve any of the issues raised in this proceeding. Should any future action by the Commission against these respondents appear to be warranted, the disposition being made of this appeal will not stand in the way.

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

IN THE MATTER OF

ADAMS DAIRY COMPANY ET AL. AND THE KROGER CO.

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

Docket 7596. Complaint, Sept. 24, 1959—Decision, May 25, 1964

Consent order requiring two associated distributors of fluid milk, ice cream, cottage cheese and other dairy products in the States of Missouri, Kansas, Illinois, and Kentucky and a supermarket chain of retail grocery stores

in those States, to end their conspiracy to fix or maintain retail prices for their products and differentials between their selling price and that of competitors; to cease coercing competitors to maintain agreed upon differentials, guaranteeing retailers a fixed margin of profit, charging a lower price in one area than in another to destroy competition.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (38 Stat. 717, 15 U.S.C.A. Sec. 41 *et seq.*, 52 Stat. 111), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Adams Dairy Company, a corporation; Adams Dairy, Inc., a corporation; and The Kroger Company,* a corporation, more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby names the previously mentioned corporations, each and all as respondents herein, and issues its complaint against each of the named parties, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Adams Dairy Company is a corporation organized and existing under the laws of the State of Missouri, with its principal office and place of business located at R.D. Mize Road, Blue Springs, Missouri.

Respondent Adams Dairy, Inc., is a corporation organized and existing under the laws of the State of Missouri with its principal office and place of business located at 5425 Easton Avenue, St. Louis, Missouri.

Respondent The Kroger Company is a corporation organized and existing under the laws of the State of Ohio, with its principal office and place of business located at 35 East Seventh Street, Cincinnati, Ohio.

PAR. 2. Respondents Adams Dairy Company and Adams Dairy, Inc., hereinbefore named and described, are engaged in the distribution and sale of fluid milk, ice cream, cottage cheese, and other miscellaneous dairy products (hereinafter referred to as dairy products) at wholesale to customers located in the States of Missouri, Kansas, Illinois, and Kentucky. Adams Dairy Company had sales of approximately six million dollars in 1956 and Adams Dairy, Inc., had sales of approximately three million dollars in 1957. There has been and is now a pattern and course of interstate commerce in the processing, distribution and sale by respondents, Adams Dairy Company and Adams Dairy, Inc., of said dairy products within the intent and meaning of the Federal Trade Commission Act.

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*The correct corporate name is The Kroger Co.

Respondent The Kroger Company, (hereinafter referred to as Kroger), is engaged in the operation of retail grocery stores located in a number of the various states, including the States of Missouri, Kansas, Illinois and Kentucky. Kroger had net sales in excess of one and one-half billion dollars in 1957.

Respondent Kroger, in connection with the operation of its retail grocery stores, handles dairy products for resale to the consumer. There has been and is now a pattern and course of interstate commerce in the purchase and sale of said dairy products by said respondent Kroger within the intent and meaning of the Federal Trade Commission Act.

PAR. 3. Each of the respondents, Adams Dairy Company and Adams Dairy, Inc., is in substantial competition with numerous other dairy concerns operating in the States of Missouri, Kansas, Illinois and Kentucky, in the processing, distribution and sale of dairy products, except to the extent that competition has been hindered, lessened, restricted and eliminated by the unfair methods of competition and unfair acts and practices hereinafter set forth.

Respondent Kroger is in competition with numerous other retail grocery concerns in the States of Missouri, Kansas, Illinois, and Kentucky, except to the extent that competition has been hindered, lessened, restricted, and eliminated by the unfair methods of competition and the unfair acts and practices hereinafter set forth.

PAR. 4. For many years, and continuing to the present time, respondents Adams Dairy Company and Adams Dairy, Inc. (hereinafter designated as respondent dairies), and The Kroger Company, have maintained and effectuated a conspiracy, combination, agreement and understanding in the sale and distribution of dairy products in restraint of trade of said products as is more fully set out in Paragraphs Five and Six hereof.

PAR. 5. As a part of, pursuant to and in furtherance of the aforesaid agreement, understanding, combination and conspiracy, respondents have, for many years past and to the present time, performed and pursued the following acts, policies and practices:

1. Fixed prices and price differentials in the sale of dairy products and coerced competitors into maintaining prices and price differentials in said products.

2. Respondent Kroger, in connection with the sale at retail of the dairy products of respondent dairies, has engaged and is engaging in the following acts and practices, among others:

(a) Charging lower prices for the dairy products of respondent dairies, directly and through the use of coupons, free merchandise or other devices furnished by respondent dairies, in certain areas than those charged elsewhere;

(b) Engaging in price wars in the sale of dairy products in certain areas with the purpose of or the natural and probable effect of injuring and destroying competition in said dairy products;

(c) Denying to competitors and potential competitors of respondent dairies a reasonable opportunity to compete for the dairy product purchases of respondent Kroger and otherwise giving respondent dairies preferential treatment in its retail stores.

3. Respondent dairies have subsidized the acts, practices and policies of respondent Kroger set out in paragraph 2 hereof in the sale and distribution of dairy products in certain areas within the states above named by the following means, among others:

(a) Selling said products to said respondent Kroger in certain areas at prices lower than those charged elsewhere by said respondent dairies, including prices that were below cost;

(b) Furnishing coupons, free merchandise and other devices for use in the retail sale of the dairy products of respondent dairies by respondent Kroger in certain areas and not elsewhere;

(c) Guaranteeing a fixed profit margin to respondent Kroger in its sale of said dairy products regardless of the price at which such products are sold to the consumer;

(d) Contributing advertising allowances to respondent Kroger upon terms not accorded or offered to all competing purchasers of dairy products on proportionally equal terms.

PAR. 6. The conspiracy, combination, agreement and understanding and the acts and practices of respondents pursuant to and in furtherance of same, as alleged herein, have had and do have the effect of hindering, lessening, restricting, restraining, destroying and eliminating competition in the processing and sale of dairy products; have had and do have a tendency to unduly hinder competition or to create in respondents a monopoly; have constituted an attempt to monopolize; have foreclosed markets and access to markets to competitors in the processing, distribution and sale of dairy products; are all to the prejudice of competitors of respondents and to the public; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER GRANTING MOTION TO DISMISS COMPLAINT AND ACCEPTING CONSENT ORDERS TO CEASE AND DESIST

The hearing examiner, pursuant to Section 3.6(a) of the Rules of Practice, has certified to the Commission a series of motions by respondents in this and two related cases. Respondent Adams Dairy,

Inc. (Adams of St. Louis), moves that the complaint against it be dismissed on the ground that as of January 1, 1964, it ceased doing business, sold all of its assets to a non-affiliated company, and has entered into a covenant not to re-enter the dairy business in competition with the purchaser. Complaint counsel has stated that he does not object to granting of the motion provided that it is without prejudice to Commission action in the unlikely event that Adams of St. Louis should resume its operations. The Commission has concluded that, in view of the complete termination of business by Adams of St. Louis, no purpose would be served by further proceedings here and its motion to dismiss should be granted.

Respondents Adams Dairy Company (Adams of Kansas City) and The Kroger Co. have requested that the proceedings be disposed of by acceptance of consent orders to cease and desist. Complaint counsel joins in these motions. The Commission has determined that good cause exists for permitting utilization of the consent-order procedure and that the agreements that have been entered into afford an adequate basis for disposition of these proceedings. It is therefore appropriate that the Commission itself initially decide these matters and forthwith issue its decision and orders.

The Commission hereby accepts the agreements, makes the following jurisdictional findings, and enters the following order:

1. Respondent Adams Dairy Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at R. D. Mize Road, Blue Springs, Missouri.

2. Respondent The Kroger Co. (incorrectly named in the complaint as The Kroger Company) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1014 Vine Street, Cincinnati, Ohio.

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

It is ordered, That respondent Adams Dairy Company, a corporation, its officers, directors, agents, representatives, and employees, directly or through any corporate or other device, in the offering for sale, sale, or distribution of packaged fresh fluid milk, cream, and cottage cheese, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, carrying out, or continuing any combination, conspiracy, agreement or understanding with The Kroger Co. or any other purchaser of any such products of respondent Adams Dairy Company not a party

hereto and not a subsidiary or affiliate of said respondent, to do or perform any of the following acts, practices, or things:

1. Fix or maintain any retail price of such product;

2. Fix or maintain an agreed amount of differential between the retail price for any such product and the retail price of any competing third party selling the same quantity of such product either in containers made of different material or through home delivery;

3. Coerce any retail or other competitor to fix or maintain an agreed amount of differential between the retail price for any such product and the retail price of any competing third party selling the same quantity of such product either in containers made of different material or through home delivery;

4. Guarantee to any retailer a minimum or a fixed margin of profit between in-store cost and retail price of any such product;

5. Charge a lower price for any such product in one area than the price charged for the same product in any other area for the purpose of destroying competition;

6. Sell any such product at an unreasonably low price for the purpose of destroying competition.

Provided, however, That nothing contained herein shall be interpreted as prohibiting respondent herein from granting a price reduction or other allowance on any such product to meet, in good faith, an equally low price or allowance of a competitor, or any price reduction or allowance which is otherwise lawful.

Provided, however, That nothing contained herein shall be interpreted as prohibiting respondent herein from establishing, maintaining, or enforcing any resale price agreement in any manner excepted from the provisions of the Federal Trade Commission Act by virtue of the McGuire Act amendments to said Act or any other applicable statute, whether now in effect or hereafter enacted, or from complying with the requirements of any law or ordinances.

It is further ordered, That respondent The Kroger Co., incorrectly named in the complaint as The Kroger Company, a corporation, its directors, officers, agents, representatives and employees, directly or through any corporate or other device, in the offering for sale, sale or distribution of packaged fresh fluid milk, cream, and cottage cheese, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, carrying out, or continuing any combination, conspiracy, agreement, or understanding with Adams Dairy Company, or with any other supplier of any such products to The Kroger Co. not a party hereto and not a sub-

sidiary or affiliate of said respondent, to do or perform any of the following acts, practices, or things in the following area:

All counties within the State of Kansas lying to the east of a continuous line formed by the western boundaries of the counties of Doniphan, Atchison, Jackson, Pottawatomie, Riley, Geary, Wabaunsee, Osage, Franklin, Anderson, Allen, Neosho and Labette; all counties within the State of Missouri; all counties within the State of Illinois lying to the south of a continuous line formed by the northern boundaries of the counties of Calhoun, Greene, Macoupin, Montgomery, Fayette and Effingham and to the west of a continuous line formed by the eastern boundaries of the counties of Effingham, Clay, Wayne, Hamilton, Saline and Pope; and the counties of Ballard, Carlisle, McCracken, Graves, Calloway and Marshall within the State of Kentucky.

1. Fix or maintain, with respect to the resale by said respondent of any such product purchased from such supplier:

(a) the retail price of such product;

(b) a fixed margin of profit between the in-store cost and any agreed upon retail price of such product; or

(c) any agreed amount of differential between said respondent's retail price for such product of such supplier and the retail price of any competing third party selling the same quantity of the same product either in containers made of different material or through home delivery.

2. Coerce any competing third party on its sale of any such product either in containers made of different material or through home delivery to fix or maintain any agreed amount of differential between such party's retail price and respondent's retail price for the same quantity of such product of such supplier.

3. Charge a lower retail price for any such product sold by respondent in one part of such area than the retail price charged by respondent for the same product of such supplier in any other part of such area for the purpose of destroying competition.

Provided, however, That nothing contained herein shall be interpreted as prohibiting The Kroger Co. from requesting or receiving from a supplier a price reduction or other allowance on any such product to meet, in good faith, an equally low price or allowance of such supplier's competitor, or any price reduction or allowance which is otherwise lawful.

Provided, however, That nothing contained herein shall be interpreted as prohibiting The Kroger Co. from establishing, maintaining, or enforcing any resale price agreement in any manner excepted from

the provisions of the Federal Trade Commission Act by virtue of the McGuire Act amendments to said Act or any other applicable statute, whether now in effect or hereafter enacted, or from complying with the requirements of any law or ordinances.

It is further ordered, That respondents Adams Dairy Company and The Kroger Co., 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.

It is further ordered, That the motion of respondent Adams Dairy, Inc., to dismiss the complaint against it be, and it hereby is, granted, and the complaint be, and it hereby is, dismissed.

Commissioner MacIntyre not participating.

IN THE MATTER OF

ADAMS DAIRY COMPANY ET AL. AND SAFEWAY STORES, INC.

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

Docket 7597. Complaint, Sept. 24, 1959—Decision, May 25, 1964

Consent order requiring two associated distributors of fluid milk, ice cream, cottage cheese and other dairy products in the States of Missouri, Kansas, Illinois and Kentucky and a supermarket chain of retail grocery stores in Missouri and Kansas, to end their conspiracy to fix or maintain retail prices for their products and differentials between their selling price and that of competitors; to cease coercing competitors to maintain agreed upon differentials, guaranteeing retailers a fixed margin of profit, charging a lower price in one area than in another to destroy competition.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (38 Stat. 717, 15 U.S.C.A. Sec. 41 *et seq.*, 52 Stat. 111), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Adams Dairy Company, a corporation; Adams Dairy, Inc., a corporation; and Safeway Stores, Inc., a corporation, more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby names the previously mentioned corporations, each and all as respondents herein, and

issues its complaint against each of the named parties, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Adams Dairy Company is a corporation organized and existing under the laws of the State of Missouri, with its principal office and place of business located at R. D. Mize Road, Blue Springs, Missouri.

Respondent Adams Dairy, Inc., is a corporation organized and existing under the laws of the State of Missouri with its principal office and place of business located at 5425 Easton Avenue, St. Louis, Missouri.

Respondent Safeway Stores, Inc., is a corporation organized and existing under the laws of the State of Maryland with its principal office and place of business located at 201 Fourth Street, Oakland, California.

PAR. 2. Respondents Adams Dairy Company and Adams Dairy, Inc., hereinbefore named and described, are engaged in the distribution and sale of fluid milk, ice cream, cottage cheese, and other miscellaneous dairy products (hereinafter referred to as dairy products) at wholesale to customers located in the States of Missouri, Kansas, Illinois, and Kentucky. Adams Dairy Company had sales of approximately six million dollars in 1956 and Adams Dairy, Inc., had sales of approximately three million dollars in 1957. There has been and is now a pattern and course of interstate commerce in the processing, distribution and sale by respondents, Adams Dairy Company and Adams Dairy, Inc., of said dairy products within the intent and meaning of the Federal Trade Commission Act.

Respondent Safeway Stores, Inc. (hereinafter referred to as Safeway), is engaged in the operation of retail grocery stores in a number of the various States, including the States of Missouri and Kansas. Safeway had net sales in excess of two billion dollars in 1957.

Safeway, in connection with the operation of its retail grocery stores, handles dairy products for resale to the consumer. There has been and is now a pattern and course of interstate commerce in the purchase and sale of said dairy products by said respondent Safeway within the intent and meaning of the Federal Trade Commission Act.

PAR. 3. Each of the respondents, Adams Dairy Company and Adams Dairy, Inc., is in substantial competition with numerous other dairy concerns operating in the States of Missouri, Kansas, Illinois, and Kentucky, in the processing, distribution and sale of dairy products, except to the extent that competition has been hindered, lessened, restricted and eliminated by the unfair methods of competition and unfair acts and practices hereinafter set forth.

Respondent Safeway is in competition with numerous other retail grocery concerns in the States of Missouri and Kansas, except to the extent that competition has been hindered, lessened, restricted and eliminated by the unfair methods of competition and the unfair acts and practices hereinafter set forth.

PAR. 4. For many years, and continuing to the present time, respondents Adams Dairy Company and Adams Dairy, Inc. (hereinafter designated as respondent dairies), and Safeway Stores, Inc., have maintained and effectuated a conspiracy, combination, agreement and understanding in the sale and distribution of dairy products in restraint of trade of said products as is more fully set out in Paragraphs Five and Six hereof.

PAR. 5. As a part of, pursuant to and in furtherance of the aforesaid agreement, understanding, combination and conspiracy, respondents have, for many years past and to the present time, performed and pursued the following acts, policies and practices:

1. Fixed prices and price differentials in the sale of dairy products and coerced competitors into maintaining prices and price differentials in said products.

2. Respondent Safeway, in connection with the sale at retail of the dairy products of respondent dairies, has engaged and is engaging in the following acts and practices, among others:

(a) Charging lower prices for the dairy products of respondent dairies, directly and through the use of coupons, free merchandise or other devices furnished by respondent dairies, in certain areas than those charged elsewhere;

(b) Engaging in price wars in the sale of dairy products in certain areas with the purpose of or the natural and probable effect of injuring and destroying competition in said dairy products;

(c) Denying to competitors and potential competitors of respondent dairies a reasonable opportunity to compete for the dairy product purchases of respondent Safeway and otherwise giving respondent dairies preferential treatment in its retail stores.

3. Respondent dairies have subsidized the acts, practices and policies of respondent Safeway set out in paragraph 2 hereof in the sale and distribution of dairy products in certain areas within the states above named by the following means, among others:

(a) Selling said products to said respondent Safeway in certain areas at prices lower than those charged elsewhere by said respondent dairies, including prices that were below cost;

(b) Furnishing coupons, free merchandise and other devices for use in the retail sale of the dairy products of respondent dairies by respondent Safeway in certain areas and not elsewhere;

(c) Guaranteeing a fixed profit margin to respondent Safeway in its sale of said dairy products regardless of the price at which such products are sold to the consumer;

(d) Contributing advertising allowances to respondent Safeway upon terms not accorded or offered to all competing purchasers of dairy products on proportionally equal terms.

PAR. 6. The conspiracy, combination, agreement and understanding and the acts and practices of respondents pursuant to and in furtherance of same, as alleged herein, have had and do have the effect of hindering, lessening, restricting, restraining, destroying and eliminating competition in the processing and sale of dairy products; have had and do have a tendency to unduly hinder competition or to create in respondents a monopoly; have constituted an attempt to monopolize; have foreclosed markets and access to markets to competitors in the processing, distribution and sale of dairy products; are all to the prejudice of competitors of respondents and to the public; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER GRANTING MOTION TO DISMISS COMPLAINT AND ACCEPTING CONSENT ORDERS TO CEASE AND DESIST

The hearing examiner, pursuant to Section 3.6(a) of the Rules of Practice, has certified to the Commission a series of motions by respondents in this and two related cases. Respondent Adams Dairy, Inc. (Adams of St. Louis), moves that the complaint against it be dismissed on the ground that as of January 1, 1964, it ceased doing business, sold all of its assets to a nonaffiliated company, and has entered into a covenant not to reenter the dairy business in competition with the purchaser. Complaint counsel has stated that he does not object to granting of the motion provided that it is without prejudice to Commission action in the unlikely event that Adams of St. Louis should resume its operations. The Commission has concluded that, in view of the complete termination of business by Adams of St. Louis, no purpose would be served by further proceedings here and its motion to dismiss should be granted.

Respondents Adams Dairy Company (Adams of Kansas City) and Safeway Stores, Inc., have requested that the proceedings be disposed of by acceptance of consent orders to cease and desist. Complaint counsel joins in these motions. The Commission has determined that good cause exists for permitting utilization of the consent-order procedure and that the agreements that have been entered into afford an

adequate basis for disposition of these proceedings. It is therefore appropriate that the Commission itself initially decide these matters and forthwith issue its decision and orders.

The Commission hereby accepts the agreements, makes the following jurisdictional findings, and enters the following order:

1. Respondent Adams Dairy Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at R. D. Mize Road, Blue Springs, Missouri.

2. Respondent Safeway Stores, Inc., is a corporation organized, 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 201 Fourth Street, Oakland, California.

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

It is ordered, That respondent Adams Dairy Company, a corporation, its officers, directors, agents, representatives, and employees, directly or through any corporate or other device, in the offering for sale, sale, or distribution of packaged fresh fluid milk, cream, and cottage cheese, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, carrying out, or continuing any combination, conspiracy, agreement or understanding with Safeway Stores, Inc., or any other purchaser of any such products of respondent Adams Dairy Company not a party hereto and not a subsidiary or affiliate of said respondent, to do or perform any of the following acts, practices, or things:

1. Fix or maintain any retail price of such product;

2. Fix or maintain an agreed amount of differential between the retail price for any such product and the retail price of any competing third party selling the same quantity of such product either in containers made of different material or through home delivery;

3. Coerce any retail or other competitor to fix or maintain an agreed amount of differential between the retail price for any such product and the retail price of any competing third party selling the same quantity of such product either in containers made of different material or through home delivery;

4. Guarantee to any retailer a minimum or a fixed margin of profit between in-store cost and retail price of any such product;

5. Charge a lower price for any such product in one area than the price charged for the same product in any other area for the purpose of destroying competition;

6. Sell any such product at an unreasonably low price for the purpose of destroying competition.

Provided, however, That nothing contained herein shall be interpreted as prohibiting respondent herein from granting a price reduction or other allowance on any such product to meet, in good faith, an equally low price or allowance of a competitor, or any price reduction or allowance which is otherwise lawful.

Provided, however, That nothing contained herein shall be interpreted as prohibiting respondent herein from establishing, maintaining, or enforcing any resale price agreement in any manner excepted from the provisions of the Federal Trade Commission Act by virtue of the McGuire Act amendments to said Act or any other applicable statute, whether now in effect or hereafter enacted, or from complying with the requirements of any law or ordinances.

It is further ordered, That respondent Safeway Stores, Inc., a corporation, its directors, officers, agents, representatives and employees, directly or through any corporate or other device, in the offering for sale, sale, or distribution of packaged fresh fluid milk, cream and cottage cheese, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, carrying out, or continuing any combination, conspiracy, agreement, or understanding with Adams Dairy Company or with any other supplier of any such products to Safeway Stores, Inc., not a party hereto and not a subsidiary or affiliate of said respondent, to do or perform any of the following acts, practices, or things in the following area:

All counties within the State of Kansas lying to the east of a continuous line formed by the western boundaries of the counties of Doniphan, Atchison, Jackson, Pottawatomie, Riley, Geary, Wabaunsee, Osage, Franklin, Anderson, Allen, Neosho and Labette; and all counties within the State of Missouri.

1. Fix or maintain, with respect to the resale by said respondent of any such product purchased from such supplier:

(a) the retail price of such product;

(b) a fixed margin of profit between the in-store cost and any agreed upon retail price of such product; or

(c) any agreed amount of differential between said respondent's retail price for such product of such supplier and the retail price of any competing third party selling the same quantity of the same product either in containers made of different material or through home delivery.

2. Coerce any competing third party on its sale of any such product either in containers made of different material or through

home delivery to fix or maintain any agreed amount of differential between such party's retail price and respondent's retail price for the same quantity of such product of such supplier.

3. Charge a lower retail price for any such product sold by respondent in one part of such area than the retail price charged by respondent for the same product of such supplier in any other part of such area for the purpose of destroying competition.

Provided, however, That nothing contained herein shall be interpreted as prohibiting Safeway Stores, Inc., from requesting or receiving from a supplier a price reduction or other allowance on any such product to meet, in good faith, an equally low price or allowance of such supplier's competitor, or any price reduction or allowance which is otherwise lawful.

Provided, however, That nothing contained herein shall be interpreted as prohibiting Safeway Stores, Inc., from establishing, maintaining, or enforcing any resale price agreement in any manner excepted from the provisions of the Federal Trade Commisison Act by virtue of the McGuire Act amendments to said Act or any other applicable statute, whether now in effect or hereafter enacted, or from complying with the requirements of any law or ordinances.

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

It is further ordered, That the motion of respondent Adams Dairy, Inc., to dismiss the complaint against it be, and it hereby is, granted, and the complaint be, and it hereby is, dismissed.

Commissioner MacIntyre not participating.

IN THE MATTER OF

ADAMS DAIRY COMPANY ET AL. AND THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.

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

Docket 7598. Complaint, Sept. 24, 1959—Decision, May 25, 1964

Consent order requiring two associated distributors of fluid milk, ice cream, cottage cheese and other dairy products in the States of Missouri, Kansas, Illinois and Kentucky and a supermarket chain of retail grocery stores

in those States, to end their conspiracy to fix or maintain retail prices for their products and differentials between their selling price and that of competitors; to cease coercing competitors to maintain agreed upon differentials, guarantying retailers a fixed margin or profit, charging a lower price in one area than in another to destroy competition.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (38 Stat. 717, 15 U.S.C.A., Sec. 41 et seq., 52 Stat. 111), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Adams Dairy Company, a corporation; Adams Dairy, Inc., a corporation; and The Great Atlantic & Pacific Tea Company, Inc., a corporation, more particularly described and referred to hereinafter as respondents, have violated the provisions of Section 5 of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby names the previously mentioned corporations, each and all as respondents herein, and issues its complaint against each of the named parties, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Adams Dairy Company is a corporation organized and existing under the laws of the State of Missouri, with its principal office and place of business located at R. D. Mize Road, Blue Springs, Missouri.

Respondent Adams Dairy, Inc., is a corporation organized and existing under the laws of the State of Missouri with its principal office and place of business located at 5425 Easton Avenue, St. Louis, Missouri.

The Great Atlantic & Pacific Tea Company, Inc., is a corporation organized and existing under the laws of the State of Maryland with its principal office and place of business located at 420 Lexington Avenue, New York, New York.

PAR. 2. Respondents Adams Dairy Company and Adams Dairy, Inc., hereinbefore named and described are engaged in the distribution and sale of fluid milk, ice cream, cottage cheese, and other miscellaneous dairy products (hereinafter referred to as dairy products) at wholesale to customers located in the States of Missouri, Kansas, Illinois, and Kentucky. Adams Dairy Company had sales of approximately six million dollars in 1956 and Adams Dairy, Inc., had sales of approximately three million dollars in 1957. There has been and is now a pattern and course of interstate commerce in the processing, distribution and sale by respondents, Adams Dairy Company and Adams Dairy, Inc., of said dairy products within the intent and meaning of the Federal Trade Commission Act.

Respondent, The Great Atlantic & Pacific Tea Company, Inc. (hereinafter referred to as A. & P.), through fifteen subsidiary corporations, is engaged in the operation of retail grocery stores located in a number of the various States, including the States of Missouri, Kansas, Illinois, and Kentucky. A. & P. had net sales in excess of four and one-half billion dollars in 1957.

A. & P., in connection with the operation of its retail grocery stores handles dairy products for resale to the consumer. There has been and is now a pattern and course of interstate commerce in the purchase and sale of said dairy products by said respondent A. & P. within the intent and meaning of the Federal Trade Commission Act.

PAR. 3. Each of the respondents, Adams Dairy Company and Adams Dairy, Inc., is in substantial competition with numerous other dairy concerns operating in the States of Missouri, Kansas, Illinois, and Kentucky, in the processing, distribution and sale of dairy products, except to the extent that competition has been hindered, lessened, restricted and eliminated by the unfair methods of competition and unfair acts and practices hereinafter set forth.

Respondent A. & P. is in competition with numerous other retail grocery concerns in the States of Missouri, Kansas, Illinois, and Kentucky, except to the extent that competition has been hindered, lessened, restricted and eliminated by the unfair methods of competition and the unfair acts and practices hereinafter set forth.

PAR. 4. For many years, and continuing to the present time, respondents Adams Dairy Company and Adams Dairy, Inc. (hereinafter designated as respondent dairies), and The Great Atlantic & Pacific Tea Company, Inc., have maintained and effectuated a conspiracy, combination, agreement and understanding in the sale and distribution of dairy products in restraint of trade of said products as is more fully set out in Paragraphs Five and Six hereof.

PAR. 5. As a part of, pursuant to and in furtherance of the aforesaid agreement, understanding, combination and conspiracy, respondents have, for many years past and to the present time, performed and pursued the following acts, policies and practices:

1. Fixed prices and price differentials in the sale of dairy products and coerced competitors into maintaining prices and price differentials in said products.

2. Respondent A. & P., in connection with the sale at retail of the dairy products of respondent dairies, has engaged and is engaging in the following acts and practices, among others:

(a) Charging lower prices for the dairy products of respondent dairies, directly and through the use of coupons, free merchandise or other devices furnished by respondent dairies, in certain areas than those charged elsewhere;

(b) Engaging in price wars in the sale of dairy products in certain areas with the purpose of or the natural and probable effect of injuring and destroying competition in said dairy products;

(c) Denying to competitors and potential competitors of respondent dairies a reasonable opportunity to compete for the dairy product purchases of respondent A. & P. and otherwise giving respondent dairies preferential treatment in its retail stores.

3. Respondent dairies have subsidized the acts, practices and policies of respondent A. & P. set out in paragraph 2 hereof in the sale and distribution of dairy products in certain areas within the states above named by the following means, among others:

(a) Selling said products to said respondent A. & P. in certain areas at prices lower than those charged elsewhere by said respondent dairies, including prices that were below cost;

(b) Furnishing coupons, free merchandise and other devices for use in the retail sale of the dairy products of respondent dairies by respondent A. & P. in certain areas and not elsewhere;

(c) Guaranteeing a fixed profit margin to respondent A. & P. in its sale of said dairy products regardless of the price at which such products are sold to the consumer;

(d) Contributing advertising allowances to respondent A. & P. upon terms not accorded or offered to all competing purchasers of dairy products on proportionally equal terms.

PAR. 6. The conspiracy, combination, agreement and understanding and the acts and practices of respondents pursuant to and in furtherance of same, as alleged herein, have had and do have the effect of hindering, lessening, restricting, restraining, destroying and eliminating competition in the processing and sale of dairy products; have had and do have a tendency to unduly hinder competition or to create in respondents a monopoly; have constituted an attempt to monopolize; have foreclosed markets and access to markets to competitors in the processing, distribution and sale of dairy products; are all to the prejudice of competitors of respondents and to the public; and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

Order Granting Motion To Dismiss Complaint and Accepting Consent Orders To Cease and Desist

The hearing examiner, pursuant to Section 3.6(a) of the Rules of Practice, has certified to the Commission a series of motions by respondents in this and two related cases. Respondent Adams Dairy, Inc. (Adams of St. Louis), moves that the complaint against it be dismissed on the ground that as of January 1, 1964, it ceased doing business, sold all of its assets to a nonaffiliated company, and has entered into a covenant not to reenter the dairy business in competition with the purchaser. Complaint counsel has stated that he does not object to granting of the motion provided that it is without prejudice to Commission action in the unlikely event that Adams of St. Louis should resume its operations. The Commission has concluded that, in view of the complete termination of business by Adams of St. Louis, no purpose would be served by further proceedings here and its motion to dismiss should be granted.

Respondents Adams Dairy Company (Adams of Kansas City) and The Great Atlantic & Pacific Tea Company, Inc., have requested that the proceedings be disposed of by acceptance of consent orders to cease and desist. Complaint counsel joins in these motions. The Commission has determined that good cause exists for permitting utilization of the consent-order procedure and that the agreements that have been entered into afford an adequate basis for disposition of these proceedings. It is therefore appropriate that the Commission itself initially decide these matters and forthwith issue its decision and orders.

The Commission hereby accepts the agreements, makes the following jurisdictional findings, and enters the following order:

1. Respondent Adams Dairy Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at R. D. Mize Road, Blue Springs, Missouri.

2. Respondent The Great Atlantic & Pacific Tea Company, Inc., is a corporation organized, 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 420 Lexington Avenue, New York, New York.

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

It is ordered, That respondent Adams Dairy Company, a corporation, its officers, directors, agents, representatives, and employees, directly or through any corporate or other device, in the offering for sale, sale, or distribution of packaged fresh fluid milk, cream, and cottage

cheese, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, carrying out, or continuing any combination, conspiracy, agreement or understanding with The Great Atlantic & Pacific Tea Company, Inc., or any other purchaser of any such products of respondent Adams Dairy Company not a party hereto and not a subsidiary or affiliate of said respondent, to do or perform any of the following acts, practices, or things:

1. Fix or maintain any retail price of such product;

2. Fix or maintain an agreed amount of differential between the retail price for any such product and the retail price of any competing third party selling the same quantity of such product either in containers made of different material or through home delivery;

3. Coerce any retail or other competitor to fix or maintain an agreed amount of differential between the retail price for any such product and the retail price of any competing third party selling the same quantity of such product either in containers made of different material or through home delivery;

4. Guarantee to any retailer a minimum or a fixed margin of profit between in-store cost and retail price of any such product;

5. Charge a lower price for any such product in one area than the price charged for the same product in any other area for the purpose of destroying competition;

6. Sell any such product at an unreasonably low price for the purpose of destroying competition.

Provided, however, That nothing contained herein shall be interpreted as prohibiting respondent herein from granting a price reduction or other allowance on any such product to meet, in good faith, an equally low price or allowance of a competitor, or any price reduction or allowance which is otherwise lawful.

Provided, however, That nothing contained herein shall be interpreted as prohibiting respondent herein from establishing, maintaining, or enforcing any resale price agreement in any manner excepted from the provisions of the Federal Trade Commission Act by virtue of the McGuire Act amendments to said Act or any other applicable statute, whether now in effect or hereafter enacted, or from complying with the requirements of any law or ordinances.

It is further ordered, That respondent The Great Atlantic & Pacific Tea Company, Inc., a corporation, its directors, officers, agents, representatives and employees, directly or through any corporate or other device, in the offering for sale, sale, or distribution of packaged fresh fluid milk, cream, and cottage cheese, in commerce, as "commerce" is

defined in the Federal Trade Commission Act, do forthwith cease and desist from entering into, carrying out, or continuing any combination, conspiracy, agreement, or understanding with Adams Dairy Company or with any other supplier of any such products to The Great Atlantic & Pacific Tea Company, Inc., not a party hereto and not a subsidiary or affiliate of said respondent, to do or perform any of the following acts, practices, or things in the following area:

All counties within the State of Kansas lying to the east of a continuous line formed by the western boundaries of the counties of Doniphan, Atchison, Jackson, Pottawatomie, Riley, Geary, Wabaunsee, Osage, Franklin, Anderson, Allen, Neosho and Labette; all counties within the State of Missouri; and all counties within the State of Illinois lying to the south of a continuous line formed by the northern boundaries of the counties of Calhoun, Greene, Macoupin, Montgomery, Fayette and Effingham and to the west of a continuous line formed by the eastern boundaries of the counties of Effingham, Clay, Wayne, Hamilton, Saline, and Pope.

1. Fix or maintain, with respect to the resale by said respondent of any such product purchased from such supplier:

(a) the retail price of such product;

(b) a fixed margin of profit between the in-store cost and any agreed upon retail price of such product; or

(c) any agreed amount of differential between said respondent's retail price for such product of such supplier and the retail price of any competing third party selling the same quantity of the same product either in containers made of different material or through home delivery.

2. Coerce any competing third party on its sale of any such product either in containers made of different material or through home delivery to fix or maintain any agreed amount of differential between such party's retail price and respondent's retail price for the same quantity of such product of such supplier.

3. Charge a lower retail price for any such product sold by respondent in one part of such area than the retail price charged by respondent for the same product of such supplier in any other part of such area for the purpose of destroying competition.

Provided, however, That nothing contained herein shall be interpreted as prohibiting The Great Atlantic & Pacific Tea Company, Inc., from requesting or receiving from a supplier a price reduction or other allowance on any such product to meet, in good faith, an equally low price or allowance of such supplier's competitor, or any price reduction or allowance which is otherwise lawful.

Provided, however, That nothing contained herein shall be interpreted as prohibiting The Great Atlantic & Pacific Tea Company, Inc., from establishing, maintaining, or enforcing any resale price agreement in any manner excepted from the provisions of the Federal Trade Commission Act by virtue of the McGuire Act amendments to said Act or any other applicable statute, whether now in effect or hereafter enacted, or from complying with the requirements of any law or ordinances.

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

It is further ordered, That the motion of respondent Adams Dairy, Inc., to dismiss the complaint against it be, and it hereby is, granted, and the complaint be, and it hereby is, dismissed.

Commissioner MacIntyre not participating.

IN THE MATTER OF

CLARK H. GEPPERT ET AL. TRADING AS DEAN STUDIOS

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

Docket C-747. Complaint, May 26, 1964—Decision, May 26, 1964

Consent order requiring Des Moines, Iowa, retailers of cameras, photograph developing, etc., to cease representing falsely, in magazine advertising, that they were offering transistor radios or other gifts to persons handing out 20 "get acquainted coupons" to friends, when the purported "gifts" were delivered only after the 20 coupons distributed were used by recipients in the purchase of respondents' services and products; and that they would sell a snapshot enlargement in a "Movietone" frame for 49¢, when the enlargement offer was a deceptive method of inducing persons to send in their hair and eye color and thus enable respondents to include an unordered color photograph with the enlargement and charge $3.37 for the combination.

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 Clark H. Geppert, Byron Geppert and Fidelis Geppert, individually and as copartners trading as Dean Studios, 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. Respondents Clark H. Geppert, Byron Geppert, and Fidelis Geppert are individuals and copartners trading as Dean Studios, with their principal office and place of business located at 913 Walnut Street, in the city of Des Moines, State of Iowa. Respondents have cooperated and acted together in the performance of the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the sale and distribution of cameras, photographic supplies and accessories, photograph developing, enlarging and tinting, camera repairing and other products and services at retail to the purchasing public.

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

PAR. 4. In the course and conduct of their business as aforesaid and for the purpose of inducing the sale of their photographic services and products, respondents have made certain statements and representations in advertisements appearing in magazines and periodicals of national circulation.

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

New General Electric
PORTABLE RADIO
at
NO COST

Picture
of
Radio

To get acquainted, I'll send you this precision made 7 transistor "gem of the vest pocket" portable radio. This powerful G.E. Miniature Portable comes in handsome reusable jewelry box, complete with carry case, earphone and battery. Simply hand out or mail only twenty get acquainted coupons FREE to friends or relatives and help us get that many new customers as per our premium letter. * * * Please send me your favorite snapshot, photo or Kodak picture when writing for your G.E. radio. We will make you a beautiful 5 x 7 inch enlargement in a "Movietone" frame and you can tell friends about our hand colored enlargements when handing out the coupons. Send today and pay postman only forty-nine cents and a few cents for our C.O.D. service plus postage on arrival. Your original returned. Also include the color of hair and eyes with each picture so

I can give you our bargain offer on a second enlargement hand colored in oils for greater beauty, sparkle and life. Limit of 2 to any one person. Send today for your 20 FREE coupons to hand out and please enclose your name, address and favorite snapshot. Our supply of G.E. radios is limited * * *.

Offers on similar terms and conditions are made for miniature dogs, Polaroid cameras, and Bulova radios.

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

1. That they were making a bona fide offer of a transistor radio, a gift of a miniature dog, a Polaroid camera, a Bulova radio, or other articles of merchandise, for the sole consideration of handing out or mailing twenty coupons.

2. That they were making a bona fide offer to sell a 5 x 7 inch enlargement of a snapshot in a "Movietone" frame for only 49¢ and a few cents for c.o.d. service plus postage, and that to those purchasers of said snapshot enlargements who sent in the color of their hair and eyes, respondents would submit an offer setting forth the price, terms, and conditions for the purchase of a color photograph.

PAR. 6. In truth and in fact:

1. Said offers are not bona fide offers of gifts for the sole consideration of handing out or mailing twenty coupons, but are made for the purpose of obtaining purchasers for respondents' services and products. Persons responding to respondents' advertising are sent further advertising and explanatory material, together with twenty coupons. These coupons must be distributed to twenty persons who must use them in purchasing respondents' services and products. It is only when these coupons are thus distributed and used by the recipients that the transistor radio, Polaroid camera, Bulova radio, or other articles of merchandise are delivered by respondents.

2. The offer of an enlargement of a 5 x 7 inch snapshot in a "Movietone" frame for only forty-nine cents and a few cents for c.o.d. mail service plus postage is not a genuine and bona fide offer, but said offer is a deceptive method of inducing innocent, unwary and unsuspecting members of the purchasing public to send along with their order for said 5 x 7 inch enlargement information relating to the color of their hair and eyes, which enables the respondents to forward an unordered color photograph along with said 5 x 7 inch enlargement and to charge purchasers thereof a total price of $3.37 c.o.d. for said combination 5 x 7 inch enlargement and unordered color photograph, rather than the 49¢ anticipated by the purchaser.

Respondents further have thereby resorted to and engaged in the deceptive and misleading practice of shipping additional merchandise to individuals by c.o.d. mail without having received an order therefor.

Therefore, the advertisements and representations referred to in Paragraphs Four and Five were and are exaggerated, false, misleading and deceptive.

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

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' products by reason of said erroneous and mistaken 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.

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. Respondents, Clark H. Geppert, Byron Geppert, and Fidelis Geppert are individuals and copartners trading as Dean Studios, with

their principal office and place of business located at 913 Walnut Street, in the city of Des Moines, State of Iowa.

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 Clark H. Geppert, Byron Geppert, and Fidelis Geppert, individually and as copartners, trading as Dean Studios, or trading under any other name or names, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of cameras, photographic supplies and accessories, photograph developing, enlarging and tinting, camera repairing, or other products or services 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 Transistor Radios, Miniature Dogs, Polaroid Cameras, Bulova Radios or any other articles of merchandise are given at no cost or at nominal cost in return for handing out or mailing 20 or any other small number of coupons or the performance of any other act or service, without clearly and conspicuously revealing in immediate connection therewith all of the obligations, duties and requirements necessary to the receipt and retention of said articles of merchandise;

2. Using in any manner, a sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of merchandise or services;

3. Representing, directly or indirectly, that any products or services are offered for sale when such offer is not a bona fide offer to sell said products or services, as is and as represented and for the price and on the terms and conditions stated.

4. Shipping or sending any unordered or unauthorized merchandise by c.o.d. mail or attempting in any manner to collect for any unordered or unauthorized merchandise or to secure or require the return thereof.

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

IN THE MATTER OF

R. H. MACY & CO., INC.

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

Docket 7869. Complaint, Apr. 19, 1960—Decision, May 27, 1964

Modified order—following the Second Circuit's decree, 326 F. 2d 445—modifying and enforcing the Commission's desist order of May 15, 1962, 60 F.T.C. 1249, requiring a large New York City department store to cease soliciting and receiving payment from any supplier for institutional advertising when it knew, or should have known, that proportionally equal payments were not made available to other customers competing with the respondent.

MODIFIED ORDER TO CEASE AND DESIST

Respondent having filed in the United States Court of Appeals for the Second Circuit a petition to review and set aside the order to cease and desist issued herein on May 15, 1962; and the court on January 16, 1964, having filed its opinion and entered judgment and on February 14, 1964, having entered its final decree modifying and, as modified, affirming and enforcing said order to cease and desist; and the time allowed for filing a petition for certiorari having expired and no such petition having been filed;

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified, in accordance with the said final decree of the court of appeals, to read as follows:

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

Receiving, or soliciting and receiving, payment from any vendor for institutional advertising when respondent knows, or should know, that such payment is not affirmatively offered or otherwise made available by such vendor on proportionally equal terms to all of its other customers competing with respondent in the sale and distribution of the vendor's products.

Complaint

IN THE MATTER OF

FINGERHUT MANUFACTURING COMPANY ET AL.

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

Docket 8565. Complaint, Apr. 17, 1963—Decision, May 27, 1964

Order requiring Minneapolis mail order sellers of automobile seat covers to cease representing falsely, in form letters, brochures and circulars mailed to prospects, that there was no extra charge when their seat covers were purchased on the installment plan and that their products carried a "written lifetime guarantee" when the guarantee had undisclosed limitations.

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 Fingerhut Manufacturing Company, a corporation, and Manny Fingerhut, Herman Schwartz, Stanley H. Nemer, and William Fingerhut, 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 thereto would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Fingerhut Manufacturing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office and place of business located at 3104 West Lake Street in the city of Minneapolis, State of Minnesota.

Respondents Manny Fingerhut, Herman Schwartz, Stanley H. Nemer, and William Fingerhut are officers of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale and sale of automobile seat covers to the public by mail order.

PAR. 3. In the course and conduct of their business, respondents now cause and for some time last past have caused, their said automobile seat covers, when sold, to be transported from their place of business in the State of Minnesota to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a course of trade in said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their said products, respondents have made certain statements in form letters, brochures and circulars distributed through the mails directly to prospective customers. Typical, but not all inclusive, of such statements are the following:

Front & Rear $14.95 3 payments of $5.31 (postage incl.)
Front only $9.95 3 payments of $3.64 (postage incl.)

* * * * * * *

3 month payment plan at no extra charge
Written lifetime guarantee
3 MONTHS TO PAY WITH NO CARRYING CHARGE.
YOU GET A LIFETIME GUARANTEE
STARDUST COVERS are *so good*, we can give you LIFETIME GUARANTEE! We're the *only* seat cover manufacturer with enough confidence to make this unconditional guarantee. If you ever damage them, we'll replace the damaged section for just the cost of postage and handling.
* * * 6 equal monthly payments with no carrying charges.
Complete set for Front & Rear seats 6 payments of $4.66 (postage and handling included) $24.95

PAR. 5. Through the use of the aforesaid statements respondents have represented, directly or by implication:

1. That there are no charges in addition to the advertised purchased price of their seat covers when purchased on the installment plan.

2. That their products are unconditionally guaranteed for life.

PAR. 6. In truth and in fact:

1. Respondents make an extra charge over and above the regular advertised price of their products if the products are purchased on the installment plan.

2. Respondents' guarantee is not unconditional but has limitations and conditions not disclosed in their initial advertising.

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

PAR. 7. Respondents in using the words "Lifetime Guarantee" fail to clearly and conspicuously disclose that the life referred to is that of the automobile of the purchaser.

PAR. 8. Through use of samples of material sent to prospective purchasers, respondents represent that their "Stardust" brand seat cover is manufactured entirely of clear plastic of the same thickness and weight as the sample.

PAR. 9. In truth and in fact, a substantial portion of respondent's "Stardust" brand seat cover is manufactured of a plastic material which is of a thinner, lighter material than the said samples and therefore is less serviceable and less desirable to a substantial number of purchasers than a seat cover made entirely of the thicker, heavier material represented by the sample. Therefore, the representations and

practices as set forth in Paragraph Eight hereof were false, misleading, and deceptive.

PAR. 10. 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 seat covers of the same general kind and nature as those sold by respondents.

PAR. 11. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice 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. William A. Somers supporting the complaint.

Mr. Charles S. Rhyne and *Mr. Thomas P. Brown, III*, *Rhyne & Rhyne*, Washington, D.C., for respondents.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

December 16, 1963

The complaint in this matter was issued by the Federal Trade Commission on April 17, 1963, and was duly served on all respondents. It charges misrepresentation in the sale of automobile seat covers. Specifically, it alleges misrepresentation of the guarantee covering respondents' products, the price of the products when purchased on the installment plan and the quality or composition of the products. Violation of Section 5 of the Federal Trade Commission Act is alleged.

After being served with the complaint, respondents appeared by counsel and filed answer making certain admissions but denying generally any violation of law. They also filed a motion to dismiss on the ground that the issues in the proceeding were moot because respondents had abandoned, prior to the filing of the complaint, the advertising upon which the complaint is based.

Hearing Examiner John Lewis, to whom the proceeding was originally assigned, denied the motion to dismiss as "premature" on June 14, 1963, but without prejudice to its renewal at a later stage.

Respondents have renewed their motion to dismiss, and it is disposed of in the course of this initial decision.

A prehearing conference was held in Washington, D.C., July 15, 1963, with Hearing Examiner Lewis presiding.

Subsequently, on September 3, 1963, the matter was assigned to the present hearing examiner, who, on September 9, 1963, adopted and ratified the prehearing order entered by Hearing Examiner Lewis August 5, 1963.

As a result of the narrowing of the issues by means of the pleadings and the prehearing proceedings, and thanks to the cooperation of counsel in stipulating many of the facts and the authenticity of documents, presentation of the evidence in support of, and in opposition to, the allegations of the complaint required only one day, with the hearing being held in Chicago, Illinois, on September 17, 1963. At that hearing, testimony and other evidence were offered in support of, and in opposition to, the allegations of the complaint, and this testimony and evidence were duly recorded and filed in the office of the Commission.

Both sides were represented by counsel, participated in the hearing, and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues.

After the conclusion of all the evidence, proposed findings of fact and conclusions of law, accompanied by a proposed form of order, were filed by counsel supporting the complaint and by counsel for respondents. Each party also filed a reply to the proposals made by the other.

Proposed findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

After carefully reviewing the entire record in this proceeding, together with the proposals and exceptions filed by both parties, the hearing examiner finds that this proceeding is in the interest of the public and, on the basis of the entire record and his observation of the witnesses, makes the following findings of fact and conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

I. The Business of Respondents.

The facts concerning the organization of Fingerhut Manufacturing Company and the nature of its business are not in dispute. By admis-

sions in respondents' answer and by stipulation (Tr. 100 [1] *et seq.*), the following facts have been established:

1. Respondent Fingerhut Manufacturing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office and place of business at 3104 West Lake Street in the city of Minneapolis, State of Minnesota.

2. Respondents Manny Fingerhut, Herman Schwartz, Stanley H. Nemer, and William Fingerhut are officers of the corporate respondent.

3. Respondents are now, and for at least several years have been, engaged in offering for sale and selling automobile seat covers to the public by mail order. Respondents' annual gross sales of seat covers for each of the fiscal years 1961, 1962, and 1963 have been in excess of $15,000,000.

4. In the course and conduct of their business, respondents now cause, and for several years have caused, their automobile seat covers, when sold, to be transported from their place of business in the State of Minnesota to purchasers in various other States of the United States. They have maintained a course of trade in such products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. In the course and conduct of their business, the respondents have been and are in substantial competition in commerce with corporations, firms and individuals in the sale of seat covers of the same general kind and nature as those sold by respondents.

6. Respondents are engaged in the mail order sale of seat covers for automobiles and trucks. Through a direct mail operation they have sent sales letters and other advertising material to millions of car and truck owners. Customarily, the promotional package sent to prospective customers for the purpose of inducing the purchase of seat covers contains a printed sales letter, a brochure depicting the seat covers in color, a specimen guarantee, a post-paid business reply envelope, a free inspection request form under which seat covers will be sent for 30-days free trial, a swatch of material demonstrating the appearance of the seat covers, and a brochure or similar flyer offering and describing so-called "free gifts" available to buyers who send in orders for seat covers.

II. The Representations Made by Respondents.

The record is replete with examples of the sales letters and other advertising material that admittedly have been disseminated by the respondents.

7. Many of the sales letters in evidence are samples of "test mailings" that had limited distribution, ranging from 1,000 copies to 15,000

[1] The transcript of hearing is abbreviated herein as "Tr."

copies (Tr. 100–102), and respondents seek, in effect, to eliminate them from consideration (Respondents' Proposed Findings, pages 6–7). However, it was stipulated (Tr. 102) that the content of the test mailings "is not substantially different from the type of format used by Respondents in [their] larger scale mailings on the matters questioned by the complaint." In any event, the findings and conclusions here made are not dependent on the so-called test mailings.

8. On the basis of his examination of all the advertising received in evidence, the examiner has concluded that a sales letter, CX 5 [2] together with other material (RX 2 A–G [2]), may be taken as typical of the advertising and promotion practices of the respondents in recent years. Although it was stipulated (Tr. 101) that CX 5 was one of the test mailings, involving distribution of 10,000 copies on January 14, 1960, it was also stipulated (Tr. 100) that CX 5 was among the advertising material "used extensively by Respondents", with "millions of copies" mailed to prospective customers.

[CX 5 also has the virtue of being among the sales letters as to which the record contains the accompanying advertising material. Respondents insist (Proposed Findings, page 5) that "the entire contents of a mailing must be read as a whole." Although not necessarily agreeing with that contention, the examiner has considered the representations in that light.]

9. Pertinent extracts from the sales letter, CX 5, are as follows:

* * * The enclosed folder describes this wonderful cover, our 30 day FREE inspection offer, and our special 3 PAY PLAN, but here's the story in a nutshell * * *

Front & rear * * * $18.88; 3 payments of $6.66 (postage incl.)
Front only * * * $10.95; 3 payments of $3.98 (postage incl.)

* * * 30 day FREE inspection with no obligation * * * 3 month payment plan at *no extra charge* [3] * * * written lifetime guarantee

10. It was stipulated (Tr. 142–143) that CX 5 was accompanied by certain enclosures, in evidence as RX 2A–G. Relevant extracts are quoted below.

11. RX 2C has a headline stating that "Now your car interior can look this lovely—*for life!*" Beneath the trade name "Stardust" on RX 2C appears the legend "Guaranteed For The Life Of Your Car." Also, the last two lines of RX 2C read as follows:

and STARDUST Vina-Glass covers are guaranteed for the life of your car—so that you can be sure your car interior will always look as beautiful as new! [4]

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[2] Commission Exhibits are designated CX; Respondents' Exhibits as RX.
[3] Emphasis in original unless otherwise noted.
[4] These same representations are found in CX 14 and 15A, and RX 1B, 3C, 4H, 5D.

12. RX 2D contains these representations:

THREE MONTHS TO PAY—You can pay for your covers in 3 equal monthly payments (30, 60, 90 days) with no carrying charges.

LIFETIME GUARANTEE—You will never have to buy another set of covers for your car because we give you a written guarantee that we will repair or replace your covers if, for any reason, they are ever damaged.[5]

13. The "Free Inspection Request Form" (RX 2F) quotes prices of $18.88 and $10.95. The preamble states: "Please send me a set of Stardust seat covers for a FREE 30 day inspection. If I am satisfied with the seat covers I agree to pay for them in 3 payments (30, 60, 90 days)."

14. RX 2G is the text of a "LIFETIME GUARANTEE." As shown by RX2G (a copy of which is appended as Appendix A), the so-called Lifetime Guarantee states:

YOU WILL NEVER HAVE TO BUY
ANOTHER SET OF COVERS FOR YOUR CAR

because we are the only seat cover manufacturer that gives you a

LIFETIME GUARANTEE

The guarantee then sets forth:

If you purchase a set of Stardust covers and if for ANY REASON IN THE WORLD you accidentally damage them, return the cover to us and we will replace any damaged section (front back, front cushion, rear back, rear cushion) for only 98¢ postage and handling charge per section.

RX 2G also states:

Remember—this guarantee applies for as many years as you own the car and regardless of what caused the damage!

15. Other sales letters and related advertising material contained variations in detail, both as to the guarantee and the price, including the number and amount of installment payments. However, these variations are of such a nature that they afford no reason to consider CX 5 and RX 2A–G as other than typical of the representations that have been made by respondents.

16. By way of illustration, reference is made to CX 11, a sales letter of which 10,009 copies were produced and "presumably mailed" in December 1959 (Tr. 101–102). CX 11 includes these representations:

LIFETIME GUARANTEE, TOO!

STARDUST covers are so good, they carry a lifetime guarantee. If you ever damage them, we'll replace the damaged section for just the cost of postage and handling. That means *you will never have to buy another set of covers for your car!*

[5] This same representation is found in CX 14 and 15A, and RX 1H, 3A, 4F, 5C; see also CX 13.

3 MONTHS TO PAY WITH NO CARRYING CHARGES!

STARDUST is our own exclusive pattern. It can't be purchased any place else in the country * * * and at such easy terms:
Front and rear * * * $19.95; 3 payments of $6.98 (postage incl.)
Front only * * * $11.95; 3 payments of $4.31 (postage incl.)

17. It was stipulated (Tr. 142–143) that CX 11 was accompanied by other advertising and promotional material, in the record as RX 5A–G. RX 5C includes the same representations as RX 2D; see Paragraph 12, *supra*. RX 5D is identical to RX 2C; see Paragraph 11, *supra*. RX 5E is the guarantee form. It is identical to RX 2G; see Paragraph 14, *supra*; also Appendix A.

18. The "Free Inspection Request Form" (RX 5G) includes this language:

Please send me a set of Stardust seat covers for a FREE 30 day inspection. If I am satisfied with the seat covers I agree to pay for them in 3 payments (30, 60, 90 days). * * *
COMPLETE SET, FRONT & REAR: ---------- $19.95
BUSINESS COUPE OR FRONTS ONLY: ---------- $11.95

19. There is another sales letter (CX 17) promoting a purported special offer whereby the customer "can save $5.00 off our regular price * * * and up to $20.00 off the price of comparable covers elsewhere." It includes these representations:

* * * The enclosed folder, describes this wonderful cover, our 30 day FREE inspection offer, and our special 3 PAY PLAN, but here's the story in a nutshell * * *
Front & rear . . . $14.95; 3 payments of $5.64 (postage, handling incl.)
Front only . . . $9.95; 3 payments of $3.97 (postage, handling incl.)
. . . 30 day FREE inspection with no obligation . . . 3 month payment plan at *no extra charge* . . . written lifetime guarantee

20. CX 17 is another of the advertising pieces "used extensively" and involving the circulation of "millions of copies." (Tr. 100)

21. The record does not contain any specific information as to the brochures and other material that may have accompanied CX 17. It was stipulated (Tr. 100–101), however, that "it is a standard requirement that a specimen guarantee form is included with each mailing."

22. Regarding the cash price and installment plan price, variations of the representations quoted above include these:

Front & rear . . . $19.95; 3 payments of $6.98 (postage included)
Front only . . . $11.95; 3 payments of $4.31 (postage included)
(CX 1, 2, 7, 11 and 12)

* * * * * * *

Front & rear . . . $18.88 ; 4 payments of $4.99 (postage incl.)
Front only . . . $10.95 ; 4 payments of $2.98 (postage incl.)

(CX 4)

* * * * * * *

Front & rear . . . $16.95 ; 3 monthly payments of $5.98, handling incl.
Front only . . . $9.95 ; 3 monthly payments of $3.65, handling incl.

(CX 6)

* * * * * * *

Ensemble with front & rear covers . . . $22.90 ; 3 payments of $7.99
Ensemble with front covers only . . . $14.90 ; 3 payments of $5.30 (postage included)

(CX 10)

* * * * * * *

STARDUST covers . . . $14.95 ; 3 payments of $5.31 (postage incl.)

(CX 9[6])

23. Further variations include examples placed in evidence by respondents (RX 9 and 10) :

Front & rear . . . $19.95 ; 6 payments of $3.86 (postage, handling incl.)
Front only . . . $11.95 ; 6 payments of $2.43 (postage, handling incl.)

24. The price representations in the sales letters were accompanied, in close proximity, by such representations as these :

3 month payment plan at *no extra charge* (CX 2, 9, 10)
4 month payment plan at *no extra charge* (CX 4)
3 month payment plan with no carrying charge (CX 6)
3 months to pay at no extra charge (CX 7)
3 *MONTHS TO PAY WITH NO CARRYING CHARGES!* (CX 11)
3 months to pay. No carrying charges. (CX 12)
6 month-payment plan at *no extra charge* (RX 10)
6 month-payment plan with *no carrying charges* (RX 9)

25. In addition, as shown by respondents' own exhibits, the brochures that were enclosed with the sales letters likewise repeated the claim of "no carrying charges." (RX 1H, 2D, 3A, 4F and 5C; see also CX 13, 14, 15A, 15B and 16.)

26. Regarding the guarantee, in addition to the representations quoted, *supra*, from CX 5, 11 and 17, other sales letters made such statements as these :

YOU GET A LIFETIME GUARANTEE

STARDUST COVERS are *so good* we can give you a LIFETIME GUARANTEE! We're the *only* seat cover manufacturer with enough confidence to make this unconditional guarantee. If you ever damage them, we'll replace the damaged section for just the cost of postage and handling. (CX 1)

* * * * * * *

[6] For trucks.

THE ONLY COVERS GUARANTEED FOR LIFE

* * * the only seat covers with a LIFETIME GUARANTEE! We're the only seat cover manufacturer who dares to make this claim. You'll never have to buy another set while you're driving your present car! (CX 2)

27. Whether or not the sales letters carried a narrative statement regarding the guarantee, such as quoted above, each referred to a "written lifetime guarantee" as one of the inducements to purchase.

28. It is believed that the guarantee claims and the text of the guarantee quoted above are sufficient for purposes of this decision. They are typical of the representations made by respondents. As in the case of the price representations, there were some variations, but they were not of such a nature as to require setting them out *in extenso*. Some of the specimen guarantees in the record specify a postage and handling charge of $1.98, instead of the 98¢ referred to in RX 2G and 5E. (See CX 14 and RX 1C, 3D, 4E, 7 and 8.)

29. Regarding the charge of misrepresenting the quality or composition of the seat covers, the complaint does not challenge any published advertisement but alleges that the misrepresentation results from the use of samples thicker and heavier than much of the plastic used in the seat covers. This matter is considered *infra*.

The typical statements made by the respondents having been set forth, we turn now to a consideration of each of the charges contained in the complaint concerning those statements.

III. The charge of misrepresenting the installment plan price.

30. In considering the question whether respondents have engaged in actionable misrepresentation concerning their installment sales of seat covers, we start out with these undisputed facts:

(1) Respondents have represented that purchases may be made on the installment plan "with no carrying charge" or "at no extra charge."

(2) The price line in the sales letters shows a total price, followed by the number and amount of the monthly payments. It also carries a legend indicating "postage included" or "handling included" or, sometimes, "postage and handling included." This representation—usually in parentheses but sometimes set off by a coma—follows immediately after the reference to the monthly payment plan. For example (CX 5):

Front & rear . . . $18.88; 3 payments of $6.66 (postage incl.)
Front only . . . $10.95; 3 payments of $3.98 (postage incl.)

The total installment plan purchase price is not disclosed in the sales letters or elsewhere.

(3) Respondents do make a charge over and above the regular advertised price of their products if the products are purchased on the

installment plan. When the monthly payment is multiplied by the specified number of payments, the total installment plan purchase price is a higher amount than the price initially quoted in the letter and repeated in the "Free Inspection Request Form." The differential ranges from approximately $1 to approximately $3, as shown by the following tabulation:

Exhibit No.	*Advertised Price*	*Installment Plan Price*	*Difference*
CX 1, 2, 7, 11, 12	$19. 95	$20. 94	$0. 99
	11. 95	12. 93	. 98
CX 4	18. 88	19. 96	1. 08
	10. 95	11. 92	. 97
CX 5	18. 88	19. 98	1. 10
	10. 95	11. 94	. 99
CX 6	16. 95	17. 94	. 99
	9. 95	10. 95	1. 00
CX 9	14. 95	15. 93	. 98
CX 10	22. 90	23. 97	1. 07
	14. 90	15. 90	1. 00
CX 17	14. 95	16. 92	1. 97
	9. 95	11. 91	1. 96
RX 9, 10	19. 95	22. 98	3. 03
	11. 95	14. 58	2. 63

31. Other than the statement in the sales letters themselves, there is no evidence as to the purpose or nature of the additional amount included in the installment plan purchase price.

As to whether the postage and/or handling charges represented as being "included" in the installment plan price were for postage and handling connected with the shipment of the seat covers, or for postage and handling connected only with the credit purchase, the record is silent.[7]

No evidence was presented on this point by either side. However, at the prehearing conference, respondents' counsel indicated that the additional amount over and above the cash price was for postage and handling costs incurred by virtue of the installment arrangements (Tr. 26–27, 44) but he still insisted it was not a "carrying charge."

32. Since the record thus establishes that when seat covers are purchased on the installment plan, there *are* charges in addition to the advertised purchase price, the basic question to be resolved is whether respondents have represented that such is not the fact.

The issue, then, is the interpretation to be placed on the claims, "no extra charge" and "no carrying charges."

33. There is no evidence as to the understanding of the public respecting either term, but as discussed *infra*, there is no necessity for such evidence.

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[7] Although not determinative, the varying differential for installment plan purchases may be compared with the *persection* "postage and handling charge" imposed by respondents under their guarantee: 98¢ (RX 2G) or $1.98 (RX 7, 8). To compound the confusion, it was stipulated (Tr. 103) that "The shipping and handling cost is less than $1.98."

34. When, in an advertisement, a legend such as "postage & handling included" is placed at the end of a price line that shows both the cash price (e.g., $19.95) and an installment arrangement (e.g., 6 payments of $3.83), the plain meaning is that there is no extra charge for postage and handling, whether the customer pays cash or pays in installments, because that charge is included in the price.

Then, when in close proximity, the same advertisement proclaims "no carrying charges" or "no extra charge" for a "6-month payment plan", the plain meaning is that there is no additional charge for an installment plan purchase; that a credit customer pays the same price as a cash customer.

35. Yet, in the example given (see RX 9 and 10), the multiplication of $3.83 by 6 yields a total of $22.98 that the credit customer must pay—$3.03 more than the cash customer.

36. Whether that $3.03 is called "postage and handling" or something else, its existence exposes the falsity of respondents' advertised claim of installment plan purchases "at no extra charge" or "with no carrying charges."

37. It is difficult to understand how respondents can seriously contend that those sales letters that promote an installment plan "at no extra charge" can be interpreted as meaning anything other than that there are no charges in addition to the advertised price. Such a representation—that there is "no extra charge"—is clearly false.

38. In their Proposed Findings and Reply, respondents place emphasis on the alternative representation that there are "no carrying charges." They seek to give the term "carrying charges" a technical, restricted meaning. They insist that the additional charge included in the installment plan price is, as shown by the advertising, a charge for postage or handling, or both, and that there is no proof that this constitutes a carrying charge.

39. Even if we were to rely on a technical definition of "carrying charge", that would not aid respondents.

In *Webster's New International Dictionary of the English Language*, 2nd Edition, Unabridged (1947), "carrying charge" is defined as "a charge made for carrying a debtor."

And that is just what the respondents' so-called postage and/or handling charge amounts to.

40. More significantly, *The Dictionary of Business and Industry* (ed. by Robert J. Schwartz, 1954) defines "carrying charge" this way:

> Amount which the retail buyer pays or contracts to pay the retail seller for the privilege of paying the principal balance in installments over a period of time *in addition to the finance charge for the same privilege.* (Emphasis added.)

Thus, in fact that respondents call their credit price differential a charge for postage and/or handling, and not an interest or finance charge, is not inconsistent with that definition of "carrying charge."

41. Regardless of any restricted meaning that the term "carrying charges" might have in law or in business parlance—and no such evidence was offered—there can be no real doubt that the purport and the import of the representation of "no carrying charges" is that the installment plan price is the same as the cash price. Reading the representation as it would be read by those to whom it is addressed, *Aronberg* v. *F.T.C.*, 132 F. 2d 165 (7th Cir. 1942), the examiner so finds.

The public does not interpret "carrying charge" in any technical sense. To the average person, or at least to a substantial number of consumers (including automobile owners), a claim of "no carrying charge" simply means that nothing extra is charged the installment purchaser. The consumer does not draw any fine distinction between a "carrying charge" and an *extra* charge for postage and/or handling.

The examiner recognizes that a statement "may be deceptive even if the constituent words can be literally or technically construed so as not to constitute a misrepresentation." The buying public does not weigh each word in an advertisement or a representation. The impression that is likely to be created upon the prospective purchaser is controlling. *Kalwajtys* v. *F.T.C.*, 237 F. 2d 654 (7th Cir. 1956).

Similarly, to tell less than the whole truth is a well-known method of deception. He who deceives by resorting to such a method cannot excuse the deception by relying upon the truthfulness *per se* of the partial truth by which it has been accomplished. Thus, in determining whether or not advertising is false and misleading within the meaning of the Federal Trade Commission Act, regard must be had, not to fine-spun distinctions and arguments that may be made in excuse, but to the effect which it might reasonably be expected to have upon the general public. *P. Lorillard Co.* v. *F.T.C.*, 186 F. 2d 52 (4th Cir 1950).

So here, even assuming that "carrying charge" technically meant a "finance charge" or "interest", and assuming further that respondents' extra charge for credit purchases was limited to postage and/or handling, these assumed facts [8] would not cure the vice inherent in the representation. At the most, the term is ambiguous, and it is well-settled that where one of two meanings conveyed by an advertisement is false, the advertisement is misleading. *Rhodes Pharmacal Company Inc.* v. *F.T.C.*, 208 F. 2d 382 (7th Cir. 1953), *reversed on other grounds*, 348 US. 940 (1955).

[8] Which have no support in the record.

42. The examiner accordingly rejects respondents' defense that the additional charge is not a carrying charge but a charge for postage or handling, or both. The fact that references to the monthly payment plan are accompanied by a statement that postage or handling charges, or both, are included does not overcome the falsity of the claim that there is "no extra charge" or "no carrying charge."

43. Respondents argue further that the "extra charge" that the complaint alleges (Paragraph Six) they charge over and above the regular advertised price, was "never identified" as a carrying charge or otherwise.

There was no necessity for any additional evidence on this point. The advertisements speak for themselves. It is simply a matter of taking respondents' own advertising statements and doing a little simple arithmetic.

44. The "reasonableness of these additions as postage or as handling charges" (Respondents' Proposed Findings, page 8) is not the issue. The issue is whether or not installment plan purchasers pay an extra charge or a carrying charge.

Respondents contend:

> It is a most reasonable act for a seller of seat covers to pay the postage and handling himself if cash is paid and to tell the buyer that those items must be paid by the buyer if the buyer chooses to pay on an installment basis.

However, the fact is that here, the seller not only *failed* "to tell the buyer" that he must pay an extra charge for postage and handling if he "chooses to pay on an installment basis", but actually told him he didn't.

45. It does not require evidence of "any peculiarly unusual terminology or interpretation of words" to translate charges for postage and handling into extra or carrying charges. The respondents have chosen to claim that they make no extra charges or no carrying charges for installment plan purchases, and the examiner and the Commission are qualified to determine what that language means to the general public.

46. Respondents profess to believe that their representations regarding the installment sales price are being challenged only because the sales letters do not disclose the total price paid when purchases are made on the installment plan. It is obvious, however, that what is being challenged is the affirmative representation that there are no extra or additional charges when purchases are made on the installment plan.

47. The failure to show the total installment plan price simply aggravates the deception resulting from the representation of "no

extra charge" or "no carrying charges." The affirmative representations of respondents have the capacity and tendency to lull a prospective customer into the belief that the total installment plan price is the same as the cash price. Simple arithmetic would disclose the discrepancy, but this provides no defense for respondents. Having made a claim open to the interpretation that the cash and installment prices are the same, they cannot be heard to say that prosective customers should take pencil and paper in order to learn the falsity of that claim.

"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. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception." *F.T.C.* v. *Standard Education Society*, 302 U.S. 112, 116 (1937). One dealing with another in business has the right to rely upon representation of facts as the truth. *Goodman* v. *F.T.C.*, 244 F. 2d 584 (9th Cir. 1957).

48. Nevertheless, even if the total installment plan price were disclosed in the advertising material, that would not cure the deception involved in the affirmative claim of no additional charges, be they "extra" or "carrying" charges. It simply would result in a contradiction or at least an ambiguity. As a practical matter, of course, it would make it almost impossible for respondents to claim that customers may purchase on the installment plan at no extra cost. They could not afford thus to disclose their own duplicity.

49. This case is analogous to *General Motors Corp.* v. *F.T.C.*, 114 F. 2d 43 (2nd Cir. 1940), *cert. denied*, 312 U.S. 682 (1941).[9]

General Motors advertised a "6% plan" for the installment purchase of automobiles. The 6% was figured on the unpaid balance due at the time of sale. Actually, the credit charge amounted to nearly 12% simple interest per annum upon the deferred and unpaid balance, *as diminished by the installment payments made.*

Disclosure was made in the advertising that the credit charge was "not 6% interest, but simply a convenient multiplier anyone can use and understand."

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[9] See also *Ford Motor Company* v. *F.T.C.*, 120 F. 2d 175 (6th Cir.), *cert. denied* 314 U.S. 668 (1941).

The Court held the advertising was "likely to cause the purchaser of a car to believe that he was paying an interest rate of 6% per annum upon his deferred installments * * *.

The Court specifically ruled that the disclaimer was not sufficient to overcome the impression created by the advertisment as a whole.

50. Respondents lay great stress on the fact that although five consumer witnesses were called by counsel supporting the complaint, none of them was asked his interpretation of respondents' representations that there were no carrying charges or extra charges in connection with installment plan purchases. They seek to have the examiner draw an adverse inference from the failure of counsel supporting the complaint to produce testimony through these witnesses concerning public understanding of respondents' representations concerning installment plan purchases.

Respondents rely not only on general principles governing the failure of the proponent of a factual proposition to produce evidence available to him in support of the proposition claimed; they also point to the prehearing order of Hearing Examiner Lewis dated August 5, 1963, reciting that at the prehearing conference of July 15, 1963, it was agreed that "Complaint counsel will call five customer-type witnesses to testify as to their understanding concerning any additional charges for purchases on the installment plan, and the thickness of the seat covers." (Paragraph 1, page 2.)

51. Counsel supporting the complaint did indeed express such an intention (Tr. 28–30). But, in context (Tr. 27–30, 33), his position was that he was going to rely upon the advertisements; that the advertisements speak for themselves; that the examiner and the Commission can find, from the brochures and letters themselves, what representation is actually being made with respect to whether there is or is not a carrying charge; that he was not relying primarily on consumer-type testimony but on Commission expertise; and that the matter was sufficiently clear so that he really didn't have to have consumer-type witnesses, but since he was going to call them on another matter, he also intended to interrogate them in that regard.

52. The failure of counsel supporting the complaint to produce consumer testimony concerning the meaning of respondents' representations, in the light of his stated intention to do so, might be of greater importance if the matter were more doubtful than it is. But this examiner agrees with the basic position taken by counsel supporting the complaint that the examiner and the Commission can find from the brochures and letters themselves what representation is actually being made with respect to whether there is or is not an extra or a carrying charge.

The Commission is not required to sample public opinion to determine what an advertiser is representing to the public. The Commission has a right to look at the advertisements in question, consider the relevant evidence in the record that would aid in interpreting the advertisement and then decide for itself whether the practices are unfair or deceptive. *Zenith Radio Corp.* v. *F.T.C.*, 143 F. 2d 29 (7th Cir. 1944).

The meaning of representations to the public and their tendency or capacity to mislead or deceive are questions of fact to be determined by the Commission. *Kalwajtys* v. *F.T.C.*, 237 F. 2d 654 (7th Cir. 1956).

53. Most of the references have been to the sales letters. But perusal of the accompanying material discloses nothing to explain or mitigate the misrepresentation found.

If anything, the deception is heightened by the other material included in the mailings. For example, the "Free Inspection Request Form" (RX 2F) has the customer agreeing to pay in 3 payments, and the price shown is the cash price ($18.88 and $10.95) rather than the installment price ($19.98 and $11.94).

54. Accordingly, it is found that:

(1) Through their use, in sales letters and other advertising material, of these expressions:

3 month payment plan at no extra charge
3 equal monthly payments with no carrying charges
3 months to pay with no carrying charges
3 months to pay at no extra charge

and other similar statements, respondents have represented that there are no charges in addition to the advertised purchase price of their seat covers when purchased on the installment plan.

(2) In truth and in fact, respondents make an extra charge over and above the regular advertised price of their products if the products are purchased on the installment plan.

55. There has been no change in respondents' practices with regard to the alleged misrepresentation that there are no extra charges or carrying charges involved in installment plan purchases. RX 8 and 9 attest to their persistence in the practices challenged by the complaint. Indeed, respondents, in renewing their motions to dismiss in their Proposed Findings (page 3), frankly state:

> No change was made in the statement of prices, including the installment price and its inclusion of postage or handling, as this is stated so clearly as to prevent any possible misunderstanding.

56. The advertisements are deceptive and misleading in a material respect, and the public interest requires an order terminating the practice.

IV. The Charge of Misrepresenting the Guarantee.

57. It is found that the guarantee form formerly used by respondents makes the disclosures required by controlling case law. It sets forth clearly and conspicuously the nature and extent of the guarantee and the manner in which the guarantor will perform, including the amount of the service charge imposed, and also discloses clearly and conspicuously the life referred to through the use of the term "Lifetime Guarantee." [10]

58. The fact that a copy of the guarantee is included in every mailing sent out by respondents (Tr. 102) does not, however, provide a defense to the charges in the complaint that their advertising of the guarantee has been false, misleading and deceptive.

Respondents themselves recognize and concede (Proposed Findings, page 11) that there are some 13 references to the guarantee in an ordinary mailing. Most, if not all, of these references do not disclose adequately, if at all, the limitations, including especially the charge of 98¢ or $1.98 per section.

Some brochures disclose that the guarantee is for the life of the purchaser's car; others, particularly the sales letters, do not, merely proclaiming the existence of a "written lifetime guarantee." It is only by reference to the guarantee itself that a purchaser learns of the per-section charge of 98¢ or $1.98 in case replacement is necessary.

59. Having unqualifiedly represented in their sales letters and other advertising materials, that their seat covers carry a "lifetime guarantee" or are "guaranteed for the life of your car," etc.,—thus implying an unconditional guarantee—respondents cannot be heard to say that the public must look further—albeit in the same mailing—to discover the existence of material limitations and conditions.

60. Even though all of the representations "taken together make crystal clear what is represented as to the guarantee," the law does not permit respondents to proclaim an unconditional guarantee in one part of their advertising materials and contradict themselves in another part.

61. The leading case on the matter of guarantees is *Parker Pen Co.* v. *F.T.C.* 159 F. 2d, 509 (7th Cir. 1946). Its holding is fatal to respondents' contentions.

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[10] The complaint did not charge any deficiency in identifying the guarantor. It is noted that some of the guarantees (CX 14, 15B) bore only the signature "M. Fingerhut;" others bore that signature plus the printed name, "Fingerhut Mfg. Co." The guarantee currently in use (RX 8) includes also the corporate address.

In *Parker*, the disclosure of limitations on a lifetime guarantee was in the *very same advertisement* where the term "Guaranteed for Life" was featured. The Court noted that Parker advertisements gave prominence to the term "Guaranteed for Life" and at the same time, in a less prominent place in the advertisement, usually at the bottom of the page and in smaller, light print, there appeared the disclosure that there was a service charge in connection with the guarantee.

The Court concluded that the advertisements were objectionable because "the limiting words of the guarantee appear in small print," and at "some distance from the words of the guarantee."

Accordingly, the modified order approved and enforced by the Court prohibited a guaranteed for life" representation if a charge was imposed unless the terms of limitation were placed close to such words as "guaranteed for life", and in print of the same size as the other regular printed matter in the advertisement.

62. Accordingly, it must be held that the use of the term "Lifetime Guarantee", or any similar representation of an unconditional guarantee, unaccompanied by a conspicuous and adequate disclosure of the limitations of the guarantee, in close conjunction therewith, constitutes an unfair and deceptive practice.

It is not sufficient that perusal of all the literature enclosed in respondents' mailing would apprise the careful reader of all he needed to know about the guarantee.

63. Strictly speaking, of course, respondents' guarantee is not a "Lifetime Guarantee." The guarantee is for neither the life of the purchaser nor for simply the life of the car in which the seat covers are installed. The duration of the guarantee, by its terms, is for the life of the car *for as long as the purchaser owns the car.*

64. However, that is not an issue raised by the complaint. With the guarantee before it, disclosing that further limitation, the Commission limited its challenge to a charge that respondents, in advertising their "Lifetime Guarantee", fail to disclose adequately "that the life referred to is that of the automobile of the purchaser" (Complaint, Paragraph Seven).

That charge recognizes, implicitly if not explicitly, the validity of the term despite the technical deficiency stated. Presumably, the Commission has determined that the further requirement of the purchaser's continued ownership is not such a material limitation that the public interest requires disclosure.[11]

[11] Cf. the Commission's Guides against Deceptive Advertising of Guarantees (April 26, 1960) Section IV. In the example there given "'A' advertised that his carburetor was guaranteed for life, whereas his guarantee ran for the life of the car in which the carburetor was originally installed. The advertisement is ambiguous and deceptive and should be modified to disclose the 'life' referred to."

65. Aside from these considerations, the record shows (RX 6AB, 8) that respondents have abandoned the term "Lifetime" as applied to their guarantee and now refer to it as an "All-Inclusive Guarantee."

66. Thus, in the opinion of the examiner, it is not necessary to make a determination whether the term "Lifetime", as formerly used by respondents in connection with their guarantee, is deceptive because it is for neither the life of the purchaser nor for the entire life of the car. Conceivably, its use could be rationalized as meaning that the seat covers are guaranteed to the original purchaser for the life, under his ownership, of the car in which they are installed.

67. In his Eleventh Proposed Finding (page 9), counsel supporting the complaint raises, for the first time, a challenge to the representation that the charge of $1.98 per seat cover section is for postage and handling. Contending that this representation is false, counsel points to the stipulated fact (Tr. 103) that "The shipping and handling cost is less than $1.98."

68. Counsel supporting the complaint argues further that by charging $1.98 per section, respondents "are recovering their entire cost of replacement per section as each section only costs them $1.92."

This argument is based on the stipulated fact (Tr. 103) that "During the period August 1, 1960, to April 1, 1962, Respondents' costs for all sections of the Stardust seat covers front and back were $7.60 plus Federal excise tax." Since a complete set of seat covers consists of four sections, counsel supporting the complaint has divided the sum of $7.60 by four to arrive at his per-section cost (which is $1.90 rather than $1.92).

69. Nevertheless, the examiner declines to make any findings, conclusions or order on this set of circumstances. Indeed, the order proposed by counsel supporting the complaint would not reach the practice here apparently challenged.

70. One reason that the proposed findings in this connection must be rejected is that the subject is outside of the scope of the complaint, and respondents were not properly put on notice that this matter was in issue.

The amount of the shipping and handling charge in connection with the guarantee was not even among the advertising statements cited as "typical" in Paragraph Four of the complaint. The challenge in the complaint concerning the guarantee is two-fold:

(1) That respondents have represented that their products are unconditionally guaranteed for life (Paragraph Five) whereas the guarantee is not unconditional but has limitations and conditions not disclosed in their initial advertising (Paragraph Six).

(2) In using the words "Lifetime Guarantee", respondents "fail to clearly and conspicuously disclose that the life referred to is that of the automobile of the purchaser." (Paragraph Seven)

(See also the Pre-Hearing Order and the statement of the issues filed by counsel supporting the complaint June 20, 1963).

71. Although respondents stipulated with counsel supporting the complaint that the shipping and handling cost is less than $1.98 and, in effect, that the manufacturing cost of each section of the seat covers was $1.90, those facts, standing alone, do not provide a substantial basis for a finding that respondents' representations concerning the shipping and handling charge constitute unfair or deceptive acts or practices, or unfair methods of competition. Accordingly, this belated attempt to inject a new element in the case must be rejected.

72. The change in the guarantee form—primarily a change in title from "Lifetime Guarantee" to "All-Inclusive Guarantee"—was made, technically, before this complaint was served on respondents. However, the record (Tr. 159 *et seq.*) makes clear that respondents had knowledge of the pendency of a Commission proceeding involving its guarantee claims and other practices.

73. It is found that the changes made by respondents were not, in substance or in timing, of such a nature to warrant dismissal of the complaint on the ground of mootness. Neither are the circumstances such as to warrant dismissal as a matter of sound discretion.

74. Actually, the mere change in title of the guarantee does not meet the objections raised by the complaint. Advertising of the "All-Inclusive Guarantee", without qualification, as in RX 9, still constitutes a representation of an unconditional guarantee, whereas the guarantee itself (RX 8) still imposes a postage and handling charge.

75. Accordingly, it is found that:

(1) Through their use without qualification, in sales letters and other advertising material, of these expressions:

> Written lifetime guarantee
>
> Guaranteed for the Life of Your Car
>
> LIFETIME GUARANTEE. You will never have to buy another set of covers for your car because we give you a written guarantee that we will repair or replace your covers if, for any reason, they are ever damaged.
>
> THE ONLY COVERS GUARANTEED FOR LIFE
>
> * * * the only seat covers with a LIFETIME GUARANTEE! We're the only seat cover manufacturer who dares to make this claim. You'll never have to buy another set while you're driving your present car!

and other similar statements, respondents have represented that their products are unconditionally guaranteed for life.

(2) In truth and in fact, respondents' guarantee is not unconditional but has limitations and conditions not disclosed in their initial advertising.

(3) Respondents in using the words "Lifetime Guarantee" fail to clearly and conspicuously disclose that the life referred to is that of the automobile of the purchaser.

V. The Charge of Misrepresentation by Sample.

76. In each of their mailings, respondents enclose a sample of the seat cover material. Such samples have a gauge or thickness of .013 of an inch (RX 6B). There has been no direct statement in the advertising either that the seat covers are made entirely of the same material as the sample or made entirely of vinyl .013 of an inch thick. However, there have been references to the sample in the advertising material:

> Feel how pliable the swatch is, too, yet how strong. (CX 2)
> See for yourself how strong and thick the enclosed sample is. (CX 12)

But the complaint says only that the misrepresentation is accomplished through the use of samples.

77. In actuality, only the portion of the front seat cover receiving the most wear, *i.e.*, that which is sat upon and at the seams, is manufactured from 13-gauge material. The balance of the seat covers is manufactured from 11-gauge material which is two gauges—or two one-thousandths of an inch—thinner than the sample sent with mailings (RX 6B). As an example, the front cover for a 1962 4-door Chevrolet contains 2,295 square inches of 13-gauge material and 3,441 square inches of the lighter 11-gauge material. (Tr. 103)

78. There was no disclosure of the fact that the larger portion of respondents' seat cover, as stated above, was manufactured from 11-gauge material.

79. The 11-gauge material used in the Stardust seat covers is made from the same plastic materials as the 13-gauge material, but is less expensive because it is thinner and therefore will give less wear if used at the same places as 13-gauge material is now used. (Tr. 103–A)

80. There is no evidence to support the claim of counsel supporting the complaint (Fifteenth Proposed Finding) that the greater portion of respondents' seat covers is made "of a lesser grade of material."

81. On the basis of the evidence, it is found, as alleged in Paragraph Eight of the complaint, that "Through use of samples of materials sent to prospective purchasers, respondents represent that their 'Stardust' brand seat cover is manufactured entirely of clear plastic of the same thickness and weight as the sample."

82. It is further found, as alleged in Paragraph Nine of the complaint, that "In truth and in fact, a substantial portion of respondent's

'Stardust' brand seat cover is manufactured of a plastic material which is of a thinner, lighter material than the said samples * * *."

83. However, the record does not support the further allegation in Paragraph Nine that the portion of the seat cover made of the thinner, lighter material "therefore is less serviceable and less desirable to a substantial number of purchasers than a seat cover made entirely of the thicker, heavier material represented by the sample."

84. In view of the test of materiality set up by the complaint itself, a finding of illegality cannot be predicated simply on the proposition that "the customer is entitled to get what he is led to believe he will get, whether he is right or wrong in thinking it makes a difference." *Colgate-Palmolive Co.* v. *F.T.C.*, 310 F. 2d 89, 94 (1st Cir. 1962); see case before Commission: Order and Opinion of December 29, 1961; Opinion on Remand (February 18, 1963); Memorandum Accompanying Final Order (May 7, 1963); and cases there cited.

85. That principle would be applicable only if the charge were simply that the seat covers were not made wholly of the same gauge material as the sample. Such a case is not before us, and the examiner intimates no opinion on that hypothesis.

86. In the absence of any evidence that the difference of two-thousandths of an inch in the thickness of part of the seat cover, compared with the sample, resulted in an unsatisfactory or inferior product, or one otherwise less serviceable or less desirable, the variance is not actionable under the complaint as drawn.

87. Here, the allegation that the enclosure of the sample constituted a "false, misleading and deceptive" practice is based specifically on the proposition that the partial substituton of the 11-guage material made the seat covers "less serviceable and less desirable to a substantial number of purchasers * * *."

88. Concerning this aspect of the case, five witnesses were called by counsel supporting the complaint. It is not surprising that the consensus of their testimony was to the effect that they expected or presumed that the seat covers would be like the sample.

The witness Stelzer expected the seat cover "to be like the sample" he received. (Tr. 108) The witness Griffin "presumed from receiving the sample, this was the sample of the actual seat covers that would be delivered." (Tr. 117) The witness Pedrosky "assumed that the seat covers would be made from the same material" as the sample. (Tr. 131) The witness Wilkins "just assumed that whatever would be ordered, would be the same as the sample." (Tr. 136) The witness Schumann "just naturally assumed" on the basis of the sample that the seat covers would be of "[like] kind and quality." (Tr. 138)

89. Of course, as respondents point out, the representation inferred by each of these witnesses was not *wholly* false. The seat covers *were* made of the same material as the sample, albeit only in part. There is a certain speciousness in respondents' arguments on this point, but it is not necessary to belabor this aspect of the matter. The decision of the hearing examiner does not turn on any such technicalities.

90. In the opinion of the examiner, the crucial element missing here is any record support for the complaint's allegation that the variance between the sample and a substantial portion of the seat covers made them "less serviceable and less desirable to a substantial number of purchasers."

91. The five consumer witnesses shed little light on the subject. Indeed, counsel supporting the complaint, on direct examination, questioned only one witness regarding his preference. He asked the witness Wilkins: "Would you have any preference whether or not your material would be made out of the lighter or the same gauge of material?" Wilkins replied: "None whatever", explaining that he had not given any serious consideration to ordering the seat covers. In fact, Wilkins had not bought the seat covers, had never seen them and didn't know what they were made of. (Tr. 136–137)

92. On cross-examination, the witness Stelzer said he "personally wouldn't" complain about the thickness of the seat covers. (Tr. 112) He agreed that he was not buying any particular thickness of seat covers, as long as they were satisfactory, and that it was reasonable to use a heavier plastic in places where the most wear occurred. He did not feel that he had been hurt by the fact that part of the seat cover was made of thinner material. (Tr. 114)

On redirect examination, he did indicate that he would "prefer" to have a heavier plastic but qualified this by adding:

> It's just a feeling. I don't know. I don't think it matters too much, though, but I would prefer to have a little heavier seat covers. (Tr. 115)

Stelzer installed the seat covers in the fall of 1962, probably in September, and at the time of hearing, about a year later, was still using them. He had not complained to the company, and he knows of nothing wrong with the seat covers. (Tr. 109–110)

93. As far as Pedrosky was concerned, he had made no complaint to the manufacturer because the seat covers had proved satisfactory. He has had the seat covers in his car for more than a year, "and they have held up very good." (Tr. 131–132)

94. Of the remaining two witnesses, neither Griffin or Schumann was questioned about his preference. Neither had ordered the seat covers. (Tr. 117, 138) Each had furnished the advertising material and sample received from Fingerhut to the F.T.C. at the request of

a personal friend employed in the Chicago branch office of the Commission. (Tr. 122–124, 139)

95. Thus, while certain factual allegations in Paragraph Eight and Nine of the complaint were established by the evidence, the charge that the practices were false, misleading and deceptive must fail for failure of proof.

In the opinion of the examiner, the theory underlying the charges respecting the sample distributed by respondents was predicated on the proposition that the variance between the sample and the actual seat cover was material because the difference in thickness made the seat cover "less serviceable and less desirable to a substantial number of purchasers."

There being no reliable, probative and substantial evidence to support this element of the charge, it has not been established that respondents' practices in this regard constitute unfair or deceptive acts and practices or unfair methods of competition.

96. Although the findings above are thus dispositive of this aspect of the case, it may be noted that respondents now disclose as "a standard part" of each mailing that the seat covers are made in part of 11-gauge material. (RX 6B, 9)

VI. Miscellaneous Matters.

97. The examiner specifically finds that the sales letters and other advertisements contained in the record are typical of respondents' advertising and provide a valid basis for an evaluation of the legality of the representations here in issue. The challenged representations have been considered both separately and in the context of all the material contained in any particular mailing. In weighing these matters, the hearing examiner has borne in mind the principle that advertisements must be considered in their entirety, and as they would be read by those to whom they appeal, *Aronberg* v. *F.T.C.* 132 F. 2d 165 (7th Cir. 1942).

98. The examiner rejects the respondents' suggestion (Proposed Findings, page 6; Reply, pages 1–2) that it was a major problem "to understand the charges against them."

Respondents point to the fact that four of the statements quoted in Paragraph Four of the complaint as typical of their advertising do not even appear in the evidence introduced at the hearing in support of the complaint. This is technically true and, at first blush, would appear to be a rather remarkable oversight on the part of counsel supporting the complaint.

99. The fact is, however, that respondents admitted making the statements in question. They *had* entered a denial in their answer, but at the prehearing conference, the counsel, in effect, withdrew that

denial and objected only that the statements were quoted "out of context". (Tr. 3–4, 17, 22; see also Paragraph 4 of Pre-Hearing Order.)

100. Moreover, the substance of each statement cited as being without record support is found in the record; see CX 9 and 17 and RX 9 and 10, the variations being only matters of inconsequential detail.

101. In any event, comparison of the statements quoted in the complaint with evidence in the record demonstrates that even if there were a technical deficiency, it cannot be viewed as prejudicial to respondents. The statements cited in the complaint, together with the allegations of Paragraph Five, obviously put respondents on notice of the nature of the charges they were required to meet.

102. Respondents appear to rely heavily on the fact that the record contains no evidence of actual deception, of customer complaints or of competitive injury. But actual deception of the public need not be shown to support a Federal Trade Commission order; representations merely having a capacity to deceive are unlawful, *Charles of the Ritz Distributors Corp.* v. *F.T.C.*, 143 F. 2d 676 (2nd Cir. 1944). See also *Goodman* v. *F.T.C.*, 244 F. 2d 584 (9th Cir. 1957).

As long ago as 1919, it was held that the Commission is "not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived." *Sears, Roebuck & Co.* v. *F.T.C.*, 258 Fed. 307, 311 (7th Cir. 1919).

103. In connection with their Fifteenth Proposed Finding (at page 19) respondents state:

As a matter of fact, the Stardust seat covers aren't even manufactured any more.

A similar statement is made at page 15 of respondents' Reply to the Proposed Findings of counsel supporting the complaint. Respondents cite no record reference to support their statements to that effect, and the examiner finds that there is no record support for such claim.

Even if this had been proved, the mere fact that manufacture of a product under a specific trade name had been discontinued would provide no bar to issuance of an order based on findings that there had been misrepresentation in the sale of such product.

104. The motion to dismiss the complaint on the ground of mootness is denied. The matter is not moot, and an order to cease and desist is required in the public interest.

CONCLUSIONS OF LAW

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 statements and representations of respondents regarding their installment plan purchase price and their guarantee, as found herein, were and are false, misleading and deceptive in material respects.

4. The acts and practices of respondents, as found herein, have had and may have the capacity and tendency to mislead and deceive members of the purchasing public with respect to the installment plan purchase price of respondents and with respect to their guarantee, and into the purchase of substantial quantities of respondents' products as a result. As a consequence, trade has been or may be unfairly diverted to respondents from their competitors, and substantial injury thereby has been or may be done to competition in commerce.

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

6. The evidence does not support the charge in Paragraph Nine of the complaint that respondents' use of samples constituted false, misleading and deceptive representations. That charge must be dismissed for failure of proof.

7. With the exception of Paragraph 3, dealing with the charge that has been dismissed, the examiner has adopted the order attached to the complaint as that which the Commission had "reason to believe should issue" if the facts were found to be as alleged in the complaint.

ORDER

It is ordered, That respondents Fingerhut Manufacturing Company, a corporation, and its officers, and Manny Fingerhut, Herman Schwartz, Stanley H. Nemer and William Fingerhut, individually and as officers 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 in commerce, as "commerce" is defined in the Federal Trade Commission Act, of automobile seat covers or any other product, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That there are no charges in addition to the purchase price of their products when purchased on the installment plan.

(b) That their products are unconditionally guaranteed where there are any conditions or limitations to such guarantee.

(c) That their products are guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously set forth.

2. Using the world "Lifetime" or other term of the same import in referring to the duration of a guarantee of a product without clearly and conspicuously disclosing the life to which such reference is made; or misrepresenting in any manner the duration of a guarantee.

It is further ordered, That the charges of Paragraph Nine of the complaint, alleging respondents' use of samples to constitute false, misleading and deceptive representations, be, and they hereby are, dismissed.

APPENDIX A

You may think we're crazy
but we promise you that if you buy a set of our custom-tailored auto seat covers
You will never have to buy another set of covers for your car because we are the only seat cover manufacturer that gives you a

LIFETIME GUARANTEE

If you purchase a set of Stardust covers and if for any reason in the world you accidentally damage them, return the cover to us and we will replace any damaged section (front back, front cushion, rear back, rear cushion) for only 98¢ postage and handling charge per section.

It's hard to believe, isn't it? But it's absolutely true and we back it up in writing with a guarantee in every set of Stardust covers.

Remember—this guarantee applies for as many years as you own the car and regardless of what caused the damage!

Our reason for this guarantee is simple: a satisfied customer is our very best business asset.

We feel certain you will be more than satisfied with Stardust custom-tailored covers even if you never have to take advantage of the guarantee because Stardust is the very finest 100% transparent seat cover.

It is the finest for good reasons, too. Stardust is the very thickest and heaviest-weight transparent material used by any major seat cover manufacturer! It also contains much more chemical plasticising ingredient than ordinary seat cover materials of this type. This important plasticiser makes Stardust absolutely transparent instead of "almost transparent" like similar covers; makes Stardust smooth and flexible instead of bulky and uncomfortable like other covers; and helps give Stardust extra rugged, supple strength.

Stardust is exclusive with us because we have it made to our specifications at the mill, especially for our use in custom-made seat covers.

Fingerhut Mfg. Co.

OPINION OF COMMISSIONER REILLY DISSENTING IN PART

MAY 27, 1964

I disagree with the majority's adoption of the hearing examiner's ruling dismissing the allegation that respondents had made false and deceptive representations concerning the material from which certain of their seat covers were made.

This allegation is worded as follows:

PAR. 8: Through use of samples of material sent to prospective purchasers, respondents represent that their "Stardust" brand seat cover is manufactured entirely of clear plastic of the same thickness and weight as the sample.

PAR. 9: In truth and in fact, a substantial portion of respondent's "Stardust" brand seat cover is manufactured of a plastic material which is of a thinner, lighter material than the said samples and therefore is less serviceable and less desirable to a substantial number of purchasers than a seat cover made entirely of the thicker, heavier material represented by the sample. Therefore, the representations and practices as set forth in Paragraph Eight hereof were false, misleading and deceptive.

The record shows, and the hearing examiner has found, that the sample of plastic enclosed with respondents' advertising was .013 inch in thickness, or 13-gauge, whereas the seat covers were made in substantial part of plastic of .011 inch thickness.[1] The hearing examiner also found that the 11-gauge material "is made from the same plastic materials as the 13-gauge material, but is less expensive because it is thinner and therefore will give less wear if used at the same places 13-gauge material is now used."

In holding that the allegation had not been sustained the examiner expressed the opinion that "the theory underlying the charges respecting the sample distributed by respondents was predicated on the proposition that the variance between the sample and the actual seat cover was material because the difference in thickness made the seat cover 'less serviceable and less desirable to a substantial number of purchasers' ". Having found that counsel supporting the complaint had failed to prove these elements of the charge, *i.e.*, serviceability and desirability of the substituted material, he ruled that "it has not been established that respondents' practices in this regard constitute unfair or deceptive acts and practices or unfair methods of competition".

It is difficult for me to understand why the examiner considered the gravamen of the charge to be that seat covers made from the substituted material were inferior to the sample or would be considered by the purchaser to be inferior and therefore less desirable. These elements of the allegation are wholly irrelevant to a determination of

[1] For example, the front cover for a 1962 4-door Chevrolet contains 2,295 square inches of 13-gauge material and 3,441 square inches of 11-gauge material.

whether the practice of shipping merchandise which does not conform to sample is unfair or deceptive. It is enough if there is a showing of a significant difference between the weight and thickness of the sample and the substituted material and, in this case, such showing is amply made by evidence that 11-gauge plastic "is less expensive because it is thinner and therefore will give less wear if used at the same places as 13-gauge material is now used." As was said by the Supreme Court in *Federal Trade Commission* v. *Algoma Lumber Company*, 291 U.S. 67, 77–78 (1934): "We have yet to make it plain that the substitution would be unfair though equivalence were shown * * * The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else."

Respondents in this case have affirmatively represented that their seat covers are made entirely of a certain type of material. Their customers have given orders for such seat covers but have been supplied with something else. This should be sufficient to establish that respondents have engaged in an unfair trade practice.

Decision of the Commission and Order to File Report of Compliance

This matter has been heard by the Commission upon the cross-appeals of respondents and counsel in support of the complaint from the hearing examiner's initial decision. The Commission has considered the entire record, including the briefs and oral argument of respondents and counsel supporting the complaint, and has determined that the order contained in the initial decision should be modified and that the appeals of both parties should be denied. Accordingly,

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

It is ordered, That Respondents Fingerhut Manufacturing Company, a corporation, and its officers, and Manny Fingerhut, Herman Schwartz, Stanley H. Nemer and William Fingerhut, individually, and as officers 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 in commerce, as "commerce" is defined in the Federal Trade Commission Act, of automobile seat covers or any other product, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That there are no charges in addition to the purchase price of their products when purchased on the installment plan.

(b) That their products are unconditionally guaranteed where there are any conditions or limitations to such guarantee.

(c) That their products are guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously set forth in immediate conjunction with such representation.

2. Using the word "Lifetime" or other term of the same import in referring to the duration of a guarantee of a product without clearly and conspicuously disclosing in immediate conjunction therewith the life to which such reference is made; or misrepresenting in any manner the duration of a guarantee.

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

It is further ordered, That Fingerhut Manufacturing Company, a corporation, and Manny Fingerhut, Herman Schwartz, Stanley H. Nemer and William Fingerhut 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.

Commissioner Reilly dissenting in part.

IN THE MATTER OF

BUDGET COUNSELLORS, INC., ET AL.

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

Docket C-748. Complaint, May 27, 1964—Decision, May 27, 1964

Consent order requiring Washington, D.C., sellers of a service whereby, for a fee, they would distribute a portion of a client's income to his creditors, to cease representing falsely in newspaper and direct mail advertising that they would consolidate their clients' debts, assist financially in payment thereof, and assure clients of restraint or other forbearance on the part of creditors in effecting collection of debts.

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 Budget Counsellors, Inc., a corporation, and Benjamin H. Feldman, Herbert F. Feldman

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

PARAGRAPH 1. Respondent Budget Counsellors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 635 F Street, NW. in the city of Washington, District of Columbia.

Respondents Benjamin H. Feldman, Herbert F. Feldman and Henryette G. Feldman 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. All of said respondents have cooperated and acted together in the performance of the acts and practices hereinafter alleged.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale to the public of a service whereby respondents distribute a portion of the income of their clients to their clients' creditors for a fee or service charge.

PAR. 3. In the course and conduct of their business, respondents now sell, and for some time last past have sold, their said service to purchasers thereof located in the District of Columbia, and various States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said service 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 service, respondents have made certain statements and representations with respect thereto in advertisements inserted in newspapers and in direct mail advertising.

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

LET US PAY YOUR BILLS . . . .

GET OUT OF DEBT TODAY!

ARRANGE REPAYMENT OF YOUR UNPAID BILLS ON WHAT YOU CAN AFFORD EACH WEEK

ACT NOW! CONSOLIDATE ALL YOUR BILLS

Payments Low as $10.00 week or less

We can get you out of debt no matter what amount whether current or delinquent. Bring in your past due bills, and we will arrange to satisfy your creditors' demands and get you out of debt with payments you can afford.

ONE PAYMENT & ONE PLACE TO PAY.
No credit investigation
No security, no co-signers
No problem too great

AVOID GARNISHMENT, LOSS OF JOB & REPOSSESSIONS.
PROTECT YOUR CREDIT
NOT A LOAN COMPANY

PAR. 5. By and through the use of the aforementioned statements and representations, and others of similar import and meaning not specifically set out herein, respondents represent directly or by implication, that:

(a) Respondents will consolidate the debt of their clients to their clients' creditors, or financially assist or arrange for financial assistance in the payment of such debts; and that

(b) Respondents' clients will be assured of delay, restraint or other forbearance on the part of all the creditors of said clients in effecting, or attempting to effect, collection of debts owed them by said clients.

PAR. 6. In truth and in fact:

(a) Respondents did not and do not consolidate the debts of their clients to their clients' creditors, or financially assist or arrange for financial assistance in the payment of such debts. Respondents furnish no money themselves but act solely as an agent distributing such monies as their clients may supply for which service respondents collect a fee.

(b) Respondents' clients have not been and are not assured of delay, restraint or other forbearance on the part of all the creditors of said clients in effecting, or attempting to effect, collection of debts owed them by said clients. In a significant number of cases respondents are unable to and do not provide for or obtain delay, restraint or other forbearance on the part of all the creditors of said clients in effecting, or attempting to effect, collection of debts owed them by said clients.

Therefore, the statements and representations referred to in Paragraphs Four and Five were and are exaggerated, false, misleading and deceptive.

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

PAR. 8. The use by respondents of the aforesaid exaggerated, false, misleading and deceptive statements and representations 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 respondents' service by reason of said erroneous and mistaken 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.

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 Budget Counsellors, Inc., is a corporation organized, 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 635 F Street, NW., in the city of Washington, District of Columbia.

Respondents Benjamin H. Feldman, Herbert F. Feldman and Henryette G. Feldman are officers of said corporation, and their address is the same as that of said corporation.

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

ORDER

It is ordered. That respondents Budget Counsellors, Inc., a corporation, and its officers, and Benjamin H. Feldman, Herbert F. Feldman and Henryette G. Feldman, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly

or through any corporate or other device, in connection with the conduct of any business for the assisting of debtors, or any other business, 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 they will consolidate the debts of their clients to their clients' creditors, or financially assist or arrange for financial assistance in the payment of such debts.

2. Representing, directly or by implication, that their clients will be assured of delay, restraint or other forbearance on the part of all the creditors of said clients in effecting, or attempting to effect, collection of debts owed them by said clients, or misrepresenting, directly or by implication, their efficacy in providing for, or obtaining delay, restraint or other forbearance on the part of the creditors of their clients in effecting, or attempting to effect, collection of debts owed them by said clients.

3. Misrepresenting in any manner the kind or character of the services they render.

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

IN THE MATTER OF

BOOK CLUB GUILD, INC., ET AL.

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

Docket C-749. Complaint, May 27, 1964—Decision, May 27, 1964

Consent order requiring a corporate book seller and its subsidiaries in Manhasset, N.Y., operating under a variety of trade names such as "Ministers Book Service", "Pastoral Psychology Book Club", etc., to cease representing falsely through their various letterheads and other materials. that delinquent customers' names have been transmitted to a bona fide credit reporting agency and that their credit rating will be adversely affected.

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 Book Club Guild, Inc., Evangelical Books, Inc., Medic-Way, Inc., and Religious Book

Club, Inc., corporations, and Lester L. Doniger, Ralph Raughley and Jonathan Springer, as officers of each of said corporations, 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 Book Club Guild, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 400 Community Drive, in the Village of Manhasset, State of New York.

Respondents Evangelical Books, Inc., Medic-Way, Inc., and Religious Book Club, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York with their prinicpal offices and places of business located at 400 Community Drive in the Village of Manhasset, State of New York. Respondents Evangelical Books, Inc., Medic-Way, Inc., and Religious Book Club, Inc., are wholly owned subsidiaries of respondent Book Club Guild, Inc.

Respondents Lester L. Doniger, Ralph Raughley and Jonathan Springer are officers of each of said corporate respondents. They as corporate officers, formulate, direct and control the acts and practices of the said corporate respondents including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondents.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of books, publications and other merchandise to the general public. Respondent Book Club Guild, Inc., engages in the aforesaid activity under the names, "Ministers Book Service", "The Minister's Dollar Book Club" and the "Pastoral Psychology Book Club". Respondent Evangelical Books, Inc., engages in the aforesaid activity under the name "Evangelical Books". Respondent Medic-Way, Inc., engages in the aforesaid activity under the name "CIHU Club of Inspirational Books". Respondent Religious Book Club, Inc., engages in the aforesaid activity under the name "Religious Book Club". All of the aforesaid activities are conducted as one business operation under the direction, control and supervision of the individual respondents.

The books, publications and other merchandise are advertised, offered for sale, sold and payment made therefor through the United States mails.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said books, pub-

lications and other merchandise when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in the 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 books, publications and other merchandise 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 payment of purportedly delinquent accounts, respondents have made certain statements and representations through letters and materials sent through the United States mails to purportedly delinquent customers who have purchased books, publications or other merchandise.

Typical, but not all inclusive of said statements and representatives are the following:

a. On the letterhead of the Pastoral Psychology Book Club and the Religious Book Club:

PLEASE NOTE! I have intervened temporarily to prevent your account from going to a collection agency because I am sure you *intended* to pay this bill. * * *

b. On the letterhead of the Pastoral Psychology Book Club, Religious Book Club, The Minister's Dollar Book Club, and the CIHU Club of Inspirational Books and Evangelical Books:

* * * As members of the Mail Order Credit Reporting Association, we are obliged to report from time to time, for the benefit of other members, all names of subscribers who have failed to pay as they have agreed.

* * * * * * *

I notice that your name appears on a list which is ready to be forwarded in such a report. . . .

* * * I am equally sure that you will want to help us protect your credit standing by taking care of your account at once.

c. On the letterhead of Evangelical Books:

We are going to have to turn your account over to a collection agency.

d. On the letterhead of CIHU Club of Inspirational Books:

* * * The amount is quite small, and I am sure you would like to clean it up once and for all. Then both of us will have it out of the way, and we can avoid the more formal and less pleasant procedures which must be taken.

e. On the following letterhead:

The Mail Order Credit Reporting Association, Inc.
Credit Reports Collections
New York 18, N.Y.

ATTENTION PLEASE!

Our client has asked us to write to you in hope that we can help bring about a friendly settlement of your long overdue account. * * *

IMMEDIATE ACTION IMPERATIVE!

Again we bring up the matter of your past due account. We are still hopeful that this matter can be settled on a friendly basis.

Which will it be? * * *

TAKE NOTICE THAT—

We have been authorized by our clients to collect the amount you owe them for books they delivered to you at your specific instance and request.

Prompt payment will clear the slate without any unpleasantness. * * *

URGENT!

Your failure to settle your account leaves our client no choice but to act as follows:

If, within fifteen days from this date, settlement in full is not in our hands, our client has stated that they will unconditionally turn your account over to a regional collection agency.

PAR. 5. By and through the use of the aforesaid statements, representations and practices, and others of similar import not specifically set out herein, respondents represent and have represented that:

a. If payment is not made, the delinquent customer's name is transmitted to a bona fide credit reporting agency.

b. If payment is not made, the customer's general or public credit rating will be adversely affected.

c. If payment is not made, respondents are required to refer the information of such delinquency to The Mail Order Credit Association, Inc.

d. If payment is not made, the delinquent customer's account is turned over to a separate, bona fide collection agency.

e. The Mail Order Credit Reporting Association, Inc., is a separate, bona fide collection and credit reporting agency located in New York City.

f. Respondents have turned over to said The Mail Order Credit Reporting Association, Inc., the delinquent account of the customer for collection and other purpose.

g. The letters and notices on the letterhead of the said The Mail Order Credit Reporting Association, Inc., have been prepared and mailed by said organization.

PAR. 6. In truth and in fact:

a. If payment is not made, the delinquent customer's name is not transmitted to a bona fide credit reporting agency.

b. If payment is not made, the customer's general or public credit rating will not be adversely affected.

c. If payment is not made, respondents are not required to refer the information of such delinquency to The Mail Order Credit Reporting Association, Inc., or any other organization or agency.

d. If payment is not made, the delinquent customer's account is not turned over to a separate, bona fide collection agency.

e. The Mail Order Credit Reporting Association, Inc., is not a separate bona fide collection or credit reporting agency. Said organization is a name utilized by respondents and others for purposes of disseminating collection letters.

f. Respondents have not turned over to said The Mail Order Credit Reporting Association, Inc., the delinquent account of the customer for collection or any other purpose.

g. The letters and notices on the letterhead of the said The Mail Order Credit Reporting Association, Inc., have not been prepared or mailed by said organization. Said letters and notices have been prepared and mailed by respondents. Replies in response to said letters and notices are forwarded unopened to respondents.

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

PAR. 7. 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 payment of substantial sums of money to respondents by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, 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. Respondents Book Club Guild, Inc., Evangelical Books, Inc., Medic-Way, Inc. and Religious Book Club, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their principal offices and place of business located at 400 Community Drive, in the Village of Manhasset, State of New York.

Respondents Lester L. Doniger, Ralph Raughley and Jonathan Springer are officers of each of said corporate respondents and their address is the same as that of said corporate respondents.

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 Book Club Guild, Inc., Evangelical Books, Inc., Medic-Way, Inc., and Religious Book Club, Inc., corporations and their respective officers, and Lester L. Doniger, Ralph Raughley, and Jonathan Springer, as officers of each of said corporations, 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 books, publications or other merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication that;

1. A customer's name has been turned over to a bona fide credit reporting agency or that a customer's general or public credit rating will be adversely affected unless respondents establish that where payment is not received, the information of said delinquency is referred to what respondents in good faith believe to be a separate, bona fide credit reporting agency;

2. Respondents are required to refer information of a customer's delinquency to The Mail Order Credit Reporting Association, Inc., or any other agency or bureau;

3. Delinquent accounts will be or have been turned over to a bona fide, separate collection agency unless respondents in fact turn over such accounts to such agencies;

4. Delinquent accounts have been or will be turned over to The Mail Order Credit Reporting Association, Inc., for collection or any other purpose;

5. The Mail Order Credit Reporting Association, Inc., any fictitious name, or any trade name owned in whole or in part by respondents or over which respondents exercise any direction or control, is an independent bona fide collection or credit reporting agency;

6. Notices or other communications which respondents have, or have caused to be prepared, written or mailed in connection with the collection of respondents' accounts, have been sent by The Mail Order Credit Reporting Association, Inc., or any other fictitious person, firm or agency.

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

IN THE MATTER OF

BELGARD & FRANK, INC., ET AL.

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

Docket C-750. Complaint, June 2, 1964—Decision, June 2, 1964

Consent order requiring New York City distributors of an imitation turquoise product to manufacturers of jewelry and others, to cease using such words as "Neo-Turquoise" and "Cultured Turquoise," for their said imitation or simulated product.

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 Belgard & Frank, Inc., a corporation, and Charles L. Frank, Frank C. Sinek and Herbert Van Dam, individually and as officers of said corporation, and Neptune Cultured Pearl Syndicate, Ltd., a corporation, and Fred Richter, 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 Belgard & Frank, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business

located at 17 East 37th Street, in the city of New York, State of New York.

Respondents Charles L. Frank, Frank C. Sinek and Herbert Van Dam are officers of corporate respondent Belgard & Frank, Inc. They formulate, direct and control the acts and practices of that corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of said corporate respondent.

Respondent Neptune Cultured Pearl Syndicate, Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 604 Fifth Avenue, in the city of New York, State of New York.

Respondent Fred Richter is the president of corporate respondent Neptune Cultured Pearl Syndicate, Ltd. He formulates, directs and controls the acts and practices of that corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of said corporate respondent.

PAR. 2. Respondent Belgard & Frank, Inc., and its above-named officers are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of an imitation turquoise product which they designate as "Neo-Turquoise" to manufacturers and distributors of jewelry and to others who incorporate said product into finished articles of jewelry, for sale to retailers for resale to the public.

Respondent Neptune Cultured Pearl Syndicate, Ltd., and Fred Richter are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of the product designated by the aforesaid supplier as "Neo-Turquoise", to retailers and others under the name "Cultured Turquoise", for resale to the public.

PAR. 3. In the course and conduct of their business, as aforesaid, each of the corporate respondents now causes, and for some time last past have caused, their said product, when sold, to be shipped from their respective aforestated places of business in the State of New York to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in their said product in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of the business of respondent Belgard & Frank, Inc., and its above-named officers, said respondents engage in the practice of selling to others a product which they designate as "Neo-Turquoise", and which is described on sales invoices as follows:

PLEASE NOTE THAT NEO-TURQUOISE STONES ARE MAN-MADE AND CONTAIN CRUSHED MINERAL TURQUOISE TOGETHER WITH OTHER CHEMICAL ELEMENTS FOUND IN NATURAL TURQUOISE.

Said respondents also engage in the practice of supplying to certain of the purchasers of this product material containing the following statement:

Neo-turquoise contains genuine powered turquoise, together with the other chemical elements found in mineral turquoise. It is the result of years of research and experimentation to duplicate nature's process in producing turquoise. In our process, all matrix or foreign substances have been avoided, with the exception of copper phosphate, and the result is the fine delicate sky-blue color so much sought after in scarce mineral turquoise.

This must not be confused with imitation turquoise which has the same chemical and physical properties as glass. Neo-turquoise has the same approximate hardness, color, chemical composition and appeal as the finest sky-blue gem.

PAR. 5. In the course and conduct of the business of respondents Neptune Cultured Pearl Syndicate, Ltd., and Fred Richter, they have engaged in the practice of advertising, offering for sale and selling as "Cultured Turquoise" the product designated as "Neo-Turquoise" by the aforesaid supplier. They have made statements and representations in advertisements, of which the following are typical and illustrative, but not all inclusive:

Announcing an event of unusual importance to the jewelry trade . . .

The Birth of Cultured Turquoise

After years of research and experimentation, Neptune is proud to report that it has succeeded in duplicating natural turquoise. We call this new stone cultured turquoise. Containing genuine turquoise, the Neptune process eliminates not only the undesirable green or grey color of American turquoise but all matrix and foreign substances with the exception of copper phosphate. The result is the fine, delicate, sky-blue color so much sought after in scarce mineral turquoise. Cultured turquoise is not a plastic nor is there any cement or other bonderizing substance used in congealing the powder. It is produced by controlled heat and extreme pressure. As a result, the finished stone contains almost the identical elements of natural turquoise (i.e., hydros aluminum phosphate copper 11.45%, aluminum 31.35% and phosphorus pentoxide (P205)).

Cultured turquoise is not to be confused with imitation turquoise. It is hand cut and has the same approximate hardness, color, chemical composition and appeal as the finest sky-blue gem turquoise. It is also creating a sales sensation in its first bow at retail counters in The Northeast. Inquiries are invited.

NEPTUNE CULTURED PEARL SYNDICATE LIMITED
604 Fifth Ave., N.Y. 20 PL 7-0768

* * * * * * *

NEPTUNE exclusive distributor of . . .

Cultured Turquoise

After years of research and experimentation, Neptune is proud to report that it has succeeded in duplicating natural turquoise. We call this new stone cultured

turquoise. Cultured turquoise contains genuine turquoise together with the other chemical elements found in mineral turquoise. It is hand cut and has the same approximate hardness, color, chemical composition and appeal as the finest sky-blue gem turquoise. Inquiries are invited. 7 to 11 mm. uniform necklaces to retail from $50 to $75.

PAR. 6. By and through the use of the names "Neo-Turquoise" and "Cultured Turquoise" in conjunction with the statements and representations as set forth in Paragraphs Four and Five hereof, respondents have represented, directly or by implication, that the product so described and referred to is composed of natural turquoise which has been crushed and powdered and reformed under heat and pressure into a turquoise product which has substantially the same chemical composition as natural turquoise.

PAR. 7. In truth and in fact the product so described and referred to is not composed of and does not contain natural turquoise or the synthetic equivalent of that mineral. The product is a compressed imitation material composed of mineral gibbsite mixed with a small amount of copper phosphate. Gibbsite, an aluminum hydroxide, is a different chemical species from turquoise and is not related to or derived from turquoise, which is a hydros copper, aluminum phosphate.

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

PAR. 8. By and through the use of the aforesaid practices, respondents place in the hands of others the means and instrumentalities whereby they may mislead the purchasing public as to the nature and composition of the aforesaid product.

PAR. 9. In the conduct of their businesses, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of a product of the same general kind and nature as that sold by respondents.

PAR. 10. 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' product by reason of said erroneous and mistaken belief.

PAR. 11. 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 Belgard & Frank, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 17 East 37th Street, in the city of New York, State of New York.

Respondents Charles L. Frank, Frank C. Sinek and Herbert Van Dam are officers of said corporation and their address is the same as that of said corporation.

Respondent Neptune Cultured Pearl Syndicate, Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 604 Fifth Avenue, in the city of New York, State of New York.

Respondent Fred Richter 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 Belgard & Frank, Inc., a corporation, and its officers, and Charles L. Frank, Frank C. Sinek and Herbert Van Dam, individually and as officers 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 imitation turquoise or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "Neo-Turquoise", or any other word or term of similar import or meaning, as a name for, or to describe or refer to, imitation turquoise, unless such word is immediately preceded, with equal conspicuousness, by the word "Imitation" or "Simulated".

2. Using the word "Turquoise", or any other word of similar import or meaning, as a name for, or to describe or refer to, imitation turquoise, unless such word is immediately preceded, with equal conspicuousness, by the word "Imitation" or "Simulated".

3. Advertising, offering for sale or selling an imitation turquoise product in any form, unless it is clearly disclosed to the purchaser that the product is imitation turquoise.

4. Misrepresenting, in any manner, or placing in the hands of others means and instrumentalities of misrepresenting, the composition, nature or identity of ingredients or elements, method of manufacture, or the characteristics or qualities of imitation turquoise, natural or synthetic turquoise, or of any other precious or semi-precious stone.

It is further ordered, That respondents Neptune Cultured Pearl Syndicate, Ltd., a corporation, and its officers, and Fred Richter, individually and as an officer of said corporation, and respondents' agents, respresentatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of imitation turquoise, or any other product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "Cultured", or any other word or term of similar import or meaning, as a name for, or to describe or refer to, imitation turquoise.

2. Using the word "Turquoise", or any other word or term of similar import or meaning, as a name for, or to describe or refer to, imitation turquoise, unless such word is immediately preceded,

with equal conspicuousness, by the word "Imitation" or "Simulated".

3. Advertising, offering for sale or selling an imitation turquoise product in any form, unless it is clearly disclosed to the purchaser that the product is imitation turquoise.

4. Misrepresenting, in any manner, or placing in the hands of others means and instrumentalities of misrepresenting, the composition, nature or identity of ingredients or elements, method of manufacture, or the characteristics or qualities of imitation turquoise, natural or synthetic turquoise, or of any other precious or semi-precious stone.

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

IN THE MATTER OF

MARCUS ROSENFELD ET AL. TRADING AS TOWEL SHOP, ETC.

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

Docket 7533. Complaint, July 13, 1959—Decision, June 4, 1964

Order modifying the Commission's consent order issued March 11, 1960, 56 F.T.C. 1049, to eliminate the requirement that respondent distributors make affirmative disclosure that their non-woven cotton and rayon fiber towel product does not have the appearance, texture and thickness of fabric towels in common use.

ORDER RESCINDING PREVIOUS ORDER DENYING RESPONDENTS' MOTION TO REOPEN PROCEEDING; REOPENING PROCEEDING, GRANTING RESPONDENTS' PRIOR MOTION AND MODIFYING ORDER TO CEASE AND DESIST

The Commission having reconsidered respondents' motion filed January 30, 1963, to reopen this proceeding and to modify the order to cease and desist issued herein March 11, 1960 [56 F.T.C. 1049], respondents asserting in their motion that the order entered herein requires them to make an affirmative disclosure in connection with the description of their product whereas such disclosure was not required in an order subsequently issued by the Commission against one of respondents' competitors selling the identical product, thereby placing respondents at a competitive disadvantage; and

The Commission now being of the opinion that the order to cease and desist entered in this proceeding should, in the public interest, be modified by eliminating the requirement that respondents make such affirmative disclosure, and respondents having indicated their acceptance of such modification:

It is ordered, That the Order Denying Request To Reopen Proceeding issued herein April 15, 1963 [62 F.T.C. 1535], be, and it hereby is, rescinded;

It is further ordered, That this proceeding be, and it hereby is, reopened;

It is further ordered, That respondents' motion filed January 30, 1963, asking for modification of the cease and desist order herein by setting aside the requirement to make such affirmative disclosure, be and it hereby is, granted;

It is further ordered, That the order to cease and desist previously entered in this proceeding be, and it hereby is, modified in the manner set forth below:

ORDER

It is ordered, That respondents Marcus Rosenfeld and Leon Rosenfeld, individually and as copartners trading as Towel Shop, L and M Company, 40 Towel Co., 50 Towel Co., and Wholesale Towel Company or under any other name, their agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of their non-woven cotton and rayon fiber product, or any other like merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, through the use of photographs, or in any other manner, that their non-woven product has the appearance, thickness or texture of fabric towels in common use or misrepresenting in any manner the appearance, thickness or texture of their said product.

2. Representing, directly or by implication:

(a) That products referred to as towels, whose dimensions are 12″ x 18″ are large, or misrepresenting in any manner the size of their said product;

(b) That the money paid for their product will be refunded to dissatisfied purchasers, unless all of the money paid, including postage, is refunded; provided, however, that nothing herein shall prevent respondents from truthfully representing that a specific amount will be refunded to dissatisfied purchasers;

(c) That respondents' product is superior to ordinary woven towels in every way; or in any way that is not in accordance with the fact;

(d) That any solicited testimonial letter used by respondents was unsolicited;

(e) That respondents guarantee the success of those selling their product or that they do not have competition;

(f) That respondents' product is made by a scientific new process.

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

IN THE MATTER OF

GRAND CAILLOU PACKING COMPANY, INC., ET AL., TRADING AS THE PEELERS COMPANY

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

Docket 7887. Complaint, May 13, 1960—Decision, June 4, 1964

Order requiring five members of a Louisiana family engaged in the development and distribution of shrimp processing machinery, of which they had a monopoly and which they leased to shrimp canners in the United States and sold to foreign canners, to cease discriminating in price between domestic lessees by such practices as charging shrimp canners in the North-Western United States double the rates they charged the canners' competitors on the Gulf of Mexico; and to cease discriminating between foreign and domestic shrimp processors by selling their machinery abroad while refusing to sell to domestic canners, with result of maintaining static higher production costs at home and permitting lower costs which receded with increased production to foreigners, thus creating the likelihood that foreigners would enlarge their penetration of the United States market and making it increasingly difficult for domestic producers to compete for foreign markets.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (U.S.C. Title 15, Sec. 45), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof, and more particularly described and referred to hereinafter as respondents, have violated the

provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in respect thereto as follows:

PARAGRAPH 1. Respondent Grand Caillou Packing Company, Inc., sometimes hereinafter referred to as Grand Caillou, is a corporation organized and existing under and by virtue of the laws of the State of Louisiana, with its office and principal place of business located at Houma, Louisiana.

Respondent Emile M. Lapeyre is president and a member of the board of directors of the corporate respondent and at all times mentioned herein participated in the formation, direction and control of the policies, practices and acts of Grand Caillou hereinafter referred to.

PAR. 2. Respondents Emile M. Lapeyre, Fernand S. Lapeyre, James M. Lapeyre, Andre C. Lapeyre, Felix H. Lapeyre, and Emile M. Lapeyre, Jr., are individuals and copartners, trading and doing business as The Peelers Company, with their offices and principal place of business located at 619 South Peters Street, New Orleans 4, Louisiana. These individual respondents, at all times mentioned herein, participated in the formation, direction and control of the policies, practices and acts of The Peelers Company hereinafter referred to.

PAR. 3. The Peelers Company, now and since November 1951, has been a partnership in commendam composed of six active or general partners (the individuals of the Lapeyre family named herein as respondents) and approximately twenty-six limited partners (also members of the Lapeyre family by blood or marriage) and respondent Grand Caillou Packing Company, Inc. Grand Caillou is a silent or inactive partner in The Peelers Company and is owned and controlled by members of the Lapeyre family. The officers and directors of the corporate respondent include the following individual respondents:

Emile M. Lapeyre, *President and Director*
Emile M. Lapeyre, Jr., *Vice President*
Fernand S. Lapeyre, *Director*
James M. Lapeyre, *Director*
Andre C. Lapeyre, *Director*

The Peelers Company is the successor to Peelers, Inc., a Louisiana corporation, which was dissolved in November 1951. All of the stockholders in Peelers, Inc., members of the Lapeyre family, became partners in the present partnership. The Lapeyre family through its ownership, domination and control of Grand Caillou and The Peelers Company formulates, directs and controls, and authorizes all of the policies,

practices and acts of both the respondent corporation and respondent partnership hereinafter referred to.

All of the partners in The Peelers Company constitute a class so numerous as to make it impracticable to specifically name them all as respondents herein. The individual partners of The Peelers Company, hereinbefore specifically named as respondents, are fairly representative of the class composed of all the partners in The Peelers Company, and are herewith and hereby made respondents as representative of that class. All partners in The Peelers Company, as represented by the individual respondents hereinbefore specifically named, are hereby made respondents as though specifically named herein and, together with the specifically named partners of The Peelers Company, are sometimes hereinafter referred to as The Peelers Company.

PAR. 4. Grand Caillou is engaged primarily in the business of processing, canning, selling, and distributing shrimp to customers located in various States of the United States, including the States of Washington, Oregon, and Alaska, and is one of the largest concerns of its kind in the country. In the course and conduct of its business, Grand Caillou obtains raw shrimp, primarily from the Gulf Coast fishing area, processes and places this product in cans, and causes it to be shipped or otherwise transported to wholesale and retail customers located in States other than the State in which it carries on its canning and packing operations. There has been at all times mentioned herein, and is now, a continuous current and movement of said shrimp in interstate commerce, as "commerce" is defined by the Federal Trade Commission Act.

PAR. 5. The Peelers Company is engaged in the leasing, licensing or sale in the United States and foreign countries of shrimp peeling machines, shrimp cleaning machines, shrimp grading machines, shrimp deveining machines, shrimp separating machines, and other machinery pertaining to processing shrimp, hereinafter sometimes collectively referred to as shrimp processing machinery, to canners and packers of shrimp located in the United States and foreign lands. The Peelers Company controls patents, through direct ownership or assignment, or has patent applications pending, on all of its shrimp processing machinery.

In the course and conduct of its business, The Peelers Company causes its shrimp processing machinery to be shipped or otherwise transported to its lessee customers and other customers located in States other than the State or States in which such shipments originate and, in some instances, The Peelers Company sells its shrimp processing machinery to customers located outside of the continental

limits of the United States. There has been at all times mentioned herein, and is now, a continuous current and movement of said shrimp processing machinery in interstate and foreign commerce, as "commerce" is defined by the Federal Trade Commission Act.

PAR. 6. Respondent Grand Caillou Packing Company, Inc., is now, and at all times mentioned herein has been, in competition with other individuals, partnerships, corporations and firms in the processing, canning, sale and distribution of shrimp and other seafoods in interstate commerce, except to the extent that such competition has been hindered, lessened, restricted, restrained and eliminated by the unlawful acts and practices hereinafter alleged.

PAR. 7. The Peelers Company is now, and at all times mentioned herein has been, in competition with other individuals, partnerships, corporations and firms engaged in the manufacture, sale or lease, and distribution of shrimp processing machinery in interstate commerce, except to the extent that such competition has been hindered, lessened, restricted, restrained and eliminated by the unlawful acts and practices hereinafter alleged.

PAR. 8. Prior to 1947, shrimp peeling, or picking, was done by hand labor. In 1947 the United States Patent Office issued a patent to respondents Fernand S. Lapeyre and James M. Lapeyre covering a shrimp peeling machine which efficiently peeled shrimp at sufficient speed and in such quantities to make feasible its commercial exploitation. In addition to the basic peeling machine, the individual respondents have subsequently obtained the issuance or control of additional patents on other shrimp processing machines which supplement and complement the peeling machine. These machines include a machine for cleaning shrimp after peeling or picking; one for slitting the shrimp's back; one for removing the heads from raw shrimp; and a machine for separating shrimp into various sizes. In 1956 industry sales of processed shrimp exceeded $16,000,000.

Beginning about October 1947, the individual respondents named herein through Peelers, Inc., began to commercially exploit the aforesaid shrimp peeling machine by the medium of leases and sales to shrimp canners and packers located throughout the United States and in foreign countries. These respondents through The Peelers Company now commercially exploit the aforesaid shrimp peeling machine and also the other shrimp processing machines on which they own or control patents. As of March 1958, they had leased approximately 118 shrimp peeling machines, 70 shrimp cleaning machines, 68 shrimp separating machines, 41 shrimp deveining machines, and 19 shrimp grading machines to 51 processing plants located throughout the United States. Due to the efficiency of operation of respondents'

shrimp processing machinery, domestic shrimp processors, including respondent Grand Caillou, must utilize these machines in their plants in order to compete in the processed shrimp market.

In addition to the aforementioned patents, the individual respondents, or The Peelers Company, have filed with the United States Patent Office, since May 17, 1956, applications for patents on an additional 11 different machines designed for the processing of shrimp.

In addition to obtaining domestic patents and applying for other patents on shrimp processing machinery, the individual respondents, since about September 1950, have obtained 86 foreign patents in 42 foreign countries on many of their various shrimp processing machines and have made patent applications for 24 patents in 24 foreign countries on other shrimp processing machinery.

PAR. 9. From 1947 to the present the individual respondents, in the course and conduct of the business of The Peelers Company and its predecessor corporation, Peelers, Inc., as aforesaid, have engaged in unfair methods of competition and unfair acts and practices in interstate and foreign commerce, and, as a part thereof, have done and performed the following acts, among others:

(a) Since about February 1951, the individual respondents, The Peelers Company, and Peelers, Inc., have entered into agreements with various individuals whereby respondents have obtained exclusive licenses granting all of the rights to control, manufacture, and commercially exploit various shrimp processing machines on which these licensors had obtained United States patents or had applied for United States patents. These licensors include, among others, Robert J. Semanie, James L. Self, Le Roy Ernest Demarest, Stephen D. Pool, and Walter Peuss. Individual respondents and The Peelers Company have, in most instances, never attempted to manufacture, develop, or commercially exploit the shrimp processing machines covered by the aforementioned agreements.

(b) Since about Feburary 1951, the individual respondents, The Peelers Company, and Peelers, Inc., have entered into agreements with Robert J. Semanie, James L. Self, Le Roy Ernest Demarest, and Stephen D. Pool, among others, whereby said individuals agreed to disclose to respondents any and all future inventions on machines pertaining to the processing of shrimp and agreed to assign or license such inventions, if any, to aforesaid respondents.

(c) Since the development of a competitive shrimp peeling machine or device, patented by Paul C. Skrmetta of New Orleans, Louisiana, in 1957, and hereinafter called the Skrmetta machine, the individual respondents, with full knowledge of that development and patent, have harassed, intimidated, and threatened suit for patent infringe-

ment against shrimp processors who purchased or leased the Skrmetta machine, or who were potential purchasers or lessees of the Skrmetta machine; have filed suit for patent infringement against purchasers, lessees, and manufacturers of the Skrmetta machine; have threatened suit for patent infringement against purchasers and prospective purchasers of the Skrmetta machine located in foreign countries; and have offered unfair terms and conditions of sale to purchasers and prospective purchasers of the Skrmetta machine located in foreign countries.

(d) The individual respondents and The Peelers Company have placed a provision in their agreements with lessees or licensees of their shrimp processing machinery in the United States which requires the lessee or licensee to purchase non-negotiable debentures issued by The Peelers Company. These debentures have a value of $500 each, bear an interest rate of five percent per annum and the majority of the outstanding debentures do not fall due or become payable until April 1, 1966. The aforesaid agreements between the respondents and such processors contain provisions requiring said processors to purchase from The Peelers Company a specific number of debentures for each type of leased shrimp processing machine, as follows:

Machine type:	*No. of debenture*	*Total debenture, amount per machine*
Shrimp Peeler	12	$6, 000
Shrimp Cleaner	2	1, 000
Shrimp Separator	1	500
Shrimp Deveiner	6	3, 000

(e) The individual respondents and The Peelers Company have leased or licensed the use of shrimp processing machinery to various processors of shrimp located in various States, including the States of Oregon, Washington, and Alaska at discriminatory and substantially higher rental or royalty rates than the rental or royalty rates granted to other lessees or licensees of similar machinery located in other States of the United States, including the State of Louisiana.

PAR. 10. From 1947 to the present, Grand Caillou, in the course and conduct of its business, as aforesaid, and the individual respondents, in the course and conduct of the business of The Peelers Company and its predecessor corporation, Peelers, Inc., as aforesaid, have agreed and combined among themselves to adopt and carry out the unfair methods of competition and unfair acts and practices hereinbefore described and set forth in Paragraph Nine.

PAR. 11. Included among the effects and results of the methods of competition, acts and practices, as hereinbefore alleged, are the following:

(a) The Peelers Company has obtained a dominant position amounting to a virtual monopoly in the manufacture, leasing, licensing or sale, and distribution of shrimp processing machinery in the United States.

(b) Potential competitors and competitors of the individual respondents and The Peelers Company have been, or may be, hindered, restricted, or prevented from engaging in the business of manufacturing, leasing, licensing, selling, or otherwise distributing shrimp processing machinery in the United States and in foreign countries.

(c) Domestic shrimp processors have been, or may be, deprived of the benefits of fair competition in the leasing, licensing, sale and distribution of shrimp processing machinery.

(d) Inventors and potential inventors of shrimp processing machinery have been, or may be, deterred from developing, producing, manufacturing, patenting, selling, leasing, licensing, or otherwise distributing and marketing shrimp processing machinery.

(e) Competitors of Grand Caillou in the processing, distributing or sale of shrimp or shrimp products have been, or may be, injured, and competition with Grand Caillou has been, or may be, prevented or destroyed.

(f) Competition in the processing, distribution or sale of shrimp or shrimp products has been, or may be, substantially lessened, and a tendency toward monopoly has occurred.

PAR. 12. The aforesaid acts and practices of the respondents have the tendency to unduly hinder competition and have injured, hindered, suppressed, lessened, or eliminated actual and potential competition, as hereinbefore alleged, and are to the prejudice and injury of the public, and constitute unfair methods of competition in commerce or unfair acts or practices in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Richard E. Ely and *Mr. William L. Weber, Jr.*, for the Commission.

Kelley, Drye, Newhall, Maginnes & Warren for respondents.

Mr. W. D. Keith, Mr. Joseph H. Smith, Mr. A. Robert Theibault, Mr. Guy W. Shoup and *Mr. John J. Loflin, Jr.*, of counsel.

OPINION OF THE COMMISSION

JUNE 4, 1964

By MacIntyre, *Commissioner:*

This matter is before the Commission on cross-appeals of the parties from the hearing examiner's initial decision filed April 25, 1963. Pur-

suant to permission granted October 3, 1963, Buquet Canning Company, Mavar Shrimp & Oyster Co., Inc., Southern Shell Fish Co., and Violet Packing Co., Inc., shrimp canners located in the Gulf of Mexico coast area, have filed a brief as *amicus curiae*.

The respondents are Grand Caillou Packing Company, Inc. (hereinafter Grand Caillou), a Louisiana corporation primarily engaged in the production and sale of canned shrimp, its president, Emile M. Lapeyre, and five additional members of the Lapeyre family as individuals and as copartners representative of all partners engaged in distributing shrimp processing machinery under the trade style The Peelers Company. The complaint, issued May 13, 1960, charges respondents with having conspired to engage in unfair methods of competition or unfair acts or practices in commerce having the tendency and actual effect of injuring, hindering, suppressing, lessening or eliminating actual and potential competition in two fields, the processing and sale of shrimp products and the manufacturing and distribution of shrimp processing machinery. Separate denial answers were filed by Grand Caillou and the individual respondents.

The hearings commenced August 26, 1960, and proceeded intermittently in various cities throughout the country until October 8, 1962, when the record was closed for the reception of evidence. The transcript of the testimony includes more than 5,790 pages. Approximately 1,300 exhibits were introduced by complaint counsel and about 2,200 exhibits by respondents. Most of the exhibits consist of documents containing a multiple number of pages. The exhibits placed in the public record occupy twenty-six bound volumes or exhibit binders. The *in camera* exhibits are contained in eleven binders.

The hearing examiner dismissed the complaint as to the corporation, Grand Caillou, and Emile M. Lapeyre in his capacity as president and director of Grand Caillou. A single charge of the complaint was sustained as to the individual respondents and an order which would require them to cease and desist from the found violation is contained in the initial decision. All other allegations of the complaint were dismissed as to all parties.

The initial decision, consisting of ninety-two pages, was, except for a few pages, copied *in haec verba* from proposed findings, briefs and pleadings filed by the respondents. It contains little independent factual or legal analysis. Nor does it explain why one hotly contested factual viewpoint was adopted instead of another. The numerous cases cited by the parties are not discussed.

We are not saying that it is error for the hearing examiner to adopt any or all of the proposed findings submitted by either party. Proposed findings are submitted for the very purpose of being adopted. Our view

is that Rule 3.21 of the Rules of Practice requires the hearing examiner to give his own independently conceived reason or basis for each conclusion made upon all material issues of fact, law or discretion presented on the record. An initial decision which does less is of little use to the Commission, for there is no indication that the primary job of the hearing examiner, that of making an initial judgment as to the facts and law, has been accomplished. In a recent case, the Supreme Court commented on a somewhat similar situation:

> * * * He [the district judge] told counsel for respondents "Prepare the findings and conclusions and judgment." They obeyed, submitting 130 findings of fact and one conclusion of law, all of which, we are advised, the District Court adopted verbatim. Those findings, though not the product of the workings of the district judge's mind, are formally his, they are not to be rejected out-of-hand, and they will stand if supported by evidence. *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 184–185. Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court. See 2B Barron and Holtzoff, Federal Practice and Procedure (Wright ed. 1961), § 1124. Moreover, these detailed findings were "mechanically adopted," to use the phrase of the late Judge Frank in *United States* v. *Forness*, 125 F. 2d 928, 942, and do not reveal the discerning line for decision on the basic issue in the case. * * * *United States* v. *El Paso Natural Gas Company*, 376 U.S. 651, April 6, 1964.

The Court cited with approval the statement of Judge J. Skelly Wright of the Court of Appeals for the District of Columbia, found in *Seminars For Newly Appointed United States District Judges* (1963), p .166, as follows:

> Who shall prepare the findings? Rule 52 says the court shall prepare the findings. "The court shall find the facts specially and state separately its conclusions of law." We all know what has happened. Many courts simply decide the case in favor of the plaintiff or the defendant, have him prepare the findings of fact and conclusions of law and sign them. This has been denounced by every court of appeals save one. This is an abandonment of the duty and the trust that has been placed in the judge by these rules. It is a noncompliance with Rule 52 specifically and it betrays the primary purpose of Rule 52—the primary purpose being that the preparation of these findings by the judge shall assist in the adjudication of the lawsuit.
>
> I suggest to you strongly that you avoid as far as you possibly can simply signing what some lawyer puts under your nose. These lawyers, and properly so, in their zeal and advocacy and their enthusiasm are going to state the case for their side in these findings as strongly as they possibly can. When these findings get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the Judge decided the case.

Since the initial decision is of no help to the Commission in resolving the many issues of this proceeding, it will be set aside and the Commission will, in this opinion, make its own findings and conclusions as to the facts.

The Respondents

This is, in essence, a proceeding against the Lapeyre family, for its members own, operate and completely control the corporations and partnerships involved. While separate business organizations are maintained, there is doubtless a community of interest which supersedes the business organization forms utilized. Where separate corporate forms are utilized, the family members become the common directors and officers. Where a partnership form is utilized, the general or operating partners also hold positions in one or more of the family corporations as officers or directors.

Grand Caillou Packing Company, Inc., is the wellspring of the Lapeyre family's various business endeavors. It was organized in March 1924, and has been primarily engaged ever since in the canning and sale of shrimp. Until about 1950 it also canned and sold oysters, but this has now been discontinued, although on occasion it still purchases and resells oysters canned by other canneries. Grand Caillou also sells canned shrimp, which it purchases from other canners. Sales are made directly to chain stores and indirectly to other customers through brokers. The canned shrimp is labeled with either the customer's brand or Grand Caillou's brand, Lou-z-ana. About 15 to 17 percent of Grand Caillou's sales of canned shrimp are made for export to foreign countries.

Grand Caillou purchases canned shrimp for resale from Shell-Tex fisheries of Brownsville, Texas, a limited partnership. Twenty-nine and sixty-six one hundredths percent of this partnership is owned by Southernmost Corporation, a private corporation organized under the laws of Texas. Respondent Emile M. Lapeyre is the president of Southernmost Corporation and all of its stock is owned by Grand Caillou. Louis F. Lapeyre is the plant manager of Shell-Tex.

In 1960 Grand Caillou sold 70,804 standard cases[1] of shrimp out of a total U.S. pack of 952,223 standard cases. Thus, Grand Caillou accounted for 7.4 percent of the total U.S. pack. During the nine-year period from 1952 through 1960 it sold 5.7 percent of the total U.S. pack. Respondents' exact ranking among shrimp canners was not exactly determined but certainly it is among the largest. Peeling machinery rentals paid to The Peelers Company give some indication of ranking, since all domestic canners save one utilize respondents' peeling equipment. In 1960 Grand Caillou ranked eighth in rentals paid to The Peelers Company.

The relationship or connection of five of the individually named respondents to Grand Caillou is as follows: Emile M. Lapeyre is the

[1] A standard case is an arbitrary statistical unit composed of forty-eight cans of 5-ounce weight.

president and a director. His son Emile, Jr., is vice president and a director. Another son, James, is a director. A brother, Fernand, is a director and another brother, Felix, is general counsel. With the exception of a negligible amount owned by two Houma, Louisiana, families, all of the common and preferred stock in Grand Caillou is owned by the Lapeyre family.

The Individual Respondents

When this suit was brought each of the individual respondents was a general partner of The Peelers Company, a partnership in commendam. Complaint counsel informed the Commission at oral argument, without contradiction from respondents' counsel, that individual respondent Andre Lapeyre died in November 1963. The complaint, therefore, will be dismissed as to him. Complaint counsel also advised that since about November 1963 the business of the former partnership, The Peelers Company, has been conducted in corporate form under the names "Lathrum Corporation" and "Lathrum International, Inc." According to counsel, the former partners in The Peelers Company have subscribed to stock in the corporations in the proportional amounts of the interest they previously held in the partnership. The Peelers Company has been liquidated and the individually named respondents are now the officers and directors of the new corporations.

The Dun & Bradstreet reference book for March 1964 lists The Laitram Corporation at 619 South Peters Street, New Orleans, Louisiana, the address of The Peelers Company. Presumably, therefore, the spelling contained in the transcript of the oral argument, *i.e.*, Lathrum, is incorrect.

While the information concerning the change in the business form utilized by the individual respondents to market their shrimp peeling machinery should have been more formally presented to the Commission, the change appears to be a fact. And, in view of the silence of respondents' counsel on the point, we assume that the ownership and control of the new corporations are substantially the same as that of The Peelers Company. Even if this were not true, however, the liability of the successor corporations and their officers to comply with the terms of any order which may issue as a result of this proceeding is clear, for the succession transpired in the midstream of the litigation. See *Regal Knitwear Co.* v. *National Labor Relations Board*, 324 U.S. 9 (1945); *Walling* v. *James V. Reuter, Inc.*, 321 U.S. 671 (1944); *Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100 (1942).

All of the individual respondents are named in their individual capacity, in their capacity as partners in the Peelers enterprise and as

representatives of a class consisting of all of the unnamed partners in The Peelers Company. Under Louisiana law a partnership in commendam is composed of two types of partners: general partners responsible for the direction, control and formulation of policies of the partnership, and partners in commendam, who are prohibited from participating in direction and control and who are not personally liable for the obligations of the partnership.

The respondents contend that under Louisiana law a partnership is a separate entity apart from the partners which must be named and served in a proceeding brought against it. Since the complaint does not name Peelers as a party, they argue, it is not before the Commission. If in fact the partnership entity is an indispensable party, the partners could not be held in their capacity as partners and possibly not at all. By naming the general partners as representative of a class consisting of all partners, The Peelers Company has effectively been brought within the ambit of this proceeding. Respondents' over-technical argument has no force in an administrative proceeding of this type. Respondents before this Commission are entitled to their "day in court", that is, they must be properly informed of the Commission's intentions with respect to them so that they may appear or be represented during the proceedings. The complaint in this proceeding is completely adequate in this respect and respondents' plea is denied.

Both the partnership The Peelers Company (hereinafter sometimes referred to as Peelers) and its predecessor, Peelers, Inc., have been engaged in the development and distribution of shrimp processing machinery, including shrimp peeling machines, shrimp cleaning machines, shrimp grading machines, shrimp deveining machines and shrimp separating machines. With the exception of some raw shrimp grading machines which are sold outright for use on board shrimp fishing vessels, respondents' machinery is leased to shrimp processors located in the continental United States.

Since June of 1958 the respondents have sold shrimp processing machinery to purchasers located in several foreign countries.

All of the respondents admit that their operations are conducted in commerce, as "commerce" is defined in the Federal Trade Commission Act.

The Scope of the Complaint

Throughout this proceeding there has been a continuous dispute as to the scope of the complaint. The respondents contend that a great deal of the evidence introduced by complaint counsel and admitted by the hearing examiner is irrelevant and immaterial to the specific allegations of unlawful activity made in the complaint. In his initial decision the hearing examiner agreed with respondents and refused

to make findings upon some sixteen so-called "factual" issues, holding they were "* * * unpleaded and unheard issues, and that the findings in this proceeding should be restricted to the issues posed by the complaint". (Initial decision, p. 91.) Complaint counsel, on appeal, argue that the rejected issues are well within the four corners of the complaint and, alternatively, that whether specifically pleaded or not, the rejected issues were heard and respondents were afforded adequate opportunity to present evidence in rebuttal. To a certain extent, this dispute is over the theory of the case, and it must, therefore, be resolved at the outset.

Before engaging the issue, it is appropriate to describe the procedures under which this complaint was issued and the evidence received. As is well known, the Commission itself originates and issues complaints and it has not delegated this authority to its staff. Thus, the Commission itself made the original determination that it was possessed of sufficient evidence to form reason to believe that the law had been violated. Neither complaint counsel nor the hearing examiner have the authority to amend a Commission complaint in such a manner that new charges or new matter not in keeping with the original theory of the complaint are appended thereto. *E.g.*, *Standard Camera Corporation*, 63 F.T.C. 1238, November 7, 1963. Recognizing that some new evidence will usually be discovered during the course of a hearing and that a petition to the Commission to amend the complaint will almost invariably disrupt and delay a proceeding, we have generally drafted our complaints in terms sufficiently broad to encompass matter reasonably related to the violation thought to exist.

Under the Commission procedure in force when this complaint issued on May 13, 1960, hearings to receive evidence were held at spaced intervals, with the time between hearings fixed by agreement of counsel and the hearing examiner. Following this practice, complaint counsel introduced evidence in support of the complaint at hearings which commenced December 7, 1960, and which were held in New Orleans, Louisiana, Seattle, Washington, and Washington, D.C., on various hearing days during December 1960 and January, February, March, July and August 1961. Respondents commenced their defense in New Orleans on November 7, 1961. Further defense hearings were held in New Orleans in January 1962 and in Washington, D.C., in March 1962. On June 4, 1962, complaint counsel filed a motion for permission to adduce newly available evidence. This motion was granted by the hearing examiner and further hearings were held in July 1962 in San Francisco, California. Complaint counsel rested their case on July 19, 1962. Respondents presented additional evidence at a hearing in Washington, D.C., on October 8, 1962, and thereafter rested their case.

At oral argument before the Commission, respondents' counsel stated that during the hearing before the hearing examiner he objected to the admission of evidence which he considered did not pertain to the allegations of the complaint and upon being overruled, then unsuccessfully moved to strike such evidence. He further stated that he was afforded the opportunity to offer evidence in rebuttal to complaint counsel's evidence, which he felt had been admitted erroneously, but that he did not choose to do so. Both sides filed proposed findings with the hearing examiner, dealing with the evidence respondents contend is irrelevant, although in doing so respondents labeled their findings "conditional" to bar the filing thereof being considered as a waiver of their objections as to relevancy and materiality.

Turning to the complaint itself, Paragraphs One through Three describe the respondents and the capacity in which they are named. Paragraph Four contains a brief description of the business activity of Grand Caillou and alleges that its activities are conducted in commerce. Paragraph Five describes the activities allegedly engaged in by the individual respondents through The Peelers Company, particularly charging that in addition to leases or sales in the various states of the United States, it "sells its shrimp processing machinery to customers located outside of the continental limits of the United States." Paragraph Six points out that Grand Caillou competes with other shrimp canners and Paragraph Seven charges that The Peelers Company competes with other manufacturers and distributors of shrimp processing machinery.

With two important exceptions, respondents' answers substantially admit the allegations of fact made in Paragraphs One through Seven of the complaint. One of the exceptions deals with the sufficiency of the complaint as to holding The Peelers Company, a partnership in commendam, as a respondent. The other exception is their denial of the allegation in complaint Paragraph Seven that The Peelers Company is in competition with other manufacturers and distributors of shrimp processing machinery. In this respect respondents pleaded "* * * they have no knowledge of any competition with The Peelers Company which presently exists or has existed from any person or persons in or connected with shrimp processing machinery used in the production of canned shrimp except by one infringer, the Deepsouth Packing Company of New Orleans, Louisiana, and those in privity with that infringer."

Paragraph Eight of the complaint describes in some detail the history of respondents' development of their shrimp processing machinery and their successful efforts to exploit it. The paragraph alleges specifically: "Due to the efficiency of operation of respondents' shrimp

processing machinery, domestic shrimp processors, including respondent Grand Caillou, must utilize these machines in their plants in order to compete in the processed shrimp market." In answer to this allegation, respondents pleaded: "Respondents further admit, on information and belief, that all of those companies in the United States making the product known in the trade as canned shrimp probably use the patented shrimp peelers which are leased by The Peelers Company or shrimp peeling machines made by infringers of patents owned by The Peelers Company."

The lead-in or "preamble" subparagraph of Paragraph Nine reads as follows:

> From 1947 to the present the individual respondents, in the course and conduct of the business of The Peelers Company and its predecessor corporation, Peelers, Inc., as aforesaid, have engaged in unfair methods of competition and unfair acts and practices in interstate and foreign commerce, and, as a part thereof, have done and performed the following acts, among others:

Thereafter follow five subparagraphs lettered (a) through (e), which describe five courses of conduct allegedly pursued by the individual respondents. The conduct which these subparagraphs allege to be unlawful can be summarized as follows:

(a) Entering agreements with inventors whereby respondents secured exclusive licenses to control and exploit shrimp processing machinery patented by such inventors. It is additionally charged that in most instances respondents have not attempted to develop the rights secured.

(b) Entering agreements with certain inventors whereby they were required to disclose all future inventions on shrimp processing machinery to respondents and to assign or license such inventions to respondents.

(c) Harassing, intimidating, threatening to sue, and suing any person who purchased, leased, or manufactured a competing shrimp peeling machine patented by one Paul C. Skrmetta.

(d) Requiring that lessees of respondents' shrimp peeling and processing machines purchase nonnegotiable debentures issued by respondents.

(e) Discriminating between lessees of shrimp processing machinery by charging shrimp canners located in the states of Oregon, Washington and Alaska substantially higher rental rates than those afforded to lessees in other states, including the state of Louisiana.

It should be noted that Paragraph Nine is directed to the individual respondents and does not charge Grand Caillou, the corporate respondent. However, included among the individual respondents is Emile M. Lapeyre, the president of Grand Caillou. Grand Caillou's opera-

tions are brought into the complaint in Paragraph Ten, wherein it is alleged that it, together with the individual respondents, agreed and combined to engage in the unfair methods of competition described in Paragraph Nine.

In Paragraph Eleven the effects and results of the questioned conduct are alleged. These may be summarized as follows:

(a) The Peelers Company has obtained a "virtual monopoly" in shrimp processing machinery.

(b) Competitors and potential competitors of The Peelers Company have been hindered or prevented from engaging in the business of making and distributing shrimp processing machinery in the United States and in foreign countries.

(c) Domestic shrimp processors are deprived of the benefit of fair competition in the leasing, sale or distribution of shrimp processing machinery.

(d) Inventors and potential inventors of shrimp processing machinery are deterred from developing, producing and selling such machinery.

(e) Those competing with Grand Caillou in the processing and sale of shrimp products have been or may be injured and competition prevented or destroyed.

(f) Competition in the processing and sale of shrimp products has been or may be lessened and a tendency toward monopoly has occurred.

With certain exceptions as to details, the respondents' answers deny the allegations made in Paragraphs Nine, Ten and Eleven. The exceptions include an admission that the respondents entered certain agreements with inventors, that they have and will continue to assert their patent rights by filing patent infringement suits against persons they deem responsible for infringement of any of their rights, and that it has been their policy to require the purchase of debentures as a condition precedent to the execution of a lease for shrimp processing machinery.

Turning now to the sixteen so-called "untried and unheard issues" which respondents' counsel persuaded the hearing examiner were not within the scope of the complaint, we find them a curious amalgamation of statements of fact and factual and legal conclusions. The sixteen so-called "issues" as framed by respondents' counsel and copied in the initial decision are as follows:

(1) have attempted to monopolize the automatic high-capacity, bulk-fed shrimp processing machinery field in the United States;

(2) have acquired patent or patent rights on virtually every competitive or potentially competitive device which came to their attention;

(3) have taken care to keep abreast of all developments in the field, viz. have engaged in "industrial surveillance" and have been quick to apply for patents on any principle they believe may be useful;

(4) have contacted or been contacted by inventors in the shrimp processing machinery field with whom they communicate;

(5) have paid and proposed awards to lessees for new ideas and discoveries;

(6) have suppressed machines capable of peeling shrimp on which they hold patents (apart from the Samanie peeler or cleaner);

(7) have offered for sale or sold shrimp processing machinery in certain foreign countries while leasing the same machinery in the United States;

(8) have charged exorbitant rates for their leased shrimp peeling machinery;

(9) have increased some machine rental rates by one-third effective June, 1960;

(10) have fixed minimum annual rentals for peeling machines and deveining machines;

(11) have fixed the terms of the machine leases at three years;

(12) have used machine rental charges which are not based upon the amount of shrimp meat remaining after the processing operation has been completed;

(13) have used machine leases containing provisions restricting the use of cleaners and separators to shrimp which had been peeled by a Peelers' peeling machine;

(14) have used machine leases prohibiting the repair or alteration or the placing of attachments on any machine;

(15) have used deveiner leases requiring the lessees to replace blades in the cutting chute with blades purchased from lessor at cost plus 10%;

(16) have used machine leases providing for the right of entry of representatives of Peelers into a lessee's plant for the purpose of inspecting and testing the performance of any leased machine.

The initial decision contains no clue as to the hearing examiner's reasoning in arriving at his conclusion that these points were "unpleaded and unheard", for in dealing with them he quoted from the pleadings of the respondents. Further, there appears to be a rather peculiar inconsistency in his handling of this conflict, for he, perhaps unwittingly, did make findings on quite a few of the so-called "unheard" issues. For example, at page 78 of his initial decision he found that respondents increased machine rentals by one-third in June 1960, as described in "issue" number 9. At page 73 he sets out the minimum annual rentals for machines and deveining machines, as described in "issue" number 10. At page 72 he finds the leases are set for a term of three years, as described in "issue" number 11. "Issue" number 12 is decided and described at page 75 of the initial decision. Contrary to the factual allegations of "issues" 14 and 15, the hearing examiner finds, at page 72 of the initial decision, that lessees are not precluded from making their own repairs, buying their own replacement parts or servicing their machines. Thus it appears that at least some of these "issues" were both pleaded and heard and apparently findings thereon were necessary to the decision.

To afford further extended seriatim treatment to the remainder of the sixteen purported "unpleaded and unheard" issues would place too much importance upon this peripheral problem. As we see it, only two of the remaining issues merit consideration. The first of these is number (1), wherein it is stated or alleged that respondents have attempted to monopolize the automatic, high-capacity, bulk-fed shrimp processing machinery field in the United States. To hold, as did the hearing examiner, that this charge is not within the purview of the complaint is such obvious error that only a brief discussion is required to point out its shortcomings. This complaint deals with two broad classifications of alleged unlawful conduct: (1) acts taken to gain, perpetuate or extend a monopoly position in the shrimp processing machinery field and (2) acts constituting abuse or misuse of patent monopoly power. Subparagraphs (a) through (d) of Paragraph Nine are alleged as specific examples of the acts which the respondents are alleged to have pursued, "among others", in order to gain and extend their monopoly position. In Paragraph Eleven it is charged that the effect of the respondents' activities has been to grant them a "virtual monopoly" in the shrimp processing machinery market. In subparagraph (f) of Paragraph Eleven it is alleged that competition has been lessened and an actual tendency toward monopoly has occurred. It is an inescapable conclusion then that this complaint cannot be read other than as charging respondents with having pursued certain specific acts for the purpose and with the result of obtaining a monopoly. Moreover, as we pointed out above, respondents' answers aver they are unaware of the existence of any competition in "shrimp processing machinery used in the production of canned shrimp. . . ."

The remaining "issue" of importance on the hearing examiner's exclusion list is number 7, which reads as follows:

> (7) have offered for sale or sold shrimp processing machinery in certain foreign countries while leasing the same machinery in the United States;

It is complaint counsel's position that this issue was both pleaded and heard. In support of their contention that the pleading encompasses this charge, they point to complaint Paragraphs Five and Eleven (c). The language referred to in Paragraph Five of the complaint charges:

> In the course and conduct of its business, The Peelers Company causes its shrimp processing machinery to be shipped or otherwise transported to its lessee customers and other customers located in states other than the state or states in which such shipments originate and, in some instances, The Peelers Company sells its shrimp processing machinery to customers located outside the continental limits of the United States. * * *

Subparagraph (c) of Paragraph Eleven of the complaint reads:

> Domestic shrimp processors have been, or may be, deprived of the benefits of fair competition in the leasing, licensing, sale and distribution of shrimp processing machinery.

The record reveals that complaint counsel informed respondents at an early stage that they felt that unfair discrimination between foreign and domestic canners was charged in the complaint. In their August 3, 1961, answer to respondents' motion to dismiss, complaint counsel argues "* * * that each and every charge set forth in the complaint in this matter has been proven without a shadow of a doubt." Among such charges allegedly proven was: "The practice of selling shrimp processing machinery in foreign lands while leasing this machinery at exorbitant rates in this country * * *." Respondents' position, then as now, was that such a charge is not encompassed within the complaint. However, their brief in support of a motion to dismiss filed on behalf of the individual respondents, filed August 28, 1961, contains a rebuttal discussion of the charge and concludes that "* * * Commission counsel have failed to show prima facie that the practice of The Peelers Company in selling machines in foreign countries while leasing them in the United States constitutes an unfair method of competition * * *."

From the foregoing it is apparent that the issue was raised before respondents began their defense. However, the respondents did not direct any rebuttal evidence specifically toward this issue, although that part of their evidence which tended to show that the difficulties of the shrimp canners in the northwestern United States were due to factors other than the activities of The Peelers Company does, of course, have a direct bearing on the issue.

The hearing examiner's rulings in this controversy are enigmatic, to say the least. Throughout the hearings he denied every motion and objection by the respondents as to the relevancy and materiality of evidence adduced for the purpose of proving the charge. As a matter of fact, he convened an entirely separate set of hearings in San Francisco, California, for the sole purpose of adducing evidence on this point. This came about in the following manner:

On June 4, 1962, after the close of respondents' defense, complaint counsel filed a motion for permission to adduce newly available evidence "* * * directed towards showing substantial or proposed increases in the imports of canned shrimp, particularly from Japan and India." The motion points out that this material is relevant to Paragraph Eleven (c) of the complaint. The motion further described the evidence to be adduced as tending to show "* * * the effect or potential

effect which imported canned shrimp may have upon the capacity of domestic shrimp canners to compete with foreign canners; the inability of domestic shrimp canners to maintain and/or improve their position in the export market for canned shrimp; and the current status of sales of shrimp processing machinery to foreign purchasers by the respondents doing business as The Peelers Company." The respondents opposed the motion on the grounds that the evidence to be adduced was not relevant or material to any allegation of the complaint. However, the hearing examiner granted the motion and hearings were removed from Washington, D.C., to San Francisco, California, where they commenced on July 16, 1962.

At the outset of the hearings in California, the hearing examiner made a perplexing statement for the record. He advised the parties that although he had scheduled the hearings he had not, as of that time, passed upon complaint counsel's motion for leave to adduce newly available evidence, as set forth in their motion. He then ruled that he would allow the motion to adduce the newly discovered evidence but in doing so was not "* * * inferring that the evidence may be material or relevant to any of the issues in this case, * * *" We have characterized this ruling as perplexing, for both the Administrative Procedure Act (§ 7(c)) and the Commission's Rules of Practice (§ 3.14 (b)) require the hearing examiner to exclude irrelevant and immaterial evidence. Moreover, it is difficult to understand why an adjudicative hearing would be removed three thousand miles from Washington, D.C., to San Francisco, California, for the entire purpose of hearing and receiving evidence not determined to be relevant or material to any of the issues in the proceeding.

The California hearings continued for four days and the transcript thereof runs to almost 500 pages. During the hearings, Commission Exhibits numbered 1276 through 1355 were received. Most of the evidence, testamentary and documentary, dealt with and bore solely upon the questioned issue. It was received over respondents' objections as to materiality and relevancy and at the conclusion of the hearings, respondents' motion to strike, based on the same grounds, was denied.

At the conclusion of the San Francisco hearings, respondents were offered the opportunity to adduce evidence in rebuttal. A hearing for this purpose was called October 8, 1962, in Washington, D.C. Respondents called no witnesses but did introduce exhibits numbered 2246 through 2295. However, respondents pointed out that their introduction of evidence did not constitute an abandonment of their contention that the issue as to sales of the peeling equipment to foreigners was not not properly within the proceeding. Thereafter both parties submitted

proposed findings to the hearing examiner on the issue and fully briefed and argued the point.

The most important question to be answered is: Were the respondents afforded due process with respect to the question issued, *i.e.*, did they have their day in court? The threshold consideration leading to a solution of this question is whether the respondents were fully apprised of the nature of the charge made against them and consequently not prejudiced in submitting a defense thereto.

Before attempting to answer these questions in the light of pertinent legal authorities and precedents, it is appropriate that we set out our preliminary conclusions as to the facts of this controversy. In the first place, it is apparent that the four corners of the complaint do not contain a specific charge of discrimination by selling to some competitors while leasing to others. On the other hand, it is equally apparent that the complaint is sufficiently broad to encompass such activity within its periphery.

As we stated above, the complaint alleges two broad species of unlawful activity—acts performed to gain, maintain and extend a patent-based monopoly and acts constituting an abuse of patent monopoly power. The distinction is real, for activities of the first type would primarily affect manufacturers or potential manufacturers of shrimp processing machinery, while acts of the latter type would here directly affect only shrimp canners. The specifically described complaint charge in the "abuse of patent" category is found in Paragraph Nine (e), wherein it is alleged that respondents charged discriminatory higher shrimp processing machinery rentals to shrimp canners in Washington, Oregon and Alaska. The alleged effect of the charged discrimination, according to Paragraph Eleven (f), is to lessen competition in the processing and sale of shrimp products.

The disputed "issue" Seven is likewise a charge of patent abuse by discrimination with resulting ill effects to shrimp processors. As such it is closely related to the charge contained in complaint Paragraph Nine (e). It falls properly within the ambit of that paragraph as one of the non-specified acts envisioned by the preamble subparagraph. As we pointed out above, the acts specifically described in Paragraph Nine are alleged to have been performed "as a part" "among others" of the unfair acts engaged in by respondents.

Prior to the commencement of respondents' defense, they were apprised, in writing, that complaint counsel interpreted the complaint as including the allegation. The hearing examiner admitted evidence relevant and material to the charge and removed the locus of a hearing three thousand miles to receive evidence with respect to it. Respondents

have conducted cross-examination and introduced documentary evidence in rebuttal to the charge. Both parties submitted proposed findings to the hearing examiner on the issue. Therefore, without question, the issue has been thoroughly heard.

From the foregoing it appears, and we conclude, that the respondents have not been prejudiced by the complaint's lack of specificity with respect to this allegation, since they were afforded ample opportunity to submit evidence in rebuttal thereto. In somewhat similar circumstances, Circuit Judge Aldrich, writing for a unanimous court, opined:

> * * * More important, respondents have not been able to suggest to us how, in the light of the evidence which they introduced after a suitable interval to prepare against the Commission's showing, they have been prejudiced. Rather, we think they are simply trying to restrict the issue to one they might be able to meet, instead of one they plainly cannot * * *. *Colgate-Palmolive Co.* v. *Federal Trade Commission*, 310 F. 2d 89, 92 (1st Cir. 1962).

It must be remembered that "* * * Pleadings before the Commission are not required to meet the standards of pleadings in a court where issues are attempted to be framed with a measure of exactness which is designed to limit the broad sweep of investigation that characterizes the proceedings of administrative bodies [citations omitted] * * *." *A. E. Staley Mfg. Co.* v. *Federal Trade Commission*, 135 F. 2d 453, 454 (7th Cir. 1943). Respondents argue that the complaint should have been amended during the course of the proceeding and its charges supplemented by the addition of a specific allegation concerning sales to foreign shrimp processors. Assuming, *Arguendo*, that such tidying up might have been desirable, we fail to see how its omission prejudiced respondents. They were informed time and again of complaint counsel's interpretation of the complaint. They were afforded ample time to secure and offer defensive evidence on the point. An amendment effecting complaint counsel's interpretation could only have formalized the procedure actually being followed, *i.e.*, the trial of the questioned issue.

The leading case on this point in which the Federal Trade Commission was involved is *Armand Co., Inc.* v. *Federal Trade Commission*, 84 F. 2d 973 (2d Cir. 1936). In that proceeding a circuit court panel consisting of Judges Swann, Learned Hand, and Augustus Hand were moved to vacate a decree of the circuit court affirming an order to cease and desist directed against respondent on the ground that the order was not responsive to the facts found. The complaint in the proceeding had charged that respondent Armand Co. conspired with various wholesalers and dealers to restrain competition by, among other things, fixing the resale price of respondent's products. The Commission made no finding that a conspiracy had existed, dismissed

the case as to the named wholesalers and retailers, but entered an order against Armand. The court denied the motion, holding that in order for the respondent to prevail it must show that "* * * the order * * * abandoned the very frame and outline of the original charge * * *." The court opined that in reaching a decision on questions of this type "* * * much depends upon what takes place before judgment; if, for instance, the defendant merely files an answer and defaults thereafter, a closer registry between pleading and judgment is exacted than after a contested trial, where it may reasonably be assumed that the disposition corresponded to the actual controversy as the parties understood it, even though no formal amendment of the pleadings appears in the roll. Not only must this be true, but, even when the case has not been contested, the question is always one of degree, else any judgment may be upset for trifling variances. At least in a contested case there must be an entire abandonment of the very substance of the dispute to which the defendant was summoned, and the substitution of another which he could not have anticipated, and which he had no opportunity to meet. [Citations omitted.] * * *" (84 F. 2d at 974–975.)

It is our conclusion that *Armand* disposes of the contentions of respondents with respect to the issue of discrimination by selling shrimp processing machinery to foreign shrimp canners in competition with respondents' domestic lessees. Certainly respondents were advised of the charges to be met and by no stretch of the imagination can the raising of this issue be considered an abandonment of the very substance of the dispute to which respondents were summoned or the substitution of a charge which they could not have anticipated.

The hearing examiner's refusal to find and rule upon the issue was erroneous. The issue is properly within the proceeding.

The appeals of the parties from the hearing examiner's rulings and the principal issues involved in this proceeding will be considered hereinafter in the following order: (1) the discrimination between domestic canners, (2) the discrimination between foreign and domestic canners, (3) the monopolization charge, and (4) the conspiracy charge.

THE DISCRIMINATION BETWEEN DOMESTIC CANNERS

The Raw Material, Gulf Area:

The raw material with which this case is concerned is shrimp, a delectable marine crustacean found in all of our coastal waters. Until 1956 the only commercial exploitation of this raw material occurred in the South Atlantic and Gulf of Mexico coast areas. The warm water

shrimp caught in these areas are almost all the penaeid type. The penaeid catch is made up of three principal species, white shrimp, brown shrimp, and pink shrimp or hoppers. A numerically less-important species commonly referred to as sea-bob makes up the remainder of the catch.

The white, brown and pink penaeid shrimp range in size from counts of 100 or more to the pound of raw heads-on shrimp to counts of less than fifteen to the pound. The sea-bob variety does not grow as large and generally runs in the 100 to the pound classification. Since only the tail of the shrimp is utilized for human consumption, the percentage of tail weight to the total weight is of importance. In the penaeid variety the tail makes up approximately 60 percent of the total weight of the animal. Penaeid shrimp spawn in outside waters, that is, waters well off the coast, with the resultant larvae working their way into inshore waters where they begin to mature. As they grow larger the young work their way to outside waters.

Penaeid shrimp are captured by boats dragging trawl nets. The outside waters are fished by large boats averaging forty to sixty-five feet in length, with an occasional boat as large as one hunderd feet. Such boats fishing the outside waters ordinarily stay out from approximately five to twelve days. Outside boats dehead (headless) their shrimp and sell them in "box" units consisting of 100 pounds of headless shrimp. In a week's fishing an outside boat will average a catch of four to seven thousand pounds of heads-on shrimp.

The smaller inside boats do not headless their shrimp and sell them in "barrel" units consisting of 210 pounds of raw, heads-on shrimp. A good catch for an inside boat may reach two to four barrels a day, that is, 420 to 840 pounds. These boats are generally no bigger than thirty or thirty-five feet in length and remain at sea for no more than two or three days. Fishing in inside waters in the Gulf of Mexico and South Atlantic areas is regulated by the various states. There are certain closed seasons and other limitations which the fishermen are required to observe. Fishing in outside waters is unregulated.

Fishermen sell their shrimp to processors, both directly and through dealers who operate receiving docks. Many factors affect the price of shrimp, with the most important being the quantity available, the competition among processors, and the extent to which processors have carried over inventories of processed shrimp. Prior to World War II competition for shrimp was almost exclusively between canners. During World War II the freezing segment of the shrimp processing industry experienced a very rapid growth and after the war it emerged as a very sizeable and major factor.

The advent of the freezing processes produced a change in the pricing procedure for raw shrimp. Prior to World War II the price a fisherman received for a barrel of shrimp did not take into account the average size of the shrimp. The increased competition for shrimp between freezers and canners, especially for shrimp in the larger sizes, led to a change in pricing practices, with the cost of the raw shrimp increasing with the size. There is little detailed information in the record dealing with the exact prices paid by canners for raw shrimp during the relevant period. The record does show the per barrel costs of Robinson Canning Co., Inc., one of the larger Gulf canners, for the smaller-sized shrimp during the period from June 1954 through August 1957. The following chart illustrates its experience:

TABULATION A.—*Raw Shrimp Costs of Robinson Canning Co., Inc.*

[Price Record—Raw Shrimp delivered cannery in dollars and cents per barrel of 210 pounds heads-on shrimp—not including any bonus]

Month and year	Number of shrimp per pound heads-on					
	41–45	46–50	51–60	61–68	Over 68	Over 85
June 1954	$30.00	$30.00	$25.00	$20.00	$20.00	----------
October 1954	20.00	20.00	15.00	15.00	15.00	----------
January 1955	20.00	20.00	20.00	20.00	15.00	----------
April 1955	30.00	25.00	25.00	25.00	20.00	----------
May 1955	30.00	30.00	30.00	30.00	25.00	----------
June 1955	30.00	30.00	30.00	25.00	25.00	----------
August 1955	30.00	30.00	25.00	25.00	20.00	----------
April 1956	35.00	35.00	30.00	30.00	25.00	----------
May 1956	40.00	40.00	40.00	40.00	40.00	----------
June 1956	50.00	50.00	45.00	40.00	40.00	----------
August 1956	50.00	50.00	45.00	40.00	35.00	----------
October 1956	55.00	55.00	50.00	45.00	40.00	----------
May 1957	55.00	55.00	50.00	45.00	45.00	$40.00
August 1957	50.00	50.00	45.00	45.00	40.00	35.00

The experience of this one company is reasonably representative of the prices paid by the other canners in the Gulf Coast area from Florida to Texas. There is no widespread difference in the price of raw shrimp across the Gulf Coast. The explanation for this lies in the fact that the canning activity lies approximately in the geographic center of the fishing area. Shrimp are hauled by motor truck from the various landings to the canneries. Thus, prices tend to be stable in the various areas, for canners can and do reach out into other states to acquire shrimp at attractive prices.

The shrimp fisheries of the Gulf and South Atlantic areas appear to be producing at or near their maximum. There is little likelihood for an increase in this area of the amount of raw material available.

The yield, that is, the amount of useable, saleable shrimp which remains after processing depends upon the nature of the process utilized. In general, the yield of shrimp meat per unit of raw shrimp is higher for the frozen shrimp products than for the canned shrimp products.

When made from penaeid shrimp an uncooked, frozen, peeled shrimp product represents a yield of about 50 percent of the weight of the raw shrimp. A canned product made of penaeid shrimp represents an average yield of about 28 to 37 percent.

The Raw Material, Northwest Area:

The cold-water shrimp found in waters off our Northwest Coast are of the pandalid variety. Pandalid shrimp have a three- or four-year life cycle and, unlike penaeids, do not spawn directly into the water but carry their eggs on their abdomen until hatched. There is some indication that the meat of the pandalid is less firm than the meat of the penaeid shrimp. Pandalid shrimp are much smaller than penaeid, running at average counts of more than ninety to the pound of raw heads-on shrimp. Moreover, pandalid shrimp are 60 percent head and 40 percent tail.

The fishing grounds for pandalid shrimp lie off the coasts of Oregon, Washington and Alaska. The shrimp are found in a mud bottom area no less than fifteen miles from shore and at a depth of from forty to ninety fathoms. The boats used by the fishermen in the Northwest area are quite large, running from sixty to eighty-five feet.

The small size of the pandalid variety is compensated for by their tremendous numbers. Fishing boats normally remain at sea for two or three days and catches may average as much as 20,000 pounds for such a trip. However, the variation in average catch is wide, running from two or three thousand pounds to forty or even seventy thousand pounds.

The combination of rather plentiful supply and limited buyers has produced comparatively low prices. During 1957 and 1958, processors on the Oregon and Washington coast paid between $14.70 and $15.75 per barrel. The price increased to $16.80 in 1959 and in September 1960, rose to $18.90 per barrel. The price paid by Alaskan processors for raw heads-on shrimp fished in Alaska coastal waters is considerably lower, four cents per pound or $8.40 per barrel.

There is no closed season for shrimp fishing in Alaska and boats operate year around, weather permitting. There is a closed season off the Oregon-Washington coast during the period when the shrimp are carrying their eggs. There appear to be definite limitations to the shrimp potential in the fisheries off the coast of Washington and Oregon, but the amount of shrimp available in Alaskan waters appears to be almost unlimited.

Respondents contend that government reports indicate the presence of substantial quantities of larger shrimp in the Alaskan and Washington-Oregon shrimp fishery but the state and federal government

reports found in the record indicate that the average catch in the area will run no less than 100 to the pound. An occasional extremely low count of sixty-eight shrimp to the pound is encountered but, on the other hand, counts of as high as 227 shrimp to the pound are also found. It further appears that there was no consistent difference in the size of shrimp, dependent upon the geographic area or depth fished. Apparently no selective fishing for the larger sizes of shrimp has been attempted, for the fishermen are paid by the pound without regard to size and thus have no economic inducement to seek the larger sizes. However, on the basis of the government surveys there appears to be little likelihood that selective fishing for only the larger sizes would produce a sufficient quantity of shrimp to make the endeavor economically feasible. Thus, the canners and processors of the Pacific Northwest are tied to a raw material which, although comparatively plentiful and cheap, is composed of shrimp which are individually much smaller than the average shrimp landed in the Gulf area.

Because of their anatomical differences, the yield of useable shrimp meat per unit of raw heads-on shrimp is much less for the pandalid shrimp than for the penaeid varieties. The yield obtained by canners from Northwest shrimp varies between 10 and 20 percent of the weight of the raw heads-on shrimp.

The Shrimp Canners:

The shrimp processing industry in the United States is composed of three separate and distinct segments: the fresh and frozen industry, the canning industry and the drying industry. The fresh and frozen section of the industry is by far the largest. In 1959, more than 140,000,000 pounds of shrimp were processed and sold by the fresh and frozen processors and dealers. The dollar value of these products approximated $100,000,000. By comparison, the canned shrimp segment of the industry produced only 922,150 standard cases (fifteen pounds to the case), having a dollar value of less than $15,000,000. The drying industry is the smallest segment, utilizing a little more than three and one-half million pounds in 1959, with a dollar value of slightly over two and one-half million dollars.

The market for frozen shrimp products has rapidly increased since the early 1940's due to several factors, including the definite rise in this country of the use of frozen foods of all kinds, vigorous promotional efforts, and expansion into the large institutional market. The principal shrimp products in the frozen industry are headless frozen shrimp, frozen raw peeled shrimp, frozen raw peeled and deveined shrimp, cooked and peeled products, cooked-peeled and deveined prod-

ucts, breaded products and various specialties. New forms and types of products are being constantly developed.

The market for dehydrated or dried shrimp is apparently diminishing. Most of the driers are located in the state of Louisiana. The process followed by this segment of the industry is to first subject the raw, whole, unpeeled shrimp to blanching, then spreading it on platforms to dry in the sun. After three or five days, the shrimp is divested of head and shell and packaged.

Turning now to the canning segment of the industry, with which this matter is primarily concerned, a most important characteristic of this industry is that its total production has shown neither growth nor diminishment over the years. Apparently the market for canned shrimp is static and has not kept up with population trends. The record indicates that total production of all U.S. canners in units of standard cases (48 five-ounce cans) is now at approximately the same level as during the 1920's. The reasons for this phenomenon are obscure, but the record reveals that until very recently little or no advertising promotion of canned shrimp was engaged in.

Prior to 1956, all shrimp canneries, excepting a single plant in Georgia, were located on the Gulf Coast. Shrimp canning has declined steadily in Georgia and its single plant ceased production in 1961.

The only shrimp processing engaged in in the Northwestern United States before 1956 was the production in Alaska of "cooked-peeled" shrimp. This operation has been in existence for many years, but the processing and end product are quite distinct from the product produced by the canneries on the Gulf Coast. The Alaskan manufactory was unique in that it subjected the shrimp to cooking before they were peeled. The shrimp were then "cold packed", that is, placed into large cans and frozen.

With the discovery in the early 1950's of commercially exploitable quantities of pandalid shrimp off the coasts of Washington and Oregon, several fish canners in that area commenced production of canned shrimp. The first plant was started in 1956 by Edward Kaakinen at Westport, Washington. Alaskan seafood canners very quickly entered the picture and by 1960 there were eleven shrimp canneries operating in the Northwestern United States.

The 1956 advent of shrimp canning in the Pacific Northwest did not result in an increase in over-all U.S. production, and thus it must be assumed that the market penetration by these new canners was accomplished at the expense of the Gulf producers. The following tabulation shows the number and location of shrimp canning plants during the period 1957 through 1961.

TABULATION B.—*Shrimp canneries*

	1957	1958	1959	1960	1961
Georgia	1	1	1	1	0
Texas	0	1	1	2	3
Alabama	2	2	2	1	1
Mississippi	13	13	9	12	11
Louisiana	24	22	19	18	18
Oregon	2	2	2	2	2
Washington	3	5	3	3	2
Alaska	1	5	9	6	7
Total	46	51	46	45	44

As the tabulation shows, the number of shrimp canning plants in the United States has remained fairly constant during the five-year period covered. The emergence of the new plants in the Northwest has been offset by the disappearance of plants in the Gulf area. It cannot be assumed, however, that there is a direct casual connection between the two phenomena.

The tabulation which follows shows the production statistics in units of standard statistical cases for the plants located in the two major producing areas:

TABULATION C.—*Shrimp production in standard cases*

	1957	1958	1959	1960	1961
Gulf:					
Alabama, Georgia, Texas	[1] 35,360	81,126	53,098	65,775	[2] 46,415
Mississippi	182,458	179,202	193,836	232,844	83,454
Louisiana	340,945	547,986	506,072	573,354	350,288
Total Gulf	558,763	808,314	753,006	871,973	480,157
Pacific:					
Washington and Oregon	32,794	94,952	64,817	27,997	26,009
Alaska	16,444	50,613	104,327	51,249	112,773
Total Pacific	49,238	145,565	169,144	79,246	138,782
Total, United States	608,001	953,879	922,150	951,219	618,939

[1] No Texas production in 1957.
[2] No Georgia production in 1961.

The largest part of the United States production of canned shrimp is packaged in four and one-half ounce cans. Twenty-four of these cans make up a case. The next most popular size is the five-ounce can, likewise sold twenty-four cans to the case. A small amount of the production is packaged in three-ounce cans with forty-eight cans to the case.

The shrimp canning industry is the only segment of the shrimp manufactory which has generally recognized size-grades for processed shrimp. The grade is based upon the size of the cooked meat in the can and, in the case of broken shrimp, upon the fact that it is broken,

regardless of its size. The grading system was promulgated and adopted by the Gulf shrimp canners and while not official, is generally recognized by interested government agencies. The proper grade must appear on the label of the can. Prior to 1954, the recognized grades of canned shrimp were as follows:

Grade	*Number of Cooked Meats to the Ounce*
Jumbo (extra large)	Less than 3½
Large	3½ to 5
Medium	6 to 9
Small	More than 9

In 1954, the Gulf shrimp canners added new grades to the top and bottom of the grading schedule. This new system which still prevails provides:

Grade	*Number of Cooked Meats to the Ounce*
Colossal	Less than 2½
Jumbo	Less than 3½
Large	3½ to 5
Medium	6 to 9
Small	10–17
Tiny	More than 17

Shrimp which have lost one or more segments while being processed so that the finished product will not form a shape similar to the letter U must be labeled "broken".

There are two types of canned shrimp—"wet pack" and "dry pack". The dry packing method, in which the shrimp is baked in the can without supplementary liquid, is the older system and it has largely fallen into disuse. The wet pack form, in which salt brine is added to the shrimp-filled can before sealing, is now the common commercial form.

Some canned shrimp, usually in the larger grades, are deveined before packing. This produces a certain amount of weight loss and the grade requirements permit a tolerance of 8 percent to offset this loss. Since almost 100 percent of the production of the Northwest canners is in the small or tiny grades, the shrimp are not deveined. Moreover, it appears that the pandalid shrimp lacks the heavy black tract found in the penaeid species. Deveining of the larger penaeid variety is performed solely to make the product more saleable. As a matter of fact, it appears that certain nutrients are lost in the deveining process.

While we shall consider the prices commanded by canned shrimp in the various United States markets in a subsequent section, it is well to point out at this juncture that the size-grade of the shrimp canned is reflected in the price. The broken shrimp command the lowest price,

followed by Tiny, with the price increasing for each successively larger grade through Colossal.

Since the Northwest canners are limited by their raw material, practically all of their production is in the smallest "Tiny" grade. Northwest packers will, on occasion, secure a sufficient amount of the larger shrimp to make canning runs of the "Small" or "Medium" grades, but such production is intermittent and accounts for only about 5 to 10 percent of the total Northwest output of canned shrimp.

The situation is significantly different with producers on the Gulf Coast. The leading grade with Gulf producers is "Medium", followed quite closely by the "Small" grade. Production of the "Tiny" grade is erratic with Gulf canners. In certain years shrimp of this small size are not available in large quantities. But the supply of this size shrimp apparently fluctuates and in some years is sufficient to support rather heavy production of the "Tiny" grade. The following tabulation illustrates the experience of one of the larger Gulf canners.

Tabulation D

Shrimp size	Fiscal year 1955–1956		Fiscal year 1956–1957	
	Regular	Deveined	Regular	Deveined
	(*Percent*)	(*Percent*)	(*Percent*)	(*Percent*)
Broken	14.36	----------	18.37	----------
Tiny	9.72	----------	4.81	----------
Small	21.19	1.28	24.37	1.32
Medium	26.57	5.20	28.35	4.73
Large	10.47	4.80	8.67	2.20
Jumbo	2.87	3.43	3.22	3.96
Colossal	----------	.11	----------	----------
	100		100	

The Canning Process:

As aforestated, delivery to the cannery on the Gulf Coast is effected by both boats and trucks. For the most part, the West Coast canneries are all located on the water and receive their shrimp by boat.

After unloading, the first operation is to wash and de-ice the shrimp. They are then inspected, and decomposed and diseased shrimp and extraneous matter are removed. The shrimp are weighed and sent to the peeling or picking department. Since it is the peeling operation with which this case is primarily concerned, it is discussed in greater detail below. At this juncture it is only necessary to point out that with the introduction of the respondents' peeling machine all shrimp canners discontinued hand peeling and, with the exception of a single canner in Alaska, all canners were utilizing respondents' machines at the time this matter was tried. In the picking operation the shrimp is divested of its head and hull. A second machine, known as a cleaner, removes

the remaining bits of shell and legs. Wastes are separated from the shrimp meat by a third machine, known as a separator. While it was formerly the practice to discard the waste material, it is now dehydrated and ground and sold as an ingredient for poultry feed or fertilizer.

The next step involves blanching of the shrimp. In this first cooking, the shrimp are placed in a boiling saline solution. The length of the cook varies, depending upon the size and condition of the shrimp. Blanching causes the shrimp to curl, extracts a certain amount of water and solubles, and changes the color from the natural pigmentation to pink. After blanching, the shrimp are graded into the various size grades and cooled. The broken pieces are separated and prepared for packaging as broken shrimp.

The shrimp are then packed into cans by hand, each can being filled to an exact weight. Following packing, a hot saline solution is added and the cans are closed. The closed cans are then processed for approximately twelve minutes at 250° F. and immediately cooled to less than 90° F.

Prior to the advent of the respondents' peeling machine in 1949, the shrimp canning industry depended upon hand labor to perform the peeling or picking operation. In the hand-picking operation the peelers or pickers lined up on both sides of tables which were usually approximately four feet wide and of varying lengths up to thirty or forty feet or more. The pickers used only their hands to remove the head and shell from the useable meat. The peeled shrimp were generally placed in a flume and floated away for further processing. The workers could be compensated either by weighing the shrimp which they had peeled or by weighing the waste removed, that is, the heads and empty shells. The hand-picking procedure had many disadvantages. The hand-picking work force was the largest single group in the cannery. A medium-sized plant would employ as many as 300 hand pickers. The expense of such a large work force was not confined to the wages alone. Higher tax and insurance rates and bookkeeping costs were incurred as a direct result of the employment of this large group. The rather wide range in size of the shrimp received in the Gulf canneries in itself produced a production problem when hand-picking was the practice. It took the pickers approximately the same length of time to peel each individual shrimp no matter what size it was. Since the size of the shrimp to be picked each day could not be accurately foretold, the canneries frequently found themselves with either too great or too small a picking force. If the shrimp were large, too many pickers would be on hand and when the shrimp ran very small, the picking force would frequently be inadequate.

Another difficulty occasioned by the varying size of the shrimp was an inability to accurately predict costs. In order to keep the level of earnings of pickers at a point satisfactory to them and in compliance with the Federal Minimum Wage Law, canners were forced to raise the rate of pay when the pickers were working with small shrimp. Moreover, it was economically unfeasible to even attempt to process shrimp of a very small size, for the peeling costs would have been prohibitive. The smallest size which could be economically handled by hand-picking were shrimp that ran about seventy-five to eighty shrimp per pound raw with heads on.

Another principal drawback of hand-picking was that the longer the pickers worked the slower they became. Thus, the remainder of the cannery could not be run at a constant speed but gradually slowed down with the pickers. Hand-picking of the smaller sizes of shrimp produced more waste than picking the larger sizes. With the small shrimp the pickers tended to pinch off the last segment of the tail.

The Shrimp Peeling Machine:

During the period from 1944 to 1949 the individual respondents James M. Lapeyre and Fernand S. Lapeyre constructed a machine to peel shrimp in sufficient volume for use in a commercial shrimp canning plant. It is apparently a unique combination of previously patented elements. The machine was patented and each subsequent modification or improvement was also patented.

Emile M. Lapeyre, the father of James Lapeyre and president of Grand Caillou, played a leading role in the development of the machine. He urged his brother Fernand to get together with James in the original development work on the machine. As early as 1945 Emile participated in the work on the machine. The first test machine was installed in the Grand Caillou plant in Dulac, Louisiana, in 1948. During this entire development period the work was financed by Grand Caillou.

From the beginning it was agreed that any fruits of the development would be shared equally by Fernand, James and Grand Caillou. But in 1946, the original three shares were reduced to quarters, making an additional one-quarter interest available. Equal parts of this one-quarter interest were transferred to the five sisters and brothers of Emile and Fernand (Olga, Alma, Andre, and Felix Lapeyre and Louise Lapeyre Waldo). Each of the new participants made a financial contribution. In 1949, the group incorporated and formed Peelers, Inc. In November 1951, this corporation was liquidated and its assets were acquired by the partnership in commendam, The Peelers Company.

In 1951, the respondents added another machine, known as a cleaner, to their line. This machine is used as an adjunct to the peeling machine and its function is to complete the peeling operation. In 1953 yet another machine, known as a separator, was offered. This machine separates the useable shrimp meat from the trash residue of the peeling operation.

In 1954, the respondents added a shrimp deveining machine to their line. Unlike the cleaner and separator, the deveiner is not an adjunct of the peeling machine, but performs a completely separate operation of removing the black tract from the shrimp. In 1956, the respondents added a grader of raw peeled shrimp meats to the line. The peeler, cleaner and separator, the deveiner and the peeled meat grader constitute the full line which The Peelers Company offers to shrimp canners. Since 1960 the respondents have offered for sale and sold a shipboard grader of raw shrimp. This is the only machine which respondents sell outright to customers located in the United States.

In May of 1949, respondents called a meeting of all canners located in the Houma, Louisiana, area. At this meeting respondents made the initial offer to build and lease the shrimp peeling machines. The offer was instantly accepted. In May and June, Grand Caillou, Bourg & Voisin Seafood Co., Barre Seafood Company, Aubin Buquett, Louisiana Packing Co., Inc., and Morgan City Canning Company became lessees and upon installation of the machines, began peeling shrimp with them. By the end of 1949, eleven peeling machines had been placed in eight Louisiana shrimp canneries. The growth thereafter was rapid. By the end of 1952, the number of peeling machines leased had grown to thirty-nine, located in twenty Louisiana plants. When the cleaning machine was first offered in 1951, all of the canners who had leased peeling machines elected to take the cleaning machine. Thereafter the cleaner became an integral part of the leased peeling equipment and the peeling machine was not leased separately.

Respondents encountered some difficulty in introducing the machine in Mississippi, since labor unions there took a dim view of this encroaching automation. However, in 1953, the first peeling machine was leased in Mississippi, and by the end of that year, sixty machines had been placed in the three states of Louisiana, Mississippi and Alabama. Plants leasing peeling machines also leased cleaners, usually in the ratio of one cleaning machine for every two peeling machines. When the separator was added to the line in 1953, it was installed in all plants having a peeling machine.

The respondents' peeling machine constituted such a tremendous advance and improvement over the hand peeling procedure that within

a few years after its first offer practically all canners on the Gulf Coast had installed it. Of course, the principal advantage of the machine was the lowering of the picking cost, as compared to the use of hand labor. Since the machine did not become fatigued or slow its production output when smaller-sized shrimps were used, it gave the canner a more constant and accurately predictable cost of peeling. The machine would handle shrimp which, because of their small size, could not be economically peeled by hand labor, that is, shrimp running from 100 to 125 or more to the pound. Moreover, the machine gave a higher percentage of yield from these smaller sizes of shrimp than did the hand pickers.

The dramatically lower picking costs, as a result of installing the Peeler machine, can be illustrated by the experience of one of the major Gulf packers. In June 1953, its cost per barrel for peeling a lot of small and medium shrimp was $6.99. In May of 1954, its cost for machine-picking a lot of mostly small shrimp was only $3.05 a barrel. This canner stated, "Without The Peelers Co. picking machines we could not have afforded economically to stay in the shrimp canning field."

Each peeling machine will process approximately 1,100 pounds of raw heads-on shrimp per hour. The machine can be fed at a faster rate, but this results in a lower percentage yield and a higher rate of broken or torn shrimp. When the capacity of the picking machines is compared to that of hand peelers, it appears that four of the machines can approximately equal the output of 250 to 300 laborers.

The immediate effect of the advent of the respondents' peeling machine was to obsolete hand picking as an economically feasible method of processing in the canning industry. It became absolutely necessary to install and utilize the machines and within less than ten years all of the canners in the Gulf area had done so.

The Alleged Discriminatory Leasing System:

When Peelers first offered its peeling machine in 1949, respondents decided to lease, rather than sell, the machines, for the market for them was so limited that it would not be possible to sustain a continuing business if the machines were sold. As new machines were added to the line, they too were offered on a lease only basis. As aforesaid, the shipboard grader, a machine not sold to canners, is the only item in the Peelers line which is sold outright in the United States.

After a certain amount of experimentation with a device to measure the volume of shrimp peeled by the machine, it was determined that the best basis for the lease rental charge was the extent of machine use as determined by counting its revolutions. Meters were attached to the machines, which registered a one unit increase for each 100 roller cycles of the machine.

To determine the rate to be charged, the respondents employed L. W. Strasburger, an independent shrimp expert, to conduct a comparison between hand peeling and machine peeling. From this study it was determined that a lease fee or rate of 55 cents for each unit increase on the meter would afford the company a reasonable return and the lessees a substantial savings when compared to the cost of hand peeling. When the cleaner was offered as an adjunct to the peeling machine in 1952, the respondents did not increase the leasing charge and thereafter the 55 cents per unit increase charge was ascribed to both the peeling machine and the cleaner. An additional charge of 5 percent of the peeling machine charge is made for the separator.

Under the respondents' billing procedure, the actual cost of producing a pound of peeled shrimp meat will vary, depending upon the rate at which shrimp is fed to the machine. Apparently the machine cannot be speeded up and it operates at a steady rate of 2,430 roller cycles per hour, equalling 24.3 meter units. Thus, it costs $13.37 per hour to operate the machine without regard to the amount of shrimp fed to it. The respondents recommend that shrimp be fed to the machine at a rate of approximately 800 pounds per hour. This recommendation is unaffected by the size of the shrimp being processed. While the practices of the lessees vary, with some adhering to the 800 pounds per hour recommendation, it appears that most canners feed the machine at the rate of at least 1,000 pounds per hour. Some canners, striving desperately for lower costs, have fed the machine at the rate of 1,500 pounds per hour. However, force-feeding the machine at too fast a rate produces a larger percentage of broken and mutilated shrimp, so that a point is reached where it is uneconomical to attempt to further increase the rate of feed.

Since the lease charge is based upon use, with respondents receiving no return from an idle machine, lessees are required to pay a minimum annual rental of $2,500 for each peeling machine. This is not an additional charge, but a minimum requirement which only becomes an actual charge when the rent return based upon the machine's use falls below $2,500. In such cases the lessee is billed for the difference between the rental actually paid and the minimum, $2,500.

In late 1953, James M. Lapeyre made a trip to the Pacific Coast to determine whether that area constituted a market for the Peelers equipment. Thereafter the respondents obtained samples of raw shrimp from Alaska, which were tested on the peeling machine with good results. At about this time it was discovered that commercial quantities of pandalid shrimp existed off the coast of Washington and Oregon.

In 1956, one Edward Kaakinen, a seafood processor, started a shrimp cannery in Westport, Washington. He experimented briefly with hand peeling and then entered negotiations with Peelers for the lease of a peeling machine. The machine was installed but the lease fixed the rental at $1.10 per unit of meter increase, exactly double the charge then being made to canners on the Gulf Coast. According to the record, this double rate was "directed" by the respondent Felix H. Lapeyre, the lawyer partner of The Peelers Co.

The witness's qualifications to "direct" the double rental charge are obscure, since he testified that he had never worked in the shrimp industry and that his knowledge thereof was gathered by hearsay from members of the industry. Nor did the witness have anything to do with fixing the original 55-cent rate. His reason for determining that the rate should be $1.10 was that his brother had told him that the West Coast shrimp were of a small size, having a count per pound of approximately 100, which was approximately twice the count per pound of the shrimp then being peeled by the Gulf canners. Thus, he stated, the higher rate was fixed "* * * in order to adhere to our basic policy of charging a rate which was in proportion to the labor saved."

As of September 30, 1957, respondents had placed their machines in two additional Northwest shrimp canning plants, Harbor Seafoods, Seattle, Washington, and W. F. Smith, Wrangell, Alaska. By September 30, 1959, respondents' peeling machines were operating in twelve Northwest shrimp canneries. During this period all of the Northwest canneries were charged the double peeling rate of $1.10 per unit increase on the meter attached to the machines.

On June 24, 1957, the respondents advised all of their lessees on both the Gulf and Northwest Coasts that effective in all peeling machinery leases, either in issue or renewal, signed thereafter, the rental charge would be increased by one-third effective June 1, 1960. This increase raised the cost of the peeling, cleaning and separating machine combination to a Gulf Coast lessee from 57.75 cents per 100 roller cycles to 77 cents per 100 roller cycles. The cost to a West Coast canner for the same equipment was raised from $1.155 to $1.54 per 100 roller cycles. The lessees on both coasts are billed twice a month for the rentals due for use of the machines.

Prior to the middle of 1959, lease agreements covering the peeling machine provided that at the option of the lessor an alternative method of computing the rental based upon the weight or volume

of shrimp processed could be instituted at any time. While the respondents have never exercised their option to change to a volume measuring meter, had they done so the discrimination between the Gulf and Northwest canners would have been unaffected, for the leases entered with the Northwest canners stipulated a charge per gallon or per pound of shrimp meats discharged from the machine which was exactly double the charge found in the Gulf Coast leases.

On May 18, 1959, about one year prior to the date when the complaint herein issued but well after the commencement of the pre-complaint investigation, respondents announced that they were establishing a schedule of lease rentals which would apply to all lessees wherever located. This rate schedule was incorporated in all leases executed after June 1959 and lessees whose three-year leases still had a substantial amount of time to run were offered the option of accepting new leases containing the new rate schedule but having the same expiration date as their existing leases. The new rate schedule provided for rental charges ranging in nine steps from 55 cents per 100 cycles to $1.10 per 100 cycles, depending upon the average size of the shrimp processed. The schedule follows.

Rate No.	*Shrimp per pound*	*Charge per 100 cycles*
1	Under 48.875	$0. 55
2	48.875–54.625	.61⅞
3	54.625–60.375	.68¾
4	60.375–66.125	.75⅝
5	66.125–71.875	.82½
6	71.875–77.625	.89⅜
7	77.625–83.375	.96¼
8	83.375–89.125	1.03⅛
9	89.125 or over	1.10

The implementation of the above rate schedule had no effect upon the discrimination between Gulf and Northwest canners, for respondents assigned rate number 1, the 55-cent rate, to all Gulf canners and rate number 9, the $1.10 rate, to all Northwest canners.

Actually, the extent of the discrimination between the Gulf and the Northwest canners is not fully revealed by a comparison of the rental rates. The smaller size of the pandalid shrimp and the increased waste due to its larger head combine to produce a much lower yield, with the result that peeling costs per case on the West Coast are considerably higher and would be considerably higher even if the discrimination in peeling machine rentals did not exist. Of course, respondents cannot be blamed for the anatomical differences between pandalid and penaeid

shrimp. However, they are fully aware of such differences and must be charged with knowledge that the imposition of their discriminatory rating system almost quadruples, rather than doubles, the per case peeling costs of the Northwest canners as compared to the costs of the Gulf canners.

At the present rental rates, Gulf Coast lessees pay approximately 77 cents per 100-cycle operating phases of the peeling machine, while West Coast lessees pay $1.54. The peeling machines have a fixed rate of operation of 24.3 100-cycle operating phases per hour. Thus, the per hour rental rate to the Gulf Coast canners is $18.71 and the per hour rate to Northwest canners is $37.42. Assuming a yield of 33 percent on the Gulf Coast and 17.5 percent in the Northwest, peeling machine operation at a feed rate of 1,100 pounds of raw heads-on shrimp per hour would produce, in terms of canned shrimp meat, approximately 363 pounds and 192.5 pounds, respectively. This yield, in terms of cases of twenty-four 4½-ounce cans (6.75 pounds per case), would amount to about 53.8 for the Gulf Coast canners and 28.5 for those in the Northwest, with a per case cost in terms of machine rentals of $0.35 and $1.31, respectively. The costs per standard case would be $0.77 and $2.92, respectively.

In order to lower their peeling costs, canners on both the Gulf and Northwest Coasts tend to exceed the recommended feeding rate of the peeling machine. This, of course, does not affect the discrimination, since the ratio between the Gulf and Northwest costs will remain the same, no matter what the hourly rate of feed. It appears from the record that because of the higher rate assigned to them, Northwest Canners tend to force-feed the machines at a higher rate than Gulf Coast canners. While this tends to narrow the cost gap somewhat, the higher rate produces more broken shrimp, more waste, and shrimp having a fuzzy appearance. Thus a point is quickly reached beyond which it is economically unfeasible to increase the feed rate of the machines.

The two tabulations which appear on the following pages graphically illustrate the competitive disadvantage imposed upon the Northwest canners by the discriminatory leasing system. While the comparisons are not perfect (as indicated by the footnotes on the tabulations), they present a reasonably accurate picture of peeling cost disparity between canners in the two regions. The tabulations' errors tend to minimize the discrimination, for the Gulf rental figures doubtless include deveiner fees well in excess of the $1,000 minimum per machine deducted.

Tabulation "E"

[Tabulation showing dollar value of Gulf Coast and West Coast Canned Shrimp Pack and Dollar Value of Gulf Coast and West Coast Rentals charged]

Year	Dollar value—Gulf Coast			Dollar value—West Coast		
	Pack	Peeler * rentals	Percent of rentals to pack	Pack	Peeler rentals	Percent of rentals to pack
1958	$18,578,925	$615,103	3.3	$2,211,677	$247,109	11.2
1959	14,220,786	777,603	5.5	2,727,684	297,747	10.9
1960	15,992,296	980,501	6.1	1,240,297	206,901	16.7
1961	9,735,177	571,885	5.9	2,242,611	314,539	14.0
Total, 4 years	58,527,184	2,945,092	5.0	8,422,269	1,066,296	12.7
	Total region pack	Percent of Gulf Coast pack to total region pack	Percent ol West Coast pack to total region pack	Total region rentals	Percent of Gulf Coast rentals to total region rentals	Percent of West Coast rentals to total region rentals
1958	$20,790,602	89.4	10.6	$862,212	71.3	28.7
1959	16,948,470	83.9	16.1	1,075,350	72.3	27.7
1960	17,232,593	92.8	7.2	1,187,402	82.6	17.4
1961	11,977,788	81.3	18.7	886,424	64.5	35.5
Total, 4 years	66,949,453	87.4	12.6	4,011,388	73.4	26.6

Rental Figures CX 106–C, 106–B, 106–M and 106–N, are shown on a fiscal year basis, whereas pack figures, RX 1893–N, 1894–P, CX 1278–P14 and 1279–P13, are shown on a calender year basis.

*RX 216 and CX 852, pages 103, 109, 110, 111, 144, 145, 166 and 172, show that there was a minimum of 35 shrimp deveining machines under rental contract from the period 1958 through 1961 in the Gulf Coast area. Since no deveining machines were under rental contract in the West Coast area during this period, the minimum rental charge of $1,000.00 per machine has been deducted from the total rental charge for the Gulf Coast area. Actual deveiner rentals are not separately shown in the record. Brunswick Quick Freezer, Inc., John A. Chauvin, Inc., Ed. Martin Sea Food Co., New Orleans Shrimp Co. and Trade Winds Co., Inc. did not pack canned shrimp; therefore, the total rental charges for these companies has been deducted from the Gulf Coast rental charges shown on CX 106.

Tabulation "F"

[Tabulation showing Shrimp Production in Standard Cases for Gulf Coast and West Coast, and the Rental Cost per Standard Case]

Year	Gulf Coast production			West Coast production		
	Number of cases	Peeler* rentals	Rental cost per case	Number of cases	Peeler rentals	Rental cost per case
1958	808,314	$615,103	$0.76	145,565	$247,109	$1.70
1959	753,006	777,603	1.03	169,144	297,747	1.76
1960	871,973	980,501	1.12	79,246	206,901	2.61
1961	480,157	571,885	1.19	138,782	314,539	2.27
Total, 4 years	2,913,450	2,945,092	1.01	532,737	1,066,296	2.00
	Total number region cases	Percent of Gulf Coast cases to to total region cases	Percent of West Coast cases to to total region cases	Total region rentals	Percent of Gulf Coast rentals to total region rentals	Percent of West Coast rentals to total region rentals
1958	953,879	84.7	15.3	$862,212	71.3	28.7
1959	922,150	81.7	18.3	1,075,350	72.3	27.7
1960	951,219	91.7	8.3	1,187,402	82.6	17.4
1961	618,939	77.6	22.4	886,424	64.5	35.5
Total, 4 years	3,446,187	84.5	15.5	4,011,388	73.4	26.6

Rental Figures CX 106–C, 106–B, 106–M and 106–N, are shown on a fiscal year basis, whereas pack figures, RX 1893–N, 1894–P, CX 1278–P14 and 1279–P13, are shown on a calendar year basis.

*RX 216 and CX 852, pages 103, 109, 110, 111, 144, 145, 166 and 172, show that there was a minimum of 35 shrimp deveining machines under rental contract from the period 1958 through 1961 in the Gulf Coast area. Since no deveining machines were under rental contract in the West Coast area during this period, the minimum rental charge of $1,000.00 per machine has been deducted from the total rental charge for the Gulf Coast area. Actual deveiner rentals are not separately shown in the record. Brunswick Quick Freezer, Inc., John A. Chauvin, Inc., Ed. Martin Sea Food Co., New Orleans Shrimp Co. and Trade Winds Co., Inc., did not pack canned shrimp; therefore, the total rental charges for these companies has been deducted from the Gulf Coast rental charge shown on CX 106.

Respondents' stated reason for doubling the rental rate to the West Coast canners is not persuasive. In the first place, we cannot fail to note that the author of the discriminatory rate, Felix Lapeyre, testified that he had no knowledge as to the cost of shrimp peeling labor on the West Coast. Further, except for one brief-lived experiment by one Northwest canner, no one had tried to peel raw pandalid shrimp for canning and no information as to the cost of such labor was available.

While it is probably legally unnecessary to examine the respondents' real reasons for setting a discriminatory rate since the illegality of an unfair practice depends not upon its purpose but upon its effect, yet the unique nature of this proceeding impels such an examination. Having found that respondents' avowed reason for their practices is not worthy of belief, we cannot leave unanswered the question as to respondents' real reason. It is elementary that business practices of this type are not planned and carried out without a rational purpose and respondents' activities here do not constitute an exception to this basic rule. Their purpose and intent was to protect and foster their own interests as shrimp canners by inhibiting the shrimp canners packing the pandalid shrimp of the Northwest.

The respondents' and other Gulf Coast canners' fear of the embryo Northwest shrimp manufactory stems from two factors: the comparative low cost of pandalid shrimp and the static condition of the canned shrimp market. These factors convinced the respondents that unless defensive steps were taken the Gulf Coast shrimp industry would be unable to compete and would be eventually overpowered by the new competition from the Northwest. That Gulf canners were concerned about the new competition in the Northwest cannot be subject to serious doubt. In a letter to respondents, dated March 10, 1958, Mr. H. R. Robinson, a leading Gulf canner, warned:

> The production of canned shrimp along the Pacific Coast has introduced a new factor into the canned shrimp business. That the Gulf area canners of shrimp are concerned over the future impact of this West Coast production is evident by the interest it has commanded in the Gulf. At the most recent meeting of the Louisiana Shrimp Canning Industry this matter was discussed, as per agenda of March 6, 1958, meeting attached.
>
> I as an individual, and my firm as such, am gravely concerned to the point where we are even discussing the possibility of putting a plant somewhere on the West Coast—believing that if you can't beat 'em then join 'em.

At another place in the same communication the author declared:

> Prior to 1957 no area outside the Gulf produced canned shrimp in sufficient quantity to affect the market price. Production began on commercial scale during 1957 on the Pacific Coast and we soon began to feel the effects of it.

Apparently 1957 was an ideal time for the embryo shrimp manufactory on the Pacific Coast to enter the market. In the latter part of

1957 the Louisiana shrimp crop was severely limited. The production of Louisiana canneries fell from the 1956 total of 628,465 standard cases to a total pack in 1957 of 340,945 standard cases. Of course, the effect of the shortage was to skyrocket the price of raw heads-on shrimp to Gulf canners. This had the effect of intensifying the Gulf canners' fears of the new competition from the West Coast, for, in the words of one Gulf canner, "Initially I believed (as did many of my competitors based upon conversations on this subject) that if we could get our raw material costs down a little we could run the Pacific shrimp a rugged race." But the Gulf canners were not able to get the price of their raw material down and, as we disclosed above in this opinion, the prices they must pay to fishermen for raw shrimp are substantially higher than the prices paid on the West Coast.

In concluding on the disparity of the West and Gulf Coast prices for raw heads-on shrimp, Mr. Robinson was quite pessimistic, stating:

> With raw material prices having been at a high level for quite some length of time, and with the prospects of heavy catches in the Gulf area about nil, we can look forward to opening raw material prices in the Gulf area being too high; too high to allow competition with West Coast canned shrimp.

The respondents were aware of but apparently discounted the fact that the West Coast canners' advantage in the price of raw material is offset by the low yield prevailing on the West Coast. As stated, on the Gulf Coast the yields are from 28 to 37 percent, while on the coasts of Oregon and Washington the yields range from 17 to 18 percent, and on the Alaskan Coast, 10 to 20 percent. While there is some substance to respondents' claim that inefficient methods are responsible in part for the lower yield on the Pacific Coast, it is an incontrovertible fact that shrimp which are 40 percent tail will yield considerably less useable meat than shrimp which are 60 percent tail. Thus, a 210-pound barrel of the pandalid shrimp will yield a maximum of 84 pounds of headlessed shrimp, as compared to the 126 pounds of headlessed shrimp secured from a barrel of the penaeid shrimp. Moreover, the yield from the smaller sizes of shrimp is always less than the yield from the larger sizes of the same variety.

As we pointed out above, the market for canned shrimp has shown no appreciable growth over the past forty years. Under such conditions the success of a new market entrant must be purchased at the expense of existing competitors. The proof of this economic truism is contained in the record, which clearly shows that each gain in market penetration made by the Northwest canners was earned at the expense of a reduction in sales by the Gulf canners. See, for example, Tabulation C, above.

Moreover, the record reveals that the principal market for canned shrimp in the United States consists of the eleven states which make up the western one-third of the continental country, excluding Alaska.[2] While parts of this area lie equal distance from the Northwest and Gulf Coast producers, most of the principal metropolitan consuming areas within the segment lie much closer to the canneries of Oregon and Washington, giving those producers a decided freight advantage. A survey made by the Fish and Wildlife Service of the Department of the Interior in 1956 (Respondents' Exhibit 1863), revealed that 46.5 percent of the country's canned shrimp consumers (those who had purchased canned shrimp in the preceding twelve months) were located in these eleven western states. The survey also showed that from the standpoint of frequency of use the West was a greater market than indicated by its percentage of all consumers, since consumers in the West served canned shrimp more often than did consumers in other areas. Moreover, it appears that the two states of California and Oregon absorbed a comparatively large percentage of Grand Caillou's total output of canned shrimp during the nine years from 1950 through 1958. The following tabulation is particularly revealing of the importance of the eleven-state "West" market to Grand Caillou. The importance of the area as a market for Grand Caillou's output of small, tiny, and broken shrimp, the only grades produced by the Northwest canners, is dramatically revealed.

TABULATION G

[Grand Caillou Packing Company Incorporated, sales to domestic consumers for the period 1-1-52 through 7-31-61 in terms of cases of 48/5 oz. cans to the case. RX 1907-A-B-C]

Years	Total all sizes			Total small, tiny, and broken		
	All regions	West	Percent of West to all regions	All regions	West	Percent of West to all regions
1952	46,607	10,920	23.4	17,067	6,689	39.2
1953	37,823	8,105	21.4	14,000	5,384	38.5
1954	44,330	22,050	49.7	23,177	15,587	67.3
1955	45,534	21,401	47.0	20,116	15,941	79.2
1956	34,613	18,591	53.7	13,337	8,434	63.2
1957	24,760	10,299	41.6	8,749	6,039	69.0
1958	29,359	15,038	51.2	10,105	7,137	70.6
1959	46,439	25,698	55.3	22,140	18,508	83.6
1960	41,326	15,943	38.6	15,526	9,898	63.8
1961	22,294	11,410	51.2	11,351	9,279	81.7
10-year, totals	373,085	159,455	42.7	155,568	102,896	66.1

The Effects of the Discrimination:

While the Western United States is the primary geographic market in which Gulf and Pacific Coast canned shrimp compete, both pro-

[2] Washington, Oregon, California, Idaho, Montana, Wyoming, Nevada, Utah, Colorado, New Mexico, and Arizona.

ducing groups are attempting to make sales throughout the United States. Through the medium of brokers, even the smallest canner can reach the most remote market. Almost all of the canners utilize brokers to sell their shrimp to smaller purchasers, but the big buyers, such as the chain grocery stores, are dealt with directly without an intervening broker.

Because of the diminutive size of their raw material, the Northwest producers are restricted to competing for the market composed of sellers who desire canned shrimp in the small, tiny, and broken sizes. Of course, the effect of this phenomena is to place Northwest producers at somewhat of a disadvantage, for their entire profit must be made from these three sizes. Moreover, as we pointed out before, the larger sizes command a higher price, but since the raw material costs are likewise higher for shrimp in these grades, it cannot be said with certainty that profit margins are greater on the larger grades.

Because many canners do not merchandise their product but instead sell it in unlabeled form to other resellers, the number of merchandisers of canned shrimp is substantially less than the number of canners. Of the Peeler lessees operating canneries in the Gulf area, about twenty have sold their product primarily in unlabeled form to others. Among the producers who do sell their product to direct purchasers or through local brokers, five can be classified as large. These are Southern Shell Fish Company, which sells about 25 percent of the national production (including its own production and that of other Southern canners), Southland Canning & Packing Company, which sells the product of its large producing unit. Violet Packing Company, and also canned shrimp purchased from others; Mavar Shrimp & Oyster Company, which primarily sells its own product; De Jean Packing Company, which sells its own product and canned shrimp purchased from others; and Robinson Canning Company, which, for the most part, sells its own product.

Grand Caillou sells both shrimp and oysters; however, canned shrimp accounts for approximately 75 percent of its volume of sales. It sells canned shrimp directly to chain stores and indirectly to other customers through brokers. Sales are made under Grand Caillou's brand name, Lou-z-ana, and under the customer's private brand. An increasing percentage of Grand Caillou's shrimp sales are made to buyers for export. Grand Caillou's export business in 1960 accounted for 30 percent of its sales of canned shrimp. In addition to its own production, Grand Caillou sells canned shrimp purchased from other canners. A principal source of supply is Shell-Tex Fisheries of Brownsville, Texas, a limited partnership, partially owned by Grand Caillou. (See page 808, above.)

With the exception of Southern Shell Fish Company, which is a subsidiary of a large food corporation, the merchandisers of canned shrimp do very little advertising. This is in contrast to the sellers of frozen shrimp products, who militantly exploit their product, utilizing most advertising media.

As above disclosed, the first canner of shrimp from the pandalid fishery of the Northwest using respondents' machinery commenced operations in 1956, but the first canned shrimp from that fishery was sold in 1957. By the close of 1957, six canneries were in operation in the Northwest, two in Oregon, three in Washington, and one in Alaska. By 1958 the total had grown to twelve, and a peak of fourteen was reached in 1959. The number declined to eleven in 1960 and remained at that figure in 1961. See Tabulation B, above, for the distribution of the canneries in each of the three states during these years.

In the years 1957 through 1960, the greatest part of the pack of canned shrimp from the Northwest was sold by three brokerage firms located in Seattle, Washington, Ivar Wendt, Wafico, and John L. Granger. One producer, East Point Seafood Company, which began business in 1958, sells its own production. Of the sellers, Ivar Wendt is by far the largest. He testified in 1961 that during the years 1957 through 1960 he had handled approximately one-half of the entire pack of canned shrimp produced in the Northwest. He had also financed, or helped to finance, three of the earlier producers: Peelers' first lessee, Kaakinen, W. F. Smith, and Pacific Shrimp Company. Wendt also owned a cannery, Pacific Pearl Frozen Foods, Inc., and had a two-thirds interest in another cannery, Sutterlin & Wendt, Inc. Most of the shrimp sold by Wendt bore his own private label, whether produced in one of his own canneries or by an independent. He handled his sales through brokers who represent him in every state of the union, paying them a commission of 2½ percent.

During the years 1958 to 1960, Wafico sold the canned shrimp output of Harbor Seafoods Company of Wrangell, Alaska, which started production in 1957. It also sold the canned shrimp output of King Crab, Inc., its affiliate, which started production in 1959 and is sometimes referred to as Island Seafood Company. Wafico sells its shrimp under its own label, under the labels of other brokers, and under the private labels of buyers. It sells both through brokers and direct to large chain stores.

The third broker, Granger, has sold much of the output of Crown Packers, Inc., Halibut Producers Cooperative, and some of Seaside Clam Company and several others. Granger primarily distributes through brokers located throughout the United States and Canada.

The only West Coast shrimp canner which sells its product without the aid of an intervening field or primary broker is East Point Seafood Company. This company sells its canned shrimp directly to large buyers and to the smaller buyers through approximately twenty-five local food brokers. It sells only its own production and under its own labels.

The testimony of Wafico, Wendt, Granger, and East Point with respect to the competitive picture in the primary markets for Northwest canned shrimp is remarkably similar. Representatives of each of these sellers pointed out that the wholesale buyers for canned shrimp of this tiny or "cocktail" size are primarly interested in the price of the product. The product is only attractive if it can be offered to the consumer by retailers at a price not exceeding thirty-nine cents a can, with an occasional "special" of three cans for a dollar. The first shrimp offerings by the Northwest sellers in 1957 were made at about $7.30 per case. Because of the shortage of Gulf shrimp, prices gradually rose to $8.00 a case, where they remained through much of 1958 and into 1959. The broker Granger dropped his price to $7.50 a case on June 18, 1959, but was unable to move it at that reduced figure, and on June 29, dropped it to $7.25. Occasionally, in order to makes sales, he sold as low as $6.75 a case, but he was unable to move any substantial quantities at these lower prices, for buyers informed him that Gulf shrimp was being quoted in the markets at $6.50 a case. Wendt testified that his price in 1957 had gotten up to $8.00, but that when Gulf shrimp came back into the area, the price broke to $7.25. Mr. Wendt believes that $7.25 a case is a natural price at which canned shrimp is attractive to buyers and, as a consequence, will move in substantial quantities. He stated that he lost a carload sale to a large buyer in San Francisco because a Gulf competitor underbid him with a price of $6.50 a case. In 1960, Wendt advised the canners in which he had an interest to stop producing canned shrimp, for money was being lost on each case sold. The experience of Wafico and East Point is substantially the same as that of Wendt and Granger. They were able to sell shrimp at a satisfactory profit during the period of the Gulf shortage in 1957 and the first part of 1958 but in 1959 competition of Gulf shrimp drove the price down to $7.00 and less. Neither seller was able to move shrimp at a price greater than $7.25 a case.

Representatives of almost all Northwest producers testified in the proceeding as to their costs of production and the profits or losses incurred as a result of their operations in canning shrimp. As it is to be expected in a new industry, the Northwest shrimp canners experienced many difficulties in entering and continuing to economically operate in the shrimp canning field. The respondents point out quite

correctly that a good deal of the difficulties encountered by the Northwest producers resulted from their own inexperience in a new field. Respondents point out that a 1952 survey showed that Northwest and Alaska canned shrimp products were overweight, that is, the contents of the can weighed more than the required 4½ ounces. They point out that some of the Northwest canners treated their products with citric acid after it had been peeled, thereby materially decreasing the yield and producing an inferior product. Respondents conclude:

> But the evidence in this case reveals that if, in fact, these Northwest and Alaska canners are not making the money they envisioned, the fault lies in their own inexperience, their poor selling methods, and their attempt without preparation or advertising to sell a tiny shrimp to a public which, arbitrarily but certainly, wants a larger shrimp, in a market which has been virtually static for forty years. (Respondents' Proposed Findings, p. 116.)

Assuming, as we do, that all of these charges made by the respondents are absolutely true, we fail to see in these factors any justification for the respondents' discriminatory peeling rate. One cannot justify throwing an anchor to a drowning man with the excuse that he was going under anyway. The plain fact of the matter is that the principal difficulty encountered by the Northwest canners was the discriminatory high peeling rate forced upon them by the respondents. This conclusion is forced by the testimony of the Northwest canners, which we shall now briefly review.

As we stated above, the respondents' first lessee in the Northwestern United States was Edwin Kaakinen, who built and commenced operating a cannery in Westport, Washington, in 1956. Kaakinen canned a few shrimp in 1956 and continued operations until early 1959. During the period of his operation he lost approximately $14,000. During the period he paid more than $108,000 in rental fees to the respondents. The discriminatory excess rental fee of more than $53,000 was the direct and proximate cause of the losses incurred by Kaakinen. Had he been charged a rental fee for the peeling machines at the same rate as the respondents charged to their Gulf producers, his operations would have returned a tidy profit.

Another Northwest producer whose canned shrimp operations had been unprofitable is E. H. Bendiksen of South Bend, Washington. Mr. Bendiksen is the president of East Point Seafood Company. His first leases from respondents were executed under the name of E. H. Bendiksen Company, but more recently the leases have been in the name of East Point Seafood Company. During 1958, 1959, and 1960, Bendiksen paid approximately $46,000 in excess discriminatory rentals to the respondents. During this period his peeling costs per case of twenty-four 4½-ounce cans were 99 cents in 1958, 97 cents in 1959, and $1.06 in 1960, before the increase of June 1st, and $1.20 per case thereafter.

Halibut Producers Cooperative handles and markets the products of its members, consisting of about 350 fishermen. The cooperative had operations in leased premises in Seward, Alaska, where it canned salmon. When salmon fishing started to fall off, the cooperative decided to enter the shrimp canning field. Considerable expenditures were made to convert the cannery to the shrimp canning operation and machines were leased from the respondents. Shrimp canning at the plant commenced in early 1959. During the period from January 1959 to March 31, 1960, Halibut Producers Cooperative lost approximately $20,000 on its shrimp canning operation. The remainder of the year 1960 saw an additional loss of approximately $72,000. During this period the cooperative paid between $40,000 and $50,000 in excess discriminatory leasing fees to the respondents.

The cooperative experienced peeling costs which ran from $1.34 to as high as $1.70 per case (twenty-four 4½-ounce cans) during this period. Experiments were engaged in, feeding the peeling machines at different rates in order to determine the most economic feeding rate. Feeding the machine at a high rate of approximately 1,400 pounds per hour decreased the machine rental but produced an increase in labor costs because it became necessary to put more workers on the production line to remove shell which the machine did not peel at the high rate of feed. Also, the forced feeding resulted in more broken shrimp.

Pacific Shrimp, Inc., of Warrenton, Oregon, has been canning shrimp since the fall of 1957. During the period from October 15, 1957 to March 20, 1961, it packed more than 54,000 cases of shrimp, on which it incurred a peeling cost of approximately 84 cents per case (twenty-four 4½-ounce cans). The rentals paid to respondents during this period aggregated approximately $47,800. Over this period the operations of the company produced a net loss of more than $10,000. Had it been charged a rental rate at the same level afforded to the Gulf Coast canners, the operation would have produced more than $10,000 profit.

Alaska Marine Foods, Inc., of Anchorage, Alaska, was a short-lived shrimp cannery, operating facilities at Seward, Alaska. The company closed its operations entirely in June 1960, shortly after the one-third peeling rate increase became effective. In July of 1960, the treasurer of the company wrote to respondents, stating, *inter alia*:

Your letters of May 25th, May 27th, and June 3rd, 1960 are acknowledged. The rate increase for the rental of your shrimp processing equipment which took effect June 1, 1960 has had a seriously crippling effect on our business. Your discriminatory rate structure, coupled with high wages in Alaska and the soft market condition has made it impossible for us to operate with a reasonable return on our investment. In view of this condition, we have elected to temporarily suspend operations until either or both the market conditions improve

allowing a higher price for our finished product or you elect to rent your equipment on an equitable basis.

Our last run, prior to our temporary suspension of operations, was on June 24th. For the use of your machines on this run, we incurred a liability to you amounting to $2.13 for each case packed. We understand that this is approximately six times the average cost per case paid by your lessees in the Gulf area. It is obvious that the shrimp industry here cannot survive with such a discriminatory rate structure.

The testimony and the documentary evidence concerning the effect of the discriminatory rate upon the Northwest canners is singularly uniform and uncontradictory and further summarization of it in this opinion would serve no purpose. The picture in the Northwest is that of a struggling industry attempting to break into a new field. As stated, many of the difficulties encountered were due to ignorance and inexperience and a certain number of casualties are expected in such an endeavor. However, the difficulties of the Northwest canners were greatly enhanced and, to a large extent, created by the discriminatory peeling rate.

Several of the canners who ceased canning shrimp entirely testified that they would have been able to continue operations and garner a reasonable profit had they been charged the same rates as those enjoyed by the Gulf canners. The statistical evidence completely supports this testimony, for in most cases the excess rental charged was substantially greater than the losses experienced.

As we view it, respondents' conduct is completely undefensible. It constitutes a hasty, almost panicky, reaction to a new competitive threat. Their activities are shortsighted and economically self-defeating. The long-range interests of the shrimp canning industry in this country and of the economy as a whole lies in increased, rather than curtailed, competition. This industry is selling in a market which has remained static for four decades. While in recent years the lack of growth may be blamed to a certain extent upon the increasing popularity with the public of frozen shrimp products, this was not true for the entire period and does not constitute a complete explanation today. A principal reason for the static condition of this universe is the complete failure of the producers to aggressively exploit their product by an aggressive program of consumer education. The money spent for advertising by the industry as a whole has been insignificant and this record indicates that an untapped market consisting of 76 percent of all American families is awaiting exploitation. If, as this record indicates, the supplies of shrimp in the Alaskan fishery are indeed unlimited, the potential for the Northwest shrimp canning industry directly and for the respondents indirectly through increased utilization of their machines is likewise unlimited.

In view of all of the foregoing facts and conclusions, it is the decision of this Commission that the respondents have engaged in unfair methods of competition and unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act. The gravamen of the offense so found is the fixing and charging of higher discriminatory peeling machinery rental rates to producers of canned shrimp located in the Northwestern United States with the result and effect of injuring and destroying competition between said Northwest canners and canners located in the Gulf and South Atlantic areas of the United States.

The Remedy:

The respondents attack the order to cease and desist promulgated by the hearing examiner, on the ground that it is unduly restrictive and goes beyond the practice found to be unlawful. In pertinent part the hearing examiner's order would require the respondents to refrain from:

> Leasing and renting such machines of the same type to any lessee at any rate or upon any terms different from the rate or terms charged any other lessee which results in any lessee paying a higher rate per hour of use of such machines than the rate charged any other lessee.

Respondents charge that this order constitutes a usurpation of their right to fix the terms and conditions pursuant to which they will lease their machines. They point out that the order would rule out other rating systems which presumably could be applied on a nondiscriminatory basis, such as a minimum annual rental or a charge based upon the volume of shrimp processed or the weight of the shrimp processed.

On the other hand, the complaint counsel contend that the order does not go far enough and that an order should be entered which requires the respondents to make a charge for their machinery based upon the amount of shrimp meat left after the processing operation has been completed. They claim that the examiner's order would be ineffective, since under its terms the respondents would be free to double the rate to Gulf Coast packers rather than halving it to the Northwest canners.

The hearing examiner's order was framed with an eye to the facts adduced in these proceedings. The evidence adduced herein, much of it by respondents, showed that at the present time the only practical way to measure the utilization of the peeling machine is by means of the meter system which measured the operating cycles. Respondents experimented with a procedure to measure the peeled shrimp yielded by the machine and decided the method was unsatisfactory. As for

complaint counsel's plea that the hearing examiner's order would permit the respondents to effect a nondiscriminatory rate by raising the rate to the Gulf Coast producers, we can only state that this is a decision which must rightfully be left to the respondents. Even though the respondents have a monopoly in the high-capacity shrimp-peeling machinery field, they are yet subject to competition or potential competition from hand peeling and the finished product of United States producers is in competition in the domestic and world markets with the product produced by foreign canners. Thus, the ceiling on the respondents' lease rate is best left to them to fix. The most that a Commission order can or should attempt to accomplish is to require that the rates be nondiscriminatory.

We find ourselves in substantial agreement with the respondents' view that the order proposed by the hearing examiner is unduly restrictive in that it does not permit nondiscriminatory alternative methods of leasing respondents' machines, but, on the other hand, we cannot agree with respondents' contention that the order should only "* * * direct respondents to cease and desist from charging its lessees differing amounts for each unit increase as reflected on the meters affixed to [their] peeling machines." Such an order would be unduly narrow and would permit alternative discriminatory rental procedures. As we see it, the ideal order will prohibit the respondents from discriminating between their lessees but would permit them freedom to frame and institute such leasing and charging systems or procedures as they desire. Thus we shall enter an order which simply prohibits the respondents from discriminating among domestic canned shrimp producers in the rentals charged for their machines. While such an order may be criticized for its lack of specificity, we feel that it constitutes a desirable middle ground between the easily-evaded, exact prohibition of past conduct advocated by the respondents and the overly restrictive order of the hearing examiner.

In keeping with our usual procedure, the respondents will be required to file within sixty days after service of the order a report of the manner in which they intend to comply. The plan which they submit will be reviewed by the Commission and respondents will be advised as to its acceptance or rejection and, if the latter, the reasons therefor. If at any subsequent time the respondents desire again to change their distribution procedures, our Rules of Practice (§ 3.26(b)) permit them to request advice from the Commission as to whether their proposed course of action will constitute compliance with the order. These procedures insure that the respondents need never institute a course of action at their peril.

THE ALLEGED DISCRIMINATION BETWEEN FOREIGN AND DOMESTIC CANNERS

Respondents' Procedures with Foreigners:

Respondents first explored the possibility of distributing their machines in foreign markets in 1950. In that year they addressed inquiries to authorities in several foreign countries to determine whether a potential market for their machine existed. Also, at about this time, the respondents were receiving inquiries from interested persons in various foreign countries who had learned of the existence of these machines.

After conducting several experiments to determine whether the equipment would satisfactorily peel the type of shrimp found in the foreign fisheries, respondents filed applications for patent in every country where they felt a potential market existed. Applications for patent protection on peeling machinery and on deveining equipment have been filed in Argentina, Australia, Belgium, Brazil, British Guiana, British Honduras, Canada, Ceylon, Chile, Columbia, Costa Rica, Cuba, Denmark, Ecuador, Egypt, France, Germany, Great Britain, Greece, Guatemala, Holland, Honduras, Iceland, India, Jamaica, Japan, Mexico, New Zealand, Nicaragua, Norway, Pakistan, Panama, Republic of the Philippines, Puerto Rico, Salvador, South Korea, Spain, Sweden, Tangiers, Turkey, Uruguay, and Venezuela.

Respondents at first decided to lease their equipment in foreign countries, as was done in the United States, and because they did not wish to undertake liability as a partnership, formed a corporation in 1956 known as Shrimp Machinery, Inc. According to respondents, dollar exchange and import license problems defeated their efforts to lease abroad and the attempt was abandoned in the early part of 1958, at which time respondents offered to sell their machines in all foreign countries, with the exception of Canada and Mexico. To handle their foreign sales attempt, respondents engaged the export firm of Smith, Kirkpatrick & Co., Inc. This firm still represents them in all countries except Iceland. Respondents have continued to attempt to lease their machines in Canada and Mexico, stating that problems of exchange, import licenses and the like, do not bar distributing the machines on a lease basis in these countries. So far, respondents have not been successful in leasing any machinery to Canadian canners. Equipment was leased to a Mexican canner, but the machines were returned in 1958 or 1959 because of labor problems encountered.

As of May 1962, respondents had sold twenty peeling machines to foreign shrimp canners. Eleven machines were sold to Japanese canners, two machines each were placed in the countries of Greenland, Sweden and Iceland, and one machine was placed in Panama, Denmark and Norway. Excepting only the Japanese sales, one separator

was sold to accompany each peeling machine. The Japanese producers purchased only eight separators to accompany their eleven peeling machines. The situation with cleaners is somewhat similar, with one cleaner sold to accompany each peeling machine, excepting that only one cleaner accompanied the two Swedish machines and only eight cleaners were sold to accompany the eleven Japanese-purchased peeling machines. The identity of each foreign purchaser and the number of machines individually purchased is contained in the record.

As of January 1, 1962, the prices of the three peeling units F.A.S. New Orleans were: peeler, $36,650; cleaner, $3,250; separator, $3,250. These prices represent a substantial increase over the prices charged for the first sales made in 1958. The prices then were F.A.S. New Orleans: peeler, $32,650; cleaner, $2,350; separator, $2,350. Respondents charged slightly lower prices in Iceland.

Respondents have steadfastly refused to sell shrimp peeling machinery to domestic producers at any price.

The Advantages to Foreign Canners:

The ideal procedure to determine whether domestic canners have in fact been disadvantaged by respondents' refusal to sell peeling equipment to them on the same basis as it is sold to foreigners would be to compare the cost experience of the domestic lessees with that of the foreign buyers. Unfortunately, the record contains no figures as to the peeling costs incurred by the foreign companies which have purchased respondents' equipment. Thus we are forced to rely upon less pragmatic, but in our view no less reliable, procedures. The record does show the number and type of machines in place in each of the United States canneries and the amounts paid to the respondents in rentals during each year. A comparison of the respondents' 1958 price to foreign buyers for the equipment in place in any domestic cannery with the rentals paid to respondents for the equipment will produce the approximate amount of advantage or disadvantage. Of course, such a comparison is essentially an oversimplification, for it does not take into account the cost of freight from New Orleans to the buyer's plant, replacement parts, repairs, insurance, and similar costs not incurred by lessees. On the other hand, the comparison does not take into account the federal and state tax laws which permit depreciation deductions from corporate income resulting in the complete return of the cost of capital investment. For federal income tax purposes the respondents depreciate their machines over a five-year period at the fixed rate of 20 percent of the original cost per year. Shrimp canners may be permitted the same rate. The following tabulation compares the rentals paid during a recent four-year period by two Gulf and two Northwest

canners with the total selling price of respondents' machinery which they were leasing as of August 31, 1960.

TABULATION H

[A tabulation showing the purchase cost of shrimp peeling equipment in relation to rental cost of shrimp peeling equipment]

	Type and amount of equipment in use (RX 216)	Dollar cost to purchase equipment (CX 843 I)	Rentals paid for equipment use from 9/30/58 to 9/30/61 (CX 106 A-O)	Excess rental payments over purchase cost
Gulf Coast companies:				
Southern Shell Fish Co., Inc	12 Peelers	$391,800		
	6 Cleaners	14,100		
	6 Separators	14,100		
	2 Graders	1,840		
	4 Deveiners	49,000		
		470,840	$525,641	$54,801
Violet Packing Company	6 Peelers	195,900		
	3 Cleaners	7,050		
	3 Separators	7,050		
	2 Graders	1,840		
	2 Deveiners	24,500		
		236,340	278,668	42,328
West Coast companies:				
E. H. Bendiksen	2 Peelers	65,300		
	1 Cleaner	2,350		
	2 Separators	4,700		
		72,350	94,525	22,175
W. F. Smith (Wrangell)	1 Peeler	32,650		
	1 Cleaner	2,350		
	1 Separator	2,350		
		37,350	129,101	91,751

From the foregoing one can conclude without question that the ability to purchase respondents' equipment constitutes an advantage of considerable proportions. As was expected, the double peeling rental rate on the West Coast resulted in a greater disparity between the rentals and the cost of the equipment utilized by canners in that locality. In fact, the rentals paid by W. S. Smith for respondents' single fiscal year ended September 30, 1958, exceeded by $9,000 the price of the equipment had he been permitted to buy it.

The Effects of the Discrimination Between Foreign and Domestic Canners:

Since the practice of selling shrimp processing machinery to foreigners is of comparatively recent origin, the full effects of the practice have yet to be felt by the domestic shrimp canning industry. However, there is sufficient evidence in the record to support a finding that the probable effects of the practice will be to injure and seriously curtail

the competitive abilities of domestic canners in two relevant markets: one consisting of the entire United States and the other the total of all foreign countries.

The Export Market:

Domestic canners have always sold a substantial percentage of their total pack in foreign countries. In 1960, more than 232,000 standard cases were exported out of a total United States pack of 951,219 standard cases. In 1961, exports dropped to 166,800 cases out of a total United States pack of 618,939. According to the Gulf Shrimp Canners Association the decline in exports of almost 30 percent was due to "the increased competition and pressure for foreign markets as exercised by foreign produced canned shrimp. * * *"

The full nature and extent of the effects of respondents' practices in foreign markets was not extensively explored in this proceeding. A comprehensive inquiry and exposition of all factors surrounding competition for foreign markets would be expensive and time-consuming, far beyond the needs of this case. The record is adequate, in our opinion, to support the conclusion that respondents' activities have curtailed the abilities of our domestic canners to compete in foreign markets with foreign canners who have purchased and own respondents' peeling equipment. The full extent of the injury or disability was not explored and need not be, for we need only find that the discriminatory distribution practices will tend inevitably to injure, destroy or prevent competition between domestic and foreign users of the respondents' equipment. The respondents are continuing to offer their machines abroad and are continuing to refuse to sell the machines to domestic canners. The inevitable result of this practice is to maintain high production costs at home and to permit to foreigners lower production costs. The resulting imbalance of competitive ability can have no other effect than to make it increasingly difficult for our domestic producers to compete for foreign markets. On the other hand, we could reasonably expect that with lower peeling costs our domestic canners could expand their foreign sales. To impede or prevent such expansion is no less of an unfair practice or unreasonable restraint than to occasion a diminution in market position.

It has been established beyond question that the purpose of the Federal Trade Commission Act is to proceed against acts at an early stage which, if full blown, will constitute violations of the Sherman or Clayton Act, *e.g.*, *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.*, 344 U.S. 392, 394, 395 (1953). It is in this light that we are here attempting to reach in their incipiency acts which, if permitted to continue, will seriously damage and injure do-

mestic producers and exporters of shrimp products attempting to sell canned shrimp abroad.

Effects in the Domestic Market:

The effects of the respondents' activities upon competition between foreign and domestic canners for the domestic United States market were more fully explored.

While there are no official statistics available showing the volume of canned shrimp imported into the United States, the American Can Company, at the request of the Gulf Shrimp Canners Association, compiled the following figures from verified data:

TABULATION I.—*Imports of canned shrimp—in standard cartons 48/5-oz.*

From—	1957	1958	1959	1960	1961
India	2,667	3,861	21,944	31,683	69,065
Norway	4,461	6,702	3,335	6,703	2,665
Denmark	600	4,813	2,565	1,967	3,447
Japan	1,283	1,148	2,183	849	27,479
Mexico				9,515	
Netherlands				7	20
Germany				20	
Iceland				127	
Greenland					5,660
England					453
Belgium					33
Sweden					115
Holland	141	733	3,006		
Hong Kong		1,699	420		
Chile			40		
Egypt			33		
Portugal			3,867		
Totals	9,152	18,956	37,393	50,871	108,937

Comparison of the above tabulation with Tabulation C, above, which reveals the total U.S. production, shows that canned shrimp imports have climbed from 1 percent of domestic production in 1957 to 11 percent in 1961. However, these figures do not tell the whole story, for the Gulf Shrimp Canners Association estimated that foreign imports show a 50 percent increase in 1962 over 1961. This prediction was based upon announcements that foreign producers, and particularly the Japanese, were expanding shrimp canning facilities and planned to increase their efforts to sell in the United States market. The Fishery Products Report for February 6, 1962, of the Interior Department's Bureau of Commercial Fisheries, reports on an article which appeared in a Japanese periodical, *Saisan Keizai Shimbun*, that one large Japanese fishing company was planning to operate a shrimp factory ship, the Einin Maru, in the Bering Sea in 1962. Accompanying the factory ship would be five pairs of two-boat trawlers. The production target for this ship in 1962 was 300,000 cases of shrimp

(twenty-four 8-ounce cans to the case). This target represented a four-fold increase over the same ship's production of 74,000 cases in 1961. The article disclosed that new shrimp peeling machinery for installation on the factory ship had been purchased and the production line would be increased by two to a total of four lines.

On June 28, 1962, the Department of the Interior was able to report in its fishery products report that the Japanese factory ship, Einin Maru, had produced over 100,000 cases (twenty-four 8-ounce cans) as of June 15th and that at the present rate of production was expected to exceed its target of 300,000 cases.

The factory ship Einin Maru is owned by Taiyo Gyogyo Kabushiki Kaisha of Tokyo, Japan. The export manager of this company advised the president of Washington Import-Export Corporation of San Francisco, a company purchasing imported shrimp and other articles for resale in the United States, that his company expected to export approximately one-half or 150,000 cases of the Einin Maru's total 1962 pack to the United States.

Additional evidence indicates the extent and manner of the penetration of the U.S. market by Taiyo fisheries. In October 1961, it sold to Southern Shell Fish Company 1,000 cases of small and 1,000 cases of broken 24 4½-oz. shrimp at a delivered price to the West Coast per case of $7.02 and $5.77, respectively. This shrimp was shipped to the West Coast in November of 1961, with 1,000 cases going to San Francisco and 500 each to Portland and Seattle. In September of 1961 Taiyo sold to Washington Import-Export Corporation of San Francisco, California, 1,500 cases of small and 1,500 cases of broken 24 4½ oz. shrimp at a price per case f.o.b. Japan of $6.75 and $5.50, respectively. The freight rate from Japan to the West Coast is 27 cents per case, making this price equal to the price paid by Southern Shell Fish. Washington Import-Export sold the broken shrimp in early 1962 at a delivery price of $6.55 per case, excepting 100 cases which were sold f.o.b. San Francisco for $7.15. It did not do so well, however, on the small shrimp, selling it at a delivered price per case of $7.00. On May 30, 1962, Taiyo sold to Washington Import-Export Corporation 3,500 cases of small and 1,500 cases of broken 24 4½ oz. shrimp at a price per case f.o.b. Japan of $7.00 and $6.00, respectively. On June 25, 1962, Washington Import-Export Corporation purchased 2,500 cases of tiny and 2,500 cases of broken shrimp packed on Taiyo's floating cannery at a price per case f.o.b. Japan of $6.75 and $6.00, respectively.

The ability of Taiyo fisheries to operate a floating cannery and compete in the United States market in the manner indicated by this record stems from their purchase and utilization of the respondents'

shrimp peeling equipment. The first shipment of this machinery consisting of two peelers, two cleaners, two separators, and two deveiners was shipped to Taiyo about March 14, 1961. An additional two peelers, one cleaner and one separator were shipped about March 1, 1962. Shrimp cannot be hand peeled aboard a factory ship because there is insufficient space to accommodate the labor force which would be necessary. Moreover, labor costs aboard ship are so high that it would be impractical from an economic standpoint to utilize a seagoing hand-peeling force. Freezing the shrimp aboard a factory ship and then thawing and peeling the shrimp ashore at the end of the voyage produces a product of inferior quality.

Another Japanese company selling in the United States markets is Nichiro Tyogyo A. K. This company purchased two peeling machines, one cleaner, one separator and one deveiner in July of 1961, and two peelers, one cleaner and one separator in March of 1962. The record reveals that Granger and Company purchased 500 cases of shrimp packed by this company in October of 1961 at a delivered price to the West Coast of $6.75 for the tiny size.

The person having the most experience in selling canned shrimp packed by the Northwest producers is Ivar Wendt. During the years 1957 to 1960 Mr. Wendt handled more than one-half of the entire pack of canned shrimp produced in the Northwest and Alaska. He financed or helped to finance three of the earlier producers, Kaakinen, Smith and Pacific Shrimp Company. He "owns" Pacific Pearl Frozen Foods, Inc., and has a two-thirds interest in Sutterlin & Wendt, Inc. This witness testified that in 1962 he was selling or attempting to sell Northwest tiny shrimp at $8.00 a case f.o.b. Seattle. Freight and handling charges to the East Coast of the United States equalled approximately 72 cents a case. At this time Japanese canned shrimp was being offered in the New York City area at a price of $7.40 to $7.45 per case f.o.b. warehouse, New York. In Boston, as of May 7, 1962, Japanese shrimp was being sold at $7.45 a case. The price of Japanese tiny shrimp in Philadelphia, as of June 13, 1962, was $8.00 a case, less 35 cents a case promotional allowance. The witness concluded that the Japanese prices were below the prices at which he could produce and sell shrimp without losing money.

The San Francisco broker for Southern Shell Fish Company testified that his 1962 sales of broken and cocktail size shrimp packed by Southern Shell Fish were 50 and 25 percent less than the volume done during the first half of 1961. He attributed this loss of sales entirely to competition from imported shrimp. He pointed out that a leading brand of Japanese shrimp was being offered for 84 cents per case less than the brand packed by his principal.

Several other sellers of shrimp testified that competition from Japanese imports was becoming an increasingly serious factor in the domestic shrimp market. Apparently most canners in both the Northwestern United States and along the Gulf Coast are apprehensive with respect to this already serious competition and the almost inevitable probability that the present relative trickle of imported canned shrimp will increase to a flood. Although the Gulf area canners are the beneficiaries of respondents' discriminatory leasing rates among United States producers, four of them [3] requested and were granted permission to file a brief as *amicus curiae* in this proceeding. In their brief the canners take the position that notwithstanding the fact that they are the recipients of the discriminatory lower rental rate the respondents' discriminatory leasing practices constitute a misuse or abuse of their patents. With respect to the discrimination in favor of foreign canners, they plead:

> * * * Are the domestic shrimp canners being deprived of the benefits of fair competition where foreign competitors get possession, title and use of the machines on terms more favorable than those granted domestic lessees for the same machine? We say that they are. Moreover, the fact that the domestic lessees have no alternative but to continue the leasing arrangement, notwithstanding the unfairness of the situation, is itself a clear manifestation of the presence and exercise of monopoly power, for no American businessman would voluntarily accept and continue such an arrangement if he had any other choice. * * *

The discomfiture of the American canners is understandable, for the respondents have placed them in an untenable position. They are required to operate with static higher peeling costs—costs which remain at a constant level without regard for production level. Foreign canners using machines purchased from respondents experience initial lower costs which recede with increased production. American canners have been placed at a competitive disadvantage by respondents' foreign sales and the likelihood is that their foreign competitors, particularly the Japanese, will enlarge their penetration of the United States canned shrimp market. Domestic canners are powerless in the face of respondents' patent monopoly to effect any change in their competitive position vis-a-vis their foreign competitors using respondents' machines and the public interest requires remedial action on their behalf. Respondents' discriminatory practice of selling to some, but not all, competing canners has been shown by this record to be unfair and violative of Section 5 of the Federal Trade Commission Act.

[3] Buquet Canning Company, Mavar Shrimp & Oyster Co., Inc., Southern Shell Fish Co., Inc., and Violet Packing Co., Inc.

The Remedy:

A patentee has no right to market his invention in a manner violative of the law. As a matter of fact, the patent statute does not even grant him the affirmative right to place his product on the market but merely grants to him, for a term of seventeen years, "* * * the right to exclude others from making, using, or selling the invention throughout the United States, * * * " (35 U.S.C. 154 (1958).) The Supreme Court has uniformly held that resale price maintenance is just as illegal when practiced by a patentee as by others. *Boston Store of Chicago* v. *American Graphophone Co.*, 246 U.S. 8 (1918); *Strauss* v. *Victor Talking Machine Company*, 243 U.S. 490 (1917). However, a patentee may establish the price at which its agents must sell goods consigned to them. *United States* v. *General Electric Company*, 272 U.S. 476 (1926).[4] A patentee may not sell or lease his invention upon the condition or understanding that it will be used only with supplies obtained from the patentee or other designated source. *Motion Picture Patents Company* v. *Universal Film Manufacturing Company*, 243 U.S. 502 (1917). The imposition of such a tying restriction upon a lessee or purchaser may effectively void all of the patentee's rights under the patent. In *Morton Salt Co.* v. *G. S. Suppiger*, 314 U.S. 488 (1942), the Supreme Court held that such misuse of a patent right effectively barred the patentee from maintaining an infringement suit regardless of whether the infringer had suffered from the the misuse of the patent.

The Supreme Court has been presented with the argument that since a patentee may choose to refrain entirely from marketing his invention he must logically and necessarily be permitted to impose any condition which he chooses when and if he does decide to market it. The Court disposed of this argument in *Motion Picture Patents Company* v. *Universal Film Manufacturing Company*, stating:

> * * * The defect in this thinking springs from the substituting of inference and argument for the language of the statute and from failure to distinguish between the rights which are given to the inventor by the patent law and which he may assert against all the world through an infringement proceeding and rights which he may create for himself by private contract which, however,

[4] In *Simpson* v. *Union Oil Company*, decided April 20, 1964, the Supreme Court placed what appears to be new emphasis on the importance of patents in price-fixing proceedings, stating:

> "The patent laws which give a 17-year monopoly on 'making, using, or selling the invention' are *in pari materia* with the antitrust laws and modify them *pro tanto*. That was the *ratio decidendi* of the General Electric Case. * * *" (84 S. Ct. 1051, 1058.)

Mr. Justice Stewart, dissenting, took the view that had the Court decided in *General Electric* that a valid agency had not been set up "* * * the price fixing requirement would have made the agreement nothing more than a resale-price maintenance scheme, unlawful under the antitrust laws, * * * regardless of whether or not the article sold was patented." (*Id.* at p. 1061.)

are subject to the rules of general as distinguished from those of the patent law * * *. (243 U.S. at 514.)

The right which is here involved, that is, the right to sell machinery to one group of competitors while leasing to a competing group is not a right acquired by respondents from the patent laws but was created by private contract completely outside their aegis. Thus, it is to be judged by the antitrust principles applicable to any other series of contracts. *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954).

Although respondents have seriously abused the monopoly power acquired through the peeling machinery patent, we do not deem it necessary to deny to them the future fruits of the patents by an order denying their right to file infringement suits or requiring compulsory royalty-free licensing, as proposed by complaint counsel. Regardless of the facts which have given rise to the need for an order, Federal Trade Commission proceedings are not punitive and it is axiomatic that its "* * * orders should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public; * * *" *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, 217 (1933). The "evil" which here exists can be corrected with a far less drastic remedy than that advocated by complaint counsel.

Affirmatively, our order must be directed toward the goal of restoring and insuring future workable competition between respondents' foreign purchasers and domestic lessees. To achieve this end, the respondents must be required and directed to treat both groups equally. Our study of the record convinces us that the minimum order to effect relief in this situation will require these respondents to offer their machines for sale to domestic canners at the same prices and under the same conditions and terms as are presently offered to foreign canners. Such an order will permit to respondents and their customers a desirable flexibility, for it permits the continuation of the leasing system, pursuant to which some canners may choose to continue to operate.

THE MONOPOLIZATION CHARGES

The Alleged Unlawful Agreements with Inventors as to Existing and Future Inventions:

Complaint Paragraph Nine (a) charges that since February 1951 the respondents, by means of agreements with various individuals, have obtained exclusive rights to exploit patented shrimp processing machines and have in most instances never attempted to produce or market said machines. The paragraph charges that such agreements were entered with Robert J. S[a]manie, James L. Self, LeRoy Ernest Demarest, Stephen D. Pool, and Walter Peuss.

In Paragraph Nine (b) of the complaint, respondents are alleged to have entered agreements with the same individual inventors, excepting Walter Peuss, whereby the inventors agree to disclose, assign or license all future inventions of shrimp processing machinery to the respondents.

We have conducted a detailed examination of all of the evidence adduced in support of and rebuttal of these charges and have concluded therefrom that while the allegation has been, at least in part, sustained, the evidence is not sufficient to support an order to cease and desist. This is true even when the proof adduced is considered as a part of the entire complex of respondents' activities illustrated by the whole record. The question is a close one, for no more effective method of curtailing competition can be imagined than the acquisition of an exclusive right to control competing machinery.

Some of the alleged unlawful agreements were entered by the respondents with its own employees and gave respondents certain rights with respect to shrimp processing machinery developed while the employee was working for the respondents. Other agreements or licenses secured covered machinery such as cleaners, separators, or deheaders, which could be considered as complementary to the shrimp peeling machinery then being developed by the respondents rather than as directly competitive therewith. With a few exceptions the respondents' agreements with the various inventors did not result in the development of marketable machines. In essence, the respondents' activities constitute little more than the normal efforts of a manufacturer to secure the rights to develop any new and promising inventions in its field. When carried to extreme and coupled with other anti-competitive acts and practices, such activity can clearly constitute a violation of the antitrust laws, *e.g.*, *United States* v. *Besser Mfg. Co.*, 96 F. Supp. 304 (E.D. Mich. 1951), *aff'd*, 343 U.S. 444 (1952). But respondents' monopoly position in the shrimp processing machinery field is the result of their own invention, development and exploitation of the first shrimp peeling machine capable of economic employment in a shrimp cannery. While they have been able to improve this machine and consequently their hold upon the market by reason of the agreements and licenses secured from various inventors, this activity has not been shown to constitute a violation of law.

The Alleged Harassment of Developers and Users of Competing Shrimp Peeling Machines:

In complaint Paragraph Nine (c) respondents are alleged to have harrassed, by patent infringement suits or threats of suits, purchasers, lessees, and manufacturers of a competitive shrimp peeling machine patented in 1957 by one Paul C. Skrmetta. It is alleged that these

activities were undertaken "with full knowledge" of the fact that the Skrmetta machine had been patented.

In 1957, Raphael Q. Skrmetta, the president of Deepsouth Packing Company, Inc., a corporation principally engaged in packing and selling canned shrimp, secured a patent on a shrimp peeling machine. The first machine developed and manufactured was retained and used at the plant of the Deepsouth Packing Company. In August of 1957 a machine was placed in the plant of Battistella Canning Company, pursuant to a lease arrangement. On November 25, 1957, the respondents filed a suit for patent infringement against Battistella, Raphael Q. Skrmetta, his father Paul C. Skrmetta, and Deepsouth Packing Company. At Battistella's request the machine was forthwith returned to Deepsouth Packing Company, where it is presently installed.

In October of 1957, Skrmetta shipped his third machine to Bay Center, Washington, for installation on an approval lease in the canning plant of Harbor Seafoods, Inc. On November 23, 1957, respondents notified Harbor Seafoods by telegram that they were filing suit against Skrmetta, Battistella, et al., for patent infringement. On November 25, 1957, respondents notified all of their West Coast lessees that the suit had actually been filed. In January 1958, respondents filed a suit for patent infringement against National Blowpipe & Manufacturing Company, Inc., the company which had been manufacturing the machines for Skrmetta.

As a result of the various notices from the respondents, Harbor Seafood refused to lease the Skrmetta machine and it was sold outright to Edwin A. Kaakinen and John Close. Skrmetta produced an additional seven machines, of which five were shipped to domestic shrimp canners and two were shipped to foreign canners.

In February 1958 respondents filed suits against Edward Kaakinen, who operated a shrimp cannery as Kaakinen Fish Company at Westport, Washington. As pointed out in an earlier section, Mr. Kaakinen had been a lessee of the respondents' peeling equipment since October 15, 1956, and was in fact their first lessee on the West Coast. On December 12, 1957, Kaakinen had purchased the Skrmetta machine which Harbor Seafoods had refused to accept.

The trial of the respondents' case against Kaakinen was held in Takoma, Washington, in August 1959 before United States District Judge George Boldt. On April 11, 1960, the district judge issued his decision, holding the Skrmetta machine infringed the patent rights of the respondents and enjoining the defendants from further use of the Skrmetta machines. The defendants appealed to the court of appeals for the ninth circuit and on January 22, 1962, that court sustained the district court and dismissed the appeal. 301 F. 2d 170. Rehearing was

denied April 10, 1962 (301 F. 2d 173) and the Supreme Court denied certiorari on October 8, 1962 (371 U.S. 823).

As a result of this successful suit, the respondents secured injunctions against all domestic canners who had purchased or were using a Skrmetta machine. Respondents secured an end to the use of the two machines which had been sold to foreign producers by the effective expedient of purchasing them from their owners.

While certainly not *res judicata* of the issues raised by complaint Paragraph Nine (c), the court decisions in respondents' infringement case against Kaakinen are extremely persuasive. As we have stated, the public policy of the United States, as expressed in its patent laws, grants to patentees the right to prevent others from manufacturing, selling or using the article patented. The laws go further and provide affirmatively:

> No patent owner otherwise entitled to relief for infringement * * * of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having * * * (3) sought to enforce his patent rights against infringement. * * * (35 U.S.C. § 271(d).)

The complaint in this proceeding issued about one month after the April 11, 1960, district court decision holding that the Skrmetta machines infringed respondents' patent right. The affirmance of that decision and the denial of certiorari in 1962 preclude a finding by this Commission that the respondents' infringement suits were not brought in good faith for the purpose of protecting their patent rights. Moreover, to order respondents to cease filing suits against infringers would constitute a complete confiscation of their patent rights. Such a remedy is too drastic under the circumstances shown here. Moreover, the "clean hands" doctrine which denies relief to a patentee shown to have misused his patents in violation of the antitrust laws (*e.g.*, *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U.S. 488 (1942)), looms as a formidable obstacle to the successful future prosecution of infringement suits by respondents.

The Debenture Issue:

Complaint Paragraph Nine (d) alleges that respondents' leases require lessees to purchase "non-negotiable debentures" issued by respondents in $500 denominations and bearing interest of 5 percent per annum. The required number of debentures varies with the type of machine leased, as follows:

Machine type	*No. of debentures*	*Total debenture amount per machine*
Shrimp Peeler	12	$6,000
Shrimp Cleaner	2	1,000
Shrimp Separator	1	500
Shrimp Deveiner	6	3,000

Respondents admit that up to July 1961 all of their machine leases, except those for peeled meat graders, required, as a condition of the lease, the purchase of debentures at the time the lessee signed the initial lease. In July of 1961, the debenture requirement was discontinued as a result of a disagreement with the Securities & Exchange Commission as to whether the debentures constituted an exempt private offering under the Securities Act of 1933.

The evidence reveals that all debentures issued paid the same rate of interest, 5 percent, and all required respondents to establish a sinking fund for the purposes of retirement. The debentures were negotiable in a sense, since respondents would reissue a transferred debenture to the new holder upon application.

It is complaint counsel's theory that the debenture requirement is unlawful as a part of the individual respondents' over-all effort to impede and discourage would-be competitors in shrimp processing machinery. They argue that the system had "* * * partnership characteristics in that debenture holders might not get their money back if The Peelers Company did not prosper, and this in itself is obviously a potential deterrent to a competitor seeking to interest and existing lessee in renting other equipment."

Respondents contend that the sole and only purpose of the debentures was to finance the production of machinery and when their need for such financing ceased, the issuing of debentures was abandoned. Respondents appear to have the better of this argument, for complaint counsel's own evidence shows that the purpose of the debenture system was to finance the construction of machinery. Of course, this innocent purpose would not save the system from a finding of illegality if the record demonstrated that its actual effect was to suppress competition. But the record does not so show. The respondents' lessees purchased Skrmetta machines without regard for the safety of their debenture investment. The record contains no testimony from either shrimp processors or manufacturers of shrimp processing machinery to the effect that the debentures were a material competitive consideration. In keeping with the foregoing conclusions, we hold that complaint counsel has failed to show that the debenture system formerly utilized by the respondents is unreasonable or unlawful in any way.

THE CONSPIRACY CHARGE

In complaint Paragraph Ten, the corporate respondent, Grand Caillou, and the individual respondents are charged with having "* * * agreed and combined among themselves to adopt and carry out the unfair methods of competition and unfair acts and practices hereinbefore described and set forth in Paragraph Nine." As we view

this proceeding, there is no necessity for a decision that a conspiracy existed between Grand Caillou and the individual respondents to perform the acts found herein to be unlawful. A complete remedy can be effected by an order issued to the respondents responsible for the shrimp processing machinery phase of the Lapeyre family's operations. An order responsive to Paragraph Ten could only require that the respondents, including Grand Caillou and its president, cease agreeing or conspiring to carry out the unlawful acts perpetrated by the individual respondents in the distribution of shrimp machinery. Such an order would add little in the way of protection to the public and may well engender some confusion, for the order we shall direct to the individual respondents flatly prohibits the performance of certain acts without regard to the manner of their conception or whether performed singly or in concert. In holding that a formal finding of conspiracy to perform unlawful acts is unnecessary, we are not shutting our eyes to the obvious fact that both shrimp canning and the manufacture and distribution of shrimp processing machinery are the enterprises of a single family with the same persons, that is, the individual respondents, in control and direction of both enterprises. While conceivably such interaction of interests may constitute a conspiracy, a formal finding to that effect is not required in the circumstances here presented. The proceeding will be dismissed as to the corporate respondent Grand Caillou and as to Emile M. Lapeyre in his capacity as president of the corporate respondent.

CONCLUSIONS

It is the Commission's conclusion and ultimate finding that the individual respondents have seriously injured the competitive opportunities of all domestic shrimp canners by selling their patented shrimp processing machinery to foreign shrimp canners, thereby granting the foreign competitors a significant competitive advantage over domestic canners in both domestic and foreign markets for canned shrimp products. It is also our conclusion and ultimate finding that the respondents have grievously injured and curtailed the competitive opportunities of shrimp canners located in the states of Oregon, Washington and Alaska by charging them a discriminatory leasing rate for patented shrimp processing machinery which is approximately double the rate charged to other domestic shrimp canners.

The acts of the respondents constitute serious abuses of the monopoly rights granted to them under the United States patent laws, are in derogation of the public interest and are hence unfair methods of compe-

tition and unfair acts or practices violative of Section 5 of the Federal Trade Commission Act.

Commissioner Elman has filed a separate opinion.

Commissioner Reilly did not partcipate for the reason that he did not hear oral argument.

Separate Opinion

By Elman, *Commissioner:*

Respondents in this case are The Peelers Company, Grand Caillou Packing Company, and the members of the Lapeyre family, who control the two companies. Through Peelers, the family, by virtue of holding certain patents, enjoys a complete monopoly of the manufacture and distribution of shrimp processing machinery used in shrimp canning. Through Grand Caillou, the family is engaged in the shrimp canning business on the Gulf Coast. Due to the high cost of peeling and cleaning shrimp by hand, respondents' shrimp processing machinery is virtually an economic necessity for shrimp canners. Peelers refuses to sell this machinery to any domestic shrimp canner, but, instead, leases it to the domestic canners. The lease charge, however, is twice as high for canners located in the Northwest as for canners located on the Gulf Coast. Respondents' explanation for the differential is that the shrimp processed by the Northwest canners requires (because of its smaller size) about twice as much hand labor per pound to process as the larger shrimp processed in the Gulf Coast canneries; and respondents' machinery is a substitute for hand labor.

In these circumstances, what are the duties of respondents under Section 5 of the Federal Trade Commission Act in the leasing of their shrimp processing machinery? Is their "discriminatory" leasing practice an unfair method of competition? An affirmative answer to this question could readily be given if, as the Commission in its opinion finds, respondents' purpose was to protect Grand Caillou from the competition of the Northwest canners. However, while it seems clear both that the Gulf canners are in competition with the Northwest canners and that the latter have found respondents' additional lease charge severely burdensome, there is no indication that Grand Caillou was anything but an incidental beneficiary of the differential. For one thing, the manufacture and leasing of shrimp processing machinery represent the more profitable and more important aspect of respondents' business interests than Grand Caillou, and it seems most unlikely that the interests of Grand Caillou would weigh heavily in respondents' decisions concerning their shrimp processing machinery business.

Moreover, if respondents desired to give Grand Caillou a boost, why did they not grant Grand Caillou a discount or rebate of some sort on its lease of their shrimp processing machinery in preference to the other Gulf Coast shrimp canners? So far as appears, respondents have not utilized their position as the sole supplier of shrimp processing machinery to confer any competitive advantage on Grand Caillou vis-a-vis its Gulf Coast competitors. Nor does the record show either that Grand Caillou was specially threatened by competition from the Northwest canners, or that Grand Caillou's competitive position was specially benefited by Peelers' differential leasing arrangement, or that the protection or improvement of Grand Caillou's business was otherwise any part of the purpose or effect of the differential. Indeed, if the Commission is correct in its conclusion on the charge of unlawful discrimination by respondents between domestic and foreign shrimp canners, namely, that respondents' practice of freely selling its machinery to foreign shrimp canners while refusing to sell to domestic canners inflicted injury on the domestic canners—Northwest and Gulf Coast alike, including Grand Caillou—then it seems quite clear that respondents managed their shrimp processing machinery business with little regard for the impact of their management decisions on the fortunes of Grand Caillou.

Although the Commission's opinion in this case nowhere mentions the Robinson-Patman Act, the rationale of the decision (apart from the question, discussed above, of the role of Grand Caillou) is a Robinson-Patman rationale. The Commission views respondents' differential lease charge as a form of price discrimination inflicting injury on competitors (the Northwest shrimp canners) of favored customers (the Gulf Coast shrimp canners), and therefore unlawful. While unfair practices in conflict with the policy of the Robinson-Patman Act may be suppressed under Section 5 of the Federal Trade Commission Act in a case where, as here, the Robinson-Patman Act is inapplicable for jurisdictional reasons [1] (respondents having leased rather than sold their machinery), I question whether the present case presents the kind of problem with which the Robinson-Patman Act was designed to deal. In the first place, whether there is discrimination here depends on how one views the transaction. If respondents may be deemed to be charging for the use of their machinery according to the number of shrimp processed, there is no discrimination between the Northwest and Gulf Coast canners; the per shrimp charge for using respondents' machinery is the same for all lessees. The question

[1] See, e.g., *Grand Union Co.* v. *F.T.C.*, 300 F. 2d 92 (2d Cir. 1962); *American News Co.* v. *F.T.C.*, 300 F. 2d 104 (2d Cir. 1962).

becomes whether it is reasonable for respondents to charge for use of their machinery on such a basis.

In the second place, the circumstances of this case seem far removed from the central concerns of Congress in enacting the Robinson-Patman Act. If the role of Grand Caillou is discounted, as I think it must be, it becomes clear that there is no problem here of large buyers demanding and receiving price concessions to the detriment of their competitors. The problem is the converse. A supplier having a complete monopoly of essential equipment is charging what the traffic will bear, with, as it happens, discriminatory results. Cf. Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L. J. 19, 24 (1957).

The only substitute for respondents' machinery, and hence the only possible source of challenge to their monopoly, is hand labor. If respondents were to increase their lease charges beyond a certain point, hand labor would become competitive with their machinery; but since hand-labor costs in the Northwest canneries, due to the size of the shrimp processed there, are approximately twice as high as the same costs in the Gulf Coast region, respondents, without increasing their charges to the point at which competition from hand labor would be invited, may with impunity charge the Northwest canners at least twice as much as the Gulf Coast canners. The differential lease charge thus enables respondents to maximize their profits. For if respondents charged the Northwest canners no more than they charge the Gulf Coast canners, they would obviously be earning less overall, while if they charged the Gulf Coast canners the same high rate as they charge the Northwest canners, the former might be driven to substitute hand labor for respondents' machinery.

In short, the source of the discriminatory effects and of the consequent injury to the Northwest canners in this "secondary line" case is not inequality of bargaining power among customers. It is, rather, the conjunction of two factors: the cost differential in the processing of shrimp by hand as between the Northwest canners and the Gulf Coast canners; and respondents' monopoly of shrimp processing machinery, which enables the differential in shrimp processing costs to be maintained notwithstanding the substitution of machinery for hand labor. If respondents did not have a monopoly of shrimp processing machinery, presumably competition would drive the price of such machinery to the Northwest canners down toward the level of the Gulf Coast canners, since the cost of processing shrimp by machine is the same regardless of the size of the shrimp. Conceptually, then, the problem of this case is not one of Robinson-Patman-type discrimination, but of the duty, if any, of a lawful monopolist to conduct its busi-

ness in such a way as to avoid inflicting competitive injury on a class of customers.

Respondents have a monopoly not only in the sense that every lawful patent confers a monopoly of the patented article, but also in an economic sense. (See my separate opinion in *American Cyanamid Co.*, F.T.C. Docket 7211 [63 F.T.C. 1747, 1892] (decided Aug. 8, 1963).) Respondents enjoy a complete monopoly of an economically significant and commercially important product market, *i.e.*, machinery for processing shrimp for canning purposes. Firms possessing monopoly power may not be *ipso facto* unlawful monopolists under the antitrust laws, but the permissible limits of lawful business conduct for such firms are more narrowly circumscribed than in the case of firms not possessing such economic power. See *United States* v. *Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945); *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521. They are accordingly subject, under the antitrust laws, to some of the obligations of fair and equal treatment borne by publicly regulated utilities. See, e.g., *Associated Press* v. *United States*, 326 U.S. 1; *United States* v. *Terminal R.R. Assn.*, 224 U.S. 383. A course of conduct that would be lawful if engaged in by a non-monopolist may, therefore, be an unfair method of competition when engaged in by a monopolist.

Had machinery for the processing of shrimp for canning purposes not been invented, the Northwest shrimp canners, owing to their high labor costs, would today inevitably be at a serious competitive disadvantage vis-a-vis the Gulf Coast canners. But such machinery has been invented, and because it processes shrimp at the same cost of operation regardless of the size of the shrimp, it has eliminated any inherent disparity in processing costs as between the Gulf Coast and Northwest canners. Thus, if respondents charged the Gulf Coast and Northwest canners equally, the Northwest canners would be in a position to compete with the Gulf Coast canners on more or less equal terms. Respondents, however, by being able to charge, and by charging, a monopolist's discriminatory price, have prevented the equalization of processing costs made possible by the invention of shrimp processing machinery, and have thereby prevented the Northwest canners from competing effectively. The Northwest canners have been forced to the wall, and may well be eliminated as a competitive factor in the shrimp canning industry.

The short of it is that respondents' insistence on charging a monopoly price may well result in the destruction of a substantial segment of the shrimp canning industry. This result, which is not dictated by efficiency—for, to repeat, the cost of processing shrimp by machine

is the same regardless of the size of the shrimp—but by monopoly power, is clearly opposed to the objectives of antitrust policy. The right of a monopolist to exploit his monopoly (whether such monopoly is conferred by patents or otherwise) by charging a monopolist's discriminatory price does not, in my opinion, include the right to destroy or cripple a major segment of an industry, but must yield in such a case to the policy of competition embodied in the antitrust laws. Cf. *United States* v. *Masonite Corp.*, 316 U.S. 265, 277; *Motion Picture Patents Co.* v. *Universal Film Mfg. Co.*, 243 U.S. 502, 514. In the circumstances, respondents' refusal to treat the Northwest and the Gulf Coast shrimp canners on equal terms is an abuse of monopoly power. It has substantially and unjustifiably injured competition in the shrimp canning industry. It is therefore an unfair method of competition forbidden by Section 5. Cf. *F.T.C.* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 394–95.[2]

Final Order

This matter having been heard by the Commission upon cross-appeals from the hearing examiner's initial decision, which in part sustained and in part dismissed the complaint, and upon briefs and oral argument in support of and in opposition to said appeals; and

The Commission, for the reasons stated in the accompanying opinion, having determined that the exceptions of both parties should be denied in part and granted in part and that the initial decision of the hearing examiner should be vacated and set aside:

It is ordered, That the hearing examiner's initial decision be, and it hereby is, vacated and set aside; the Commission's findings of fact and conclusions appear in the accompanying opinion.

It is further ordered, That Paragraphs Nine (a), (b), (c), (d), and Paragraph Ten of the complaint be, and they hereby are, dismissed.

It is further ordered, That the complaint be dismissed in its entirety as to individual respondent Andre C. Lapeyre, now deceased; individual respondent Emile M. Lapeyre in his capacity as president of Grand Caillou Packing Company, Inc.; and as to corporate respondent Grand Caillou Packing Company, Inc.

It is further ordered, That the following be, and it hereby is, entered as the Commission's order to cease and desist:

It is ordered, That the respondents, Emile M. Lapeyre, Fernand S. Lapeyre, James M. Lapeyre, Felix H. Lapeyre, and Emile M.

[2] So far as the charge relating to unlawful discrimination by respondents between foreign and domestic shrimp canners is concerned, I am compelled to dissent from the Commission's finding of violation. The record tells us altogether too little about the costs of foreign shrimp canners to justify an inference of competitive injury. Nor is it at all clear to what extent being able to purchase rather than lease respondents' shrimp processing machinery represents a net cost savings to the foreign canners.

Lapeyre, Jr., individually, as copartners trading and doing business as The Peelers Company, and as representatives of all of the partners in The Peelers Company, and their agents, representatives, and employees, directly or indirectly, through any existing or succeeding corporation, partnership, sole proprietorship, or other device, in connection with the distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any shrimp peeling, cleaning and separating machinery or improvements thereto now or hereafter controlled by respondents, do forthwith cease and desist from:

(1) Discriminating between lessees of such machinery by charging higher rental or use rates to any lessee than are charged to any other lessee.

For the purposes of this proceeding, lease or rental terms which result in any lessee paying a higher rate than the rate charged any other lessee for use of respondents' machines for the same period of time or through the same number of mechanical revolutions or operations shall be deemed discriminatory.

(2) Discriminating between foreign and domestic shrimp processors by refusing to sell such machinery to domestic processors upon the same terms and conditions afforded to foreign processors.

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 contained herein.

Commissioner Elman's views are stated in a separate opinion. Commissioner Reilly did not participate for the reason that he did not hear oral argument.

IN THE MATTER OF

GEORGIA-PACIFIC CORPORATION ET AL.

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

Docket C-751. Complaint, June 4, 1964—Decision, June 4, 1964

Consent order prohibiting the Nation's sixth largest producer of coarse paper—which, between 1947 and 1963 had acquired at least 45 lumber, plywood and paper companies—and its wholly owned subsidiary from acquiring, without prior Commission approval, any company engaged in producing, converting or selling (1) coarse paper or finished products thereof or (2) container-