Commissioner Reilly concurring in the decision except for the holding that respondent advertising agency, W. B. Doner & Company, should be included in the order to cease and desist. Commissioner MacIntyre dissented as to that portion of the decision relating to fictitious pricing, and has filed a dissenting opinion.

IN THE MATTER OF

JOHN A. GUZIAK TRADING AS SUPERIOR IMPROVEMENT COMPANY

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

Docket 8614. Complaint, Jan. 20, 1964—Decision, June 28, 1965

Order requiring a Little Rock, Ark., distributor of aluminum and simulated stone siding materials to cease making deceptive pricing and discount representations, falsely guaranteeing its products, misrepresenting that it is connected with any aluminum manufacturer, and representing to any prospective purchaser that his house will be used as a "model home."

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 John A. Guziak, an individual, formerly trading through the instrumentality of General Aluminum Company, a corporation, and now trading through the instrumentality of Superior Improvement Company, a corporation, hereinafter referred to as the respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent John A. Guziak is an individual formerly trading through the instrumentality of General Aluminum Company, a Tennessee corporation with his principal office and place of business located at 630 Third Avenue, South, in the city of Nashville, State of Tennessee, and now trading through the instrumentality of Superior Improvement Company, an Arkansas corporation, with his principal office and place of business located at 1605 Main Street, in the city of Little Rock, State of Arkansas.

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

or indirectly, the purchase of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations or misrepresentations prohibited in paragraph A. above.

Respondent shall, within sixty (60) days after service upon him of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which he has complied with the order to cease and desist.

III

Respondent W. B. Doner & Company and its officers, agents, representatives and employees, directly or through any corporate or other device in connection with the offering for sale, sale or distribution of foods, drugs, cosmetics or devices, do forthwith cease and desist from:

A. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents, through the use or display of any words, emblem, seal, symbol, certification, or otherwise, that merchandise has been approved or endorsed by an independent organization engaged in protecting the interests of consumers or in determining objectively the merits of such merchandise: *Provided*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondent to establish either that such representation is truthful in every material respect or that respondent neither knew nor had reason to know of the falsity of such representation.

B. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations or misrepresentations prohibited in paragraph A. above.

Respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

It is further ordered, That the charges contained in paragraphs seven, nine, twelve and thirteen of the complaint be, and they hereby are, dismissed.

being used only as a means to induce resistant purchasers into the buying of said merchandise under the mistaken impression that they were receiving some sort of special price because of their willingness to allow their homes to be used for this purpose and that they would receive a bonus of $100 for each sale made by the respondent as a result of using that person's home as a model.

(2) Purchasers do not receive enough, if any, bonus money to offset the cost of their siding job.

(3) Respondent is not a manufacturer of siding materials.

(4) Aluminum siding materials sold by respondent are not manufactured by Alcoa, Kaiser or Reynolds Aluminum Company.

(5) Respondent is not connected or affiliated with Reynolds Aluminum Company.

(6) Aluminum siding sold by respondent is not applied by factory trained personnel.

(7) Aluminum siding sold by respondent will require painting and maintenance.

(8) The simulated stone siding sold by respondent will chip or crack, will require maintenance, and is not completely fireproof.

(9) Respondent's guarantee is not unconditional and it fails to set forth the nature and extent of the guarantee and the manner in which the guarantor will perform.

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

PAR. 6. In the conduct of his business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of aluminum and simulated stone home and building siding materials of the same general kind and nature as that sold by respondent.

PAR. 7. The use by the respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair 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.

of aluminum and simulated stone home and building siding materials to the public.

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

PAR. 4. In the course and conduct of his business and for the purpose of inducing the purchase of his products, respondent has, by statements and representations in advertisements in newspapers, in direct mail advertising, and by direct oral solicitations, represented, directly or by implication:

(1) That persons who allowed the siding materials installed by respondent to be used for model home demonstration purposes would receive,

(a) A special discount price from respondent's usual and regular price, and,

(b) A bonus of $100 for each sale made by respondent as a result of using that person's home as a model.

(2) That purchasers can be assured of receiving enough bonus money from the use of their home as a model to offset the cost of their siding job.

(3) That respondent is a manufacturer of siding materials and consequently can offer such materials at lower prices.

(4) That aluminum siding materials sold by respondent are manufactured by Alcoa, Kaiser or Reynolds Aluminum Company.

(5) That respondent is connected or affiliated with Reynolds Aluminum Company.

(6) That respondent's siding materials are applied by factory trained installers.

(7) That aluminum siding sold by respondent will never need any painting and will never require maintenance.

(8) That the simulated stone siding sold by respondent will never chip or crack, will never require maintenance and is completely fireproof.

(9) That the application of siding materials by the respondent is unconditionally guaranteed.

PAR. 5. In truth and in fact:

(1) Respondent did not intend to use, nor did he use, the home of any of his purchasers for demonstration purposes, this statement

Tennessee, and on September 25, 1964, at Hopkinsville, Kentucky, at which testimony and other evidence were offered in support of and in opposition to the allegations of the complaint. At the conclusion of the hearings on September 25, 1964, the record was closed and in due course both parties filed proposed findings of fact, conclusions of law and briefs in support thereof. Consideration has been given to the proposed findings of fact, conclusions of law and briefs submitted by the parties and all proposed findings of fact hereinafter not specifically adopted are rejected. Based upon the entire record and his observation of the witnesses, the hearing examiner hereinafter makes his findings of fact, conclusions and order.

The Complaint

It should be noted at the outset that under the complaint as drafted, John A. Guziak, as an individual, is the sole respondent in this proceeding. Although the General Aluminum Company, a corporation, and Superior Improvement Company, a corporation, are referred to in the caption of the complaint, they were not joined as named parties in this proceeding, but were merely added for descriptive purposes to typify the individual respondent trading as said companies. At the opening of the hearings in Little Rock, Arkansas, on September 15, 1964, counsel for the individual respondent moved to dismiss this proceeding for the reason that the acts and practices complained of were the acts of the aforesaid corporations and that the individual respondent was carrying out his duties as an officer of said corporations. It was also counsel for respondent's position that without the two corporate entities being joined as parties to this proceeding, the complaint did not lie against the individual respondent. In denying the motion to dismiss, the hearing examiner expressed the opinion that notwithstanding the non-joinder of the two corporate entities, the complaint would be in proper form provided that it could be established that the individual respondent actively formulated, directed, managed, and controlled the policies of both of the corporations, or was aware of, responsible for or personally participated in the acts and practices complained of herein. The examiner, however, believes that it would have been preferable practice to have joined the corporate entities in this proceeding, but as indicated, the failure to do so would not be fatal.

Paragraph Four, the charging paragraph of the complaint, reads as follows:

PARAGRAPH FOUR: In the course and conduct of his business and for the purpose of inducing the purchase of his products, respondent has, by

Mr. DeWitt T. Puckett supporting the complaint.

Mr. Claude Carpenter and *Moses, McClellan, Arnold, Owen & McDermott* by *Mr. Harry E. McDermott*, Little Rock, Ark., for respondent.

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER

DECEMBER 24, 1964

This proceeding was commenced by the issuance of a complaint on January 30, 1964, charging the respondent, John A. Guziak, an individual trading as General Aluminum Company, a corporation, and as Superior Improvement Company, a corporation, with unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act, by making false and deceptive statements and representations in newspapers and direct mail advertisements and in oral solicitations regarding prices, discounts, bonuses, guarantees and other specifically enumerated claims in the sale of aluminum and simulated stone siding materials.

After being served with the complaint, the respondent appeared by counsel and on March 31, 1964, filed his answer admitting a number of the specific allegations in the complaint, but denying generally that he, as an individual, or to his knowledge any of the corporations with which he has been connected, made any of the statements and representations alleged in the complaint.

By order dated April 7, 1964, the hearing examiner scheduled a prehearing conference in this matter for the purposes of, among other things, simplification and clarification of the issues; obtaining stipulations, admissions of fact and authenticity of documents; exchanging lists of witnesses and documents; and the scheduling of the time and places of the hearings. As a result of the prehearing conference, counsel for both parties exchanged lists of witnesses and documents, agreed upon the time and places of the hearings and various other matters.

By order of the Acting Director, Hearing Examiners, dated August 24, 1964, the undersigned hearing examiner was substituted for Loren H. Laughlin, the hearing examiner heretofore appointed to take testimony and receive evidence in this proceeding who because of illness was unavailable.

Hearings were held in this matter on September 15, 16, 17, 1964, in Little Rock, Arkansas, September 21 and 22, 1964, at Nashville,

was not admissible. In fairness to complaint counsel, it should be noted that he was substituted in this proceeding on March 6, 1964, several months after the complaint was filed, and did not participate in the drafting of the complaint.

FINDINGS OF FACT

1. The respondent, John A. Guziak, is an individual engaged in advertising, offering for sale, sale and distribution of aluminum and simulated stone home and building siding materials to the public (Tr. 19).

2. In the latter part of 1960, respondent organized the General Aluminum Company, a Tennessee corporation, with an office and warehouse located at 630 Third Avenue, South Nashville, Tennessee, for the purpose of engaging in the aforesaid business (Tr. 21). General Aluminum Company closed its office and ceased operations in October or November 1962 (Tr. 21, 38, 54–56).

3. In the latter part of 1962 or early 1963, respondent left Tennessee and organized a similar type of business in Arkansas under the corporate name Superior Improvement Company, an Arkansas corporation, with an office and warehouse at 1605 Main Street, Little Rock, Arkansas. That business is still active (Tr. 21, 38).

4. Respondent Guziak is president of both corporations, sole owner of all the stock of each corporation and formulates, directs, manages and controls the policies, acts and practices of the two corporations (Tr. 20–24, 55–56).

5. Respondent Guziak was never a manufacturer of aluminum or simulated stone siding materials (Tr. 39, 44, 67–68), but purchased them during all times covered by the complaint herein from the following suppliers (Tr. 40–41, 43–44):

U.S. Aluminum Siding Corporation,
Franklin Park, Illinois
Terox Corporation of America,
Franklin Park, Illinois
Brixite Corporation,
South Carney, New Jersey
Pfeifer Wire Company,
Tuscaloosa, Alabama
Wolverine Corporation,
Michigan

Said products are shipped by the aforesaid suppliers from their above-mentioned addresses to respondent Guziak's warehouses in Nashville, Tennessee, or in Little Rock, Arkansas (Tr. 39–40). As materials are required for various jobs, the carpenters or workmen

statements and representations in advertisements in newspapers, in direct mail advertising, and by direct oral solicitations, represented, directly or by implication:

(1) That persons who allowed the siding materials installed by respondent to be used for model home demonstration purposes would receive,

(a) A special discount price from respondent's usual and regular price, and,

(b) A bonus of $100 for each sale made by respondent as a result of using that person's home as a model.

(2) That purchasers can be assured of receiving enough bonus money from the use of their home as a model to offset the cost of their siding job.

(3) That respondent is a manufacturer of siding materials and consequently can offer such materials at lower prices.

(4) That aluminum siding materials sold by respondent are manufactured by Alcoa, Kaiser or Reynolds Aluminum Company.

(5) That respondent is connected or affiliated with Reynolds Aluminum Company.

(6) That respondent's siding materials are applied by factory trained installers.

(7) That aluminum siding sold by respondent will never need any painting and will never require maintenance.

(8) That the simulated stone siding sold by respondent will never chip or crack, will never require maintenance and is completely fireproof.

(9) That the application of siding materials by the respondent is unconditionally guaranteed.

During the course of the hearings, it developed that additional statements and representations regarding "free gift offers" and "the terms and conditions of financing" had been made by the respondent. Counsel for respondent objected to this line of testimony on the grounds that these matters were not included within the scope of Paragraph Four of the complaint. Complaint counsel was unable to relate these matters to any of the nine (9) specific sub-paragraphs of Paragraph Four, but took the position that such testimony fell within the overall scope of Paragraph Four. Upon reading Paragraph Four, the hearing examiner noted that the usual "catch-all" language was not included. In previous complaints, the examiner has observed that it was Commission practice to include, immediately after the introductory sentence and before the specifically enumerated sub-paragraphs, the following language:

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

(See *In the Matter of Solmica, Inc.*, Docket No. C–817 [66 F.T.C. 566].) In view of the absence of such or similar language in the subject complaint, the examiner ruled that unless the additional matter was reasonably related to one of the nine sub-paragraphs of the complaint, such testimony or evidence would not be material and

these contracts were entered into by one of his salesmen who did not have authority to enter into contracts in Kentucky or to solicit jobs in Kentucky (Tr. 70–72, 623), but the record shows that the contract with Thomas and Nora Glass was personally signed by respondent (CX 44). In cases where respondent signs a contract, he has seen the customer (Tr. 26). Furthermore, Thomas and Nora Glass testified Guziak personally negotiated the transaction at their home in Kentucky (Tr. 550–570). With regard to the other two contracts performed in Kentucky, it appears that all contracts had to be approved by either respondent or one of his two office secretaries who had authority to approve or reject contracts (Tr. 25, 57, 75), and these contracts were so approved (Tr. 72–75). It should also be noted that each contract provided a space at the lower left hand corner for it to be "Accepted for General Aluminum Company," and the salesman merely signed in a box entitled "Order taken by" (CX 43, 44). Although it appears that in these two cases his agents negotiated these contracts without his knowledge and contrary to his instructions, the approval of these contracts by his office (Tr. 75), the release of the materials to the subcontractors by his office (Tr. 77) and respondent's subsequent action in permitting the work to be completed (Tr. 73, 622–625), constitutes ratification of the salesman's acts. In view of the foregoing, the examiner finds that of the three identified jobs performed in Kentucky, respondent personally executed one and either he or one of his office staff approved the other two contracts. Accordingly, to the extent of these three or four contracts, the examiner further finds that the respondent was doing business in Kentucky.

9. Respondent, trading as General Aluminum Company and Superior Improvement Company, contacts his prospective customers in four ways: by telephone solicitation (Tr. 28, 60); by direct approach, that is, respondent Guziak or one of his salesmen or both together contact home owners in person (Tr. 28); by newspaper advertising (CX 19); and by "direct mailing" of a circular or brochure to prospective customers (CX 8, 13, 20, 27, 28, 39). The last method is used most frequently.

10. The "direct mailing" of the circular or brochure is done by respondent's wife from Medford, Wisconsin, to home owners in Tennessee and Arkansas (Tr. 604, see also postmark on CXs 8, 13, 20, 27, 28). Medford, Wisconsin, is respondent's "home town" and where he has maintained a residence from 1946 to the present (Tr. 517). The circulars or brochures contain, on one side, pictures of houses to which siding materials appear to have been attached and various statements relative to such materials. On the other side of the circu-

who apply them pick them up at respondent's warehouses and haul them to the homes or buildings of respondent's customers. The carpenters or workmen who perform the labor and transport the materials are paid for their services by respondent on a job or contractual basis (Tr. 45–46, 68, 69, 228–229, 239).

6. Respondent, trading as General Aluminum Company and Superior Improvement Company, employs only two office girls and some part-time telephone solicitors paid by the hour (Tr. 51). The carpenters or workmen who perform the labor are subcontractors; the man in charge of the crew is paid on the basis of so much a square and he in turn pays his own workers (Tr. 45–56). Respondent's salesmen are paid on a commission basis, do not work full time and may be working for some other corporation at the same time (Tr. 46–50). Respondent supplies his salesmen with blank contract forms and sample cases of the materials (Tr. 62–63; CX 34, 38 a–c; RX 2, 3). Respondent instructs his salesmen on what to put in the contract and not to misrepresent the siding materials (Tr. 62). Respondent's salesmen operate under his supervision and control (Tr. 61–64). Materials from suppliers arrive at respondent's warehouses approximately once a month in large vans and are unloaded by hourly wage rate laborers obtained from the Tennessee Security Employment Office (Tr. 52).

7. The merchandise, equipment and parts used for Superior Improvement Company sales are never shipped direct from the manufacturers to the customer's residence, but are always picked up by the subcontractor's vehicles at its warehouse at 1605 Main Street, Little Rock, Arkansas, and delivered to the job site in Arkansas (Tr. 28, 35–36, 38–40, 79).

8. The merchandise, equipment and parts used on contracts entered into by General Aluminum Company, are similarly transported from its warehouse at 630 Third Avenue, South Nashville, Tennessee, to the job sites in Tennessee (Tr. 68) with the exception of three contracts and possibly a fourth entered into and performed in and around Hopkinsville, Kentucky. (See testimony of Robert E. Frommel, Tr. 527–542; John C. Spurlin, Tr. 542–549; Thomas Glass, Tr. 550–563; Nora Glass, Tr. 564–570; Guziak, T. 78, 625; CX 43, 44).[1] On these contracts, the materials were transported from respondent's warehouse in South Nashville, Tennessee, to the job sites in and around Hopkinsville, Kentucky (Tr. 314). Respondent testified that

[1] Robert E. Frommel's contract was for $3,240 (CX 43); John C. Spurlin's contract was for $2,240 (Tr. 546); Thomas Glass' contract was for $2,880 (CX 44) or a combined total of $8,360.

pany for a siding job on their homes.[2] Sixteen of said witnesses testified that they received a circular through the mail, similar to or identical with CX 8; that they detached, signed and returned the self-addressed card, similar to or identical with the ones appearing as part of CX 28 or CX 39, and that thereafter Guziak and/or a representative of General Aluminum Company in Tennessee or Kentucky, or Superior Improvement Company in Arkansas, called on them.[3] Irrespective of the method by which they were contacted, twenty-eight of the witnesses testified that Guziak or said representative stated that the prospect's house would be used for demonstration purposes and that for each house sold as a result thereof the prospective customer, the witness, would receive a bonus of one hundred dollars.[4] With one exception, said witnesses testified that their houses were not used for demonstration purposes and that they never received any bonus payments. Thirteen of the customer-witnesses testified that respondent Guziak or the company representative represented that said witness would receive a special discount price from respondents usual and regular price (*i.e.*, at cost, a factory price or demonstration price), but that they never received a discount.[5] Twelve of the witnesses testified that Guziak or his representative represented to them that they would receive enough bonus money from the use of their home as a model to offset the cost of their siding job, and each further testified that they never received any bonus money whatsoever.[6]

Respondent testified that he had never instructed his salesmen to make any bonus offers, that when it came to his attention, he instructed his salesmen to discontinue such practice and had fired salesmen for such activities (Tr. 508). Guziak, however, testified that he himself had made statements to customers that their houses would be used as demonstrators and that they would receive a $100 bonus (Tr. 509–510):

> The Witness: I have made that statement, yes, sir, acting in the authority as an officer of the corporation. (Tr. 510, lines 11–12.)

In subsequent testimony, the respondent also gave contradictory testimony (Tr. 628, lines 21–25, Tr. 629, lines 1–3).

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[2] Tr. 98, 116, 181, 200, 215, 250, 255, 321, 335, 346, 357–8, 374, 379, and others. CX 1, 3, 5, 9, 10, 11, 12, 14, 15, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 43, 44 and RX 1.

[3] Tr. 95, 110, 127, 143, 156, 169, 181, 195, 234, 296, 454, 544, and others.

[4] Tr. 97, 111, 128, 144, 151, 157, 182, 196, 206, 215, 223, 236, 251, 260, 285, 296, 326, 331, 350, 371, 381, 455, 464, 471, 531. 546, 556, 567.

[5] Tr. 96, 128, 151–2, 181–2, 196, 207, 287, 305–6, 355, 361, 371, 528, 546.

[6] Tr. 251–2, 331, 337, 342, 457, 471 and others.

lar appears the name and address of a home owner, or a space therefor, the postmark "Medford, Wisconsin," an offer of a free gift to addressees who return the self-addressed, detachable card at the bottom of the circular. The detachable card is addressed to General Aluminum Company, 546 South 2nd Avenue, Medford, Wisconsin (CX 28), and Superior Improvement Company, 546 South 2nd Avenue, Medford, Wisconsin (CX 39), as the case may be.

11. The newspaper advertisement (CX 19) appeared on Sunday, April 29, 1962, in The Nashville Tennessean. The newspaper has a daily circulation of 564 and a Sunday circulation of 1,725 in Christian County, Kentucky, which includes Hopkinsville, Kentucky (Tr. 481). The copy for the advertisement was brought to respondent's attention by a salesman who worked for a company in Birmingham, Alabama, which had used the ad successfully. The ad was mailed to respondent's office in Nashville by the salesman and although respondent was out of town at the time and did not actually see it before it was run, he discussed it over the telephone with his office girl who, with his knowledge, approved the ad for publication (Tr. 594–597). Respondent admitted that when he saw the ad late on Saturday evening, as the first editions of the paper were being circulated, he became aware of obvious discrepancies and errors in the ad of which he did not approve and would never have run had he known of them in advance (Tr. 595–598).

12. When one of the detachable cards from a circular is mailed in or a telephone inquiry is received as a result of the newspaper ad, the prospective customer is called upon by either a salesman or respondent, or both. During the course of this visit, or as in some cases several visits, the customer is given a sales talk. If a transaction is consummated, a printed form contract is signed by the homeowner and his wife on the one hand, and the salesman or respondent, as the case may be, on the other hand. The customer's credit rating is then checked by respondent's office and, if approved by his office (Tr. 511), respondent's subcontractors in due course pick up the materials at respondent's warehouse, transport them to the customer's home and install the siding. After the job is completed, the customer is asked to sign a completion certificate (Tr. 33–34, see summary of witnesses' testimony, *infra*).

13. Thirty-two customers of respondent were called as witnesses and testified in support of the complaint. All of the aforesaid witnesses, except one, testified that they signed a contract with either General Aluminum Company or with Superior Improvement Com-

(Tr. 117), and that he signed a contract (CX 3). On cross-examination, the witness testified he was not really sure it was Guziak who came to see him (Tr. 121).

Thomas S. Taylor, Bauxite, Arkansas (Tr. 127–140), testified he "received a pamphlet through the mail" from Superior Improvement Company, that he wrote them he was interested, that Mr. Guziak came to his house (Tr. 127), that Guziak "demonstrated the siding, beat on it, showed how strong it was, and he said the insulation behind it was termite-proof and that the aluminum itself was guaranteed for life," that Guziak stated "the paint on it was guaranteed for twenty years of service," that Guziak stated "he was letting me have it at factory price for a demonstrating—for letting him demonstrate it and show it on television, and that he was going to bring people by there and each one that he brought by that I would have a bonus of a hundred dollars if they bought a siding job from him," that Guziak never brought anybody to look at it and he has never received any bonus payments (Tr. 128), that Guziak said he "would receive a written guarantee" which he has never received (Tr. 129), and that he signed a contract (CX 5).

H. D. Tompkins, Benton, Arkansas (Tr. 140–149), testified he got a card (CX 8) through the mail from Superior Improvement Company, that he and his wife detached the card, filled it out and mailed it back (Tr. 142), that Upchurch, a salesman came to his home and "made an appointment for a night," that "Mr. Guziak and him come back that night" (Tr. 143), that "he went on giving a sales talk about the aluminum and giving us a price, and he showed us the bonus we would get if we sold a job or if they brought somebody by there to look at our house and if they bought we would get a hundred dollars for every time, they would bring somebody by who bought the siding job, or if we gave them some contact and they made a sale we would get a hundred dollars" up to the amount of their contract (Tr. 144), that they "would guarantee the work, that all work would be guaranteed" (Tr. 145), that no one was ever brought by to look at the house and they never received any one hundred dollar bonus payments (Tr. 146), and that he signed a contract (CX 9, CX 10).

Opal Tompkins, Benton, Arkansas (Tr. 150–155), amplifying her husband's testimony, testified, looking directly at Guziak, that "he told that this stone or fiberglass would never chip, crack, fade or soak up with water, or anything like that, and I asked him then if the aluminum would ever need paint, and he said no. He said it would never need paint, and it was a life-time guarantee. And about the

14. In view of the apparent discrepancies between the 32 customers' testimony and respondent's, and the specific contradictions in respondent's own testimony, a summary of the 32 customers' testimony is hereinafter set forth:

Lawrence G. Wendel, Mt. Vernon, Arkansas (Tr. 93–109), testified that he received a circular in the mail from Superior Improvement Company (Tr. 94), that he tore off and mailed in a coupon attached, that Mr. Upchurch and Mr. Guziak came to his house, that Mr. Guziak did most of the talking (Tr. 95), that Mr. Guziak showed him samples of aluminum siding and terox stone, that Mr. Guziak "told us that we were at a good location * * * and that he was going to make our place a show place * * * that he would sell us the material at cost, and that there wasn't going to be any salesman's commission and he [Guziak] would pay for the installation," that "the workmanship would be the very best, and that the workmen were factory-trained to install the materials" (Tr. 96), that he [Guziak] had 20 salesmen working for him, that he [Guziak] would bring prospective customers out to see his house, that if any of these customers bought he would receive a bonus payment of one hundred dollars for each customer sold up to his cost of $2,170, that neither Guziak nor his salesmen ever brought any prospective customers out to see his house, that he never received any bonus payments (Tr. 97), that Guziak said the siding "came from Reynolds Aluminum," that the "aluminum was guaranteed for life" and "that we would not have to paint it for 20 years," that the terox finish was fireproof, chip-proof and would not crack or break (Tr. 99), and that he signed a contract (CX 1). On cross-examination, he testified that the workmen failed to caulk around the windows, and the walls were not covered with siding completely to the ground (Tr. 109).

John Zuber, Little Rock, Arkansas (Tr. 110–123), testified that his "wife answered an advertisement that she got through the mail" from Superior Improvement Company, that Mr. Guziak and another man came to the house (Tr. 110), that "they looked the house over and said it would be a good house to advertise their business and demonstrate it and they would knock off a thousand dollars off the original cost" (Tr. 111), that "they would use the house as a demonstration" (Tr. 112), that for everybody who saw the house and put on their siding "they would knock off a hundred dollars off the cost of the house," that "they never did bring anybody by to see the house like they said they would" (Tr. 113), that he never received any bonus payments of $100 (Tr. 123), that they said "it was guaranteed for a lifetime, the siding was, and it never would need paint"

siding because she liked the material and she replied, "Not necessarily. Of course, I would have liked and appreciated having some reduction on it, but it was mainly because I wanted the insulation and the savings to paint" (Tr. 162).

Mrs. Glenn Vineyard, Little Rock, Arkansas (Tr. 167–179), testified that she received through the mail a circular from Superior Improvement Company (Tr. 168), that she "took the card out and returned (mailed) it to the company to permit a salesman to come out and talk to us" (Tr. 169), that she and her husband own their home and had been planning to either brick their house or put aluminum siding on (Tr. 169), that a salesman came out (Tr. 172), that the salesman came in response to her mailing the card (Tr. 173), and that after a discussion took place, no contract was signed (Tr. 174).

Clay Edmonson, Harrison, Arkansas (Tr. 179–193), testified that he received through the mail a circular from Superior Improvement Company, that his wife detached, filled out and mailed back a card which had been attached to the circular (Tr. 180), that Mr. Collins, a representative of Superior, came to see them, that they signed a contract (CX 11), that he was induced to sign the contract because he received a special price (Tr. 181), that the reason for the special price was that "I would be the first one there in the community to have this, and that he could show it to other people for advertising purposes," that "he did say that it would be a hundred dollars deducted when he sold to someone that had come by and looked at my house," that he never received any such payments (Tr. 182), that Collins said "all the labor was factory trained" (Tr. 183). On cross-examination, the witness testified that Mr. Collins first came to his house and that later Mr. Guziak was there and that "Both of them was there" (Tr. 188), that he was sure about the statement that factory trained personnel would install the siding (Tr. 188). On redirect examination, the witness stated both Guziak and Collins were present when he signed the contract (Tr. 190). On recross-examination, the witness testified that immediately prior to the hearing, the complaint counsel showed him a copy of the complaint which had certain portions marked with an "X," that complaint counsel directed him to read those portions (Tr. 191–192).

Herman D. Thomason, Berryville, Arkansas (Tr. 193–202), testified that he received an advertising circular through the mail from Superior Improvement Company, that his wife tore off a self-addressed return reply card, filled it out and mailed it in (Tr. 194), that "one evening about 6:00 o'clock, why, a Cadillac pulled in the

hundred dollars certificate, we signed it, and it was a paper just about that square (indicating), and he said we wouldn't get a copy of that, that it would be sent to the company, but our number would be on file with the company, and I told him that night, I said that I had read somewhere that you never—that you sign these things and you never got any money for them, and he said—well, he asked me if I was a Baptist, and I told him no, and he said, 'That's the reason, you haven't got any faith,' and then he went ahead and talked and told me that we would get it, and if they brought someone by and made a sale that we would get the hundred dollars, and if we sold it that we would get a hundred dollars if we made a sale to someone on our own" (Tr. 150–151). Mrs. Tompkins also stated that a neighbor girl was present when Guziak arrived that night and "he said he couldn't talk in front of her because he was giving us a demonstrator price and that he couldn't offer it to everyone like that, and we could understand why he couldn't talk in front of other people, so this little girl went in the bedroom with my daughter" (Tr. 151–152). On cross-examination, Mrs. Tompkins testified that she had "not seen Guziak from the time we signed the contract until today," that "we tried to get them to come out and they wouldn't come" (Tr. 153), that "he didn't bring anyone there either," and that she has never received any bonus payments of one hundred dollars (Tr. 154).

Mrs. Irene Medlin, Conway, Arkansas (Tr. 155–162), testified that she received a circular in the mail and mailed it back to Superior Improvement Company, that Mr. Guziak and Mr. Upchurch came to her house (Tr. 156), that they demonstrated the siding, that she had a corner lot, that Guziak "stated that this would be a good place to have it as a show place and they would like to bring somebody to show it to them so as to induce them to buy the material, and I agreed to that, and they told me I would have a bonus or refund * * * "(Tr. 157), that no one was ever brought around, that she never received any bonus payments, that "factory-trained men would put the job up" (Tr. 158). As an afterthought, the witness stated on direct examination that "I don't know if I stated this before or not, but he did state that if I sold another person on this kind of material that I would get a bonus from it. But I didn't sell anybody and couldn't get anybody to agree to buy it, so, of course, I didn't receive anything from it" (Tr. 159). The witness also stated that "I thought if I got a little reduction to start with, naturally, that would influence me buying." (Tr. 161.) On cross-examination, the witness was asked if she did not make the contract to purchase the

him except through his secretary," and that the work has never been done (Tr. 200).

Mr. Marion L. Hackney, Little Rock, Arkansas (Tr. 202–210), testified that a salesman called upon him, showed him a circular (CX 8), asked him "if he could bring a feller out that night to talk to me about it * * * so he brought, I believe, a Mr. Page," that Mr. Page showed him samples of siding, that he liked it, that "he started figuring," that he told him that the price seemed "pretty high" (Tr. 203), that he also needed a roof, that he [Page] figured in the cost of the roof, and he signed a contract (Tr. 204). The witness also testified that Page and other salesman, in order to induce him to sign the contract, told him that "they had factory-trained mechanics," that "they would give me a hundred dollars for every time I would get a customer, a contract, or give them somebody that they could contact and make a sale, or some prospect that would buy, and I was to get a hundred dollars on each job, either by check * * * or put it on my contract" (Tr. 206), that to his knowledge they never brought any prospective customers to see his house and that he never received any bonus payments of one hundred dollars (Tr. 207). On cross-examination, the witness stated he was positive they told him it would be put on by "factory-trained mechanics" (Tr. 209).

Mrs. Geneva Eloise Long, Little Rock, Arkansas (Tr. 210–220), testified she received a pamphlet in the mail from Superior Improvement Company (CX 13), that she detached a reply card and mailed it in (Tr. 212–213), that Mr. Page and Mr. Kays, salesmen, came to see her as a result of the card she mailed in to Superior (Tr. 213–214), that the reply card was self-addressed to the firm, that the salesmen told her they represented Superior (Tr. 214), that she signed a contract, that before she signed the contract Page told her "that he had just gotten to town, that Mr. Guziak had set up this office here and had purchased all this material and was the local representative, that he was the Little Rock man, and that he had just gotten to town, and I [the witness] was the first person they had contacted, and they were going to take pictures of my house before and after the job was done, and it would be advertised in national magazines, also on television, and also on radio locally, and that I would receive a rebate of $100 for every job they sold as a result of people seeing my home, and I told them I wanted to think the situation over and they said that I wouldn't have time for it, that they wouldn't have time because there were so many other people who were anxious to do this, and that Mr. Page was not going to be in town, but he was going to leave, and he was the sales repre-

driveway and there was an elder-like feller come up and introduced himself. He was Mr. Collins, and he was coming about this here card, which he had there and handed me * * * the card was sent in," that "he said that Mr. Guziak was there and he would see if he wanted to talk to me, and then they both came back in and we went to talking and he [Guziak] commenced telling me that he really was a religious man and belonged to the Baptist church here in Little Rock (Tr. 195) and, as I kind of have respect for these people, I trusted him, and then he [Guziak] showed me samples and told me all about it. He [Guziak] didn't want to give me no estimate (Tr. 196) but I showed him the plan of my house and he [Guziak] give me an estimate on it, and he told me that he [Guziak] would sell it to me at about a thousand dollars less than cost," that "he [Guziak] said then it would be used as a demonstration house and anybody that come out there and they sold the siding to, that he would pay me a hundred dollars on the deal that we would make," that Guziak said "if we could find it any other place for less money that he would put it in the house free, so we signed the contract" (CX 12), that later he [Thomason] found he could get it considerably cheaper (Tr. 196), that he [Thomason] found he "had been hooked," that he went to the bank to stop payment on the check, but it had been cashed when the bank opened the next morning, that he tried to call Guziak but couldn't reach him, that he talked to Guziak's secretary, but couldn't get a hold of Guziak, that he went to his office to see him, but he [Guziak] was out of town, that Guziak's secretary promised she would reach him and write to the witness, that she did write him, but he never heard from Guziak, so he turned the matter over to the Better Business Bureau (Tr. 197). The witness further testified that Guziak stated that "he was representing this here aluminum which he had the franchise for in this part of the country, * * *. He had the franchise, he said, over this Alcoa Aluminum, and if I got it any other place that it would have to come through him and he would get a cut out of it, and that he was the cheapest that I could buy, * * *." (Tr. 198), that "when I got to checking around, why, I found different," that "he [Guziak] said to say a little prayer, and pray to the Lord and let Him guide us as to whether to sign the contract," that he [the witness] "got suspicious and went and checked the prices," that he "went to an attorney and got his advice," that he "tried to get a hold of Mr. Guziak to tell him that he was off, that he had misrepresented this to me (Tr. 199) but I [the witness] never could get in touch with

of the talking, that they eventually signed a contract (CX 14), that he (the witness) told them he worked for Reynolds Aluminum Company and he wanted to be sure he got Reynolds Aluminum, that they showed him some samples of siding and "it had the Reynolds insignia on the side, on the aluminum, and so I told them that was good enough for me since the insignia was there," that they told him "it would be put on by trained men * * * (Tr. 235), that it was a lifetime product * * * it was guaranteed and it would not chip or anything like that * * * that it would not need painting and would not peel off or anything," that he "could pay for that house, or pay a big lot of it, or help out on it by getting out and showing it, or telling other people about it, and that he would give us a hundred dollars for each one that we caused to be sold," that he and his wife never found any actual customers (Tr. 236). On cross-examination, the witness stated that it was his understanding that the aluminum siding demonstrated by respondent was made from aluminum material manufactured by Reynolds (Tr. 239–240) and that the siding put on his house was the same as the samples he saw (Tr. 240). On re-direct examination, the witness stated he believed the material on his house "is Reynolds aluminum" (Tr. 242).

John A. McClain, Russellville, Arkansas (Tr. 247–254), testified that he received a telephone call from a young lady wanting to know if he was interested in aluminum siding, that he told her he was not, that she asked if she could send a man out to talk to him, that the next day a man named Miller came out (Tr. 248), that Miller stated "he was with the Improvement Company," that he [the witness] told him he was not interested, that Miller "stayed around there 30 or 40 minutes and then left, and so John Guziak came up" (Tr. 249), that Guziak said " 'Now, can you pay by the month?' I said I had bought lots of automobiles by the month, and then he said, 'Could you pay $75.00 a month?' I told him no, that we were living off our social security. Then he said, 'Can you pay $50.00?' I said that we couldn't. He said then, 'Can you pay $25.00 then?' I said that we could, and then he went to writing, and at 6% interest, and so went on and wrote the papers and we signed them" (Tr. 250, CX 15). The witness then testified that over the weekend he studied the contract and called Guziak's office to cancel it, that he was unsuccessful, that the next morning Guziak and two workmen came out and started putting the siding on (Tr. 250), after some words and threats, Guziak left and the workmen completed the job (Tr. 251). The witness also testified that before sign-

sentative and the only one who could okay or authorize the contract" (Tr. 215). The witness further testified that Page told her "they were going to put seven salesmen on the job * * * and that if each of them would sell—well, I [the witness] said each ought to sell one job, and Mr. Page said, 'Well, they better sell two because I have a wife and some children who have to eat,' * * * so I [the witness] of course, expected to get some refund or rebate on these houses" (Tr. 216), that "they were going to bring these people by there to see what a pretty job they had done on my house, * * * and, as a result, the people would buy," that she "would get a rebate of a hundred dollars for every job they sold as a result of showing my place," that Page and Kays assured her that she "would get one hundred dollars every time they sold a job" (Tr. 217), that she never received anything and that to her knowledge they never brought anyone by to see her house (Tr. 218). The witness also testified that they told her that "they were going to have factory-trained employees put this work on, and they had two teen-age boys that did it," that she asked the oldest boy "who taught the other one how to do it, and he said his dad was a carpenter and he learned all he knew from him, and he was showing this other boy how to do it (Tr. 218).

T. D. Frazier, Pine Bluff, Arkansas (Tr. 221–225), testified that somebody from Superior Improvement Company came out and offered to put aluminum siding on the house for $1,500, that he told them it was too much (Tr. 221), that they came back a second time, that he told them he could not pay for it and "the place was not mine * * * that it was my son-in-law and daughter's house" (Tr. 222), that they told him that they "would make a demonstrator out of this house * * * so it would be a better job," that he signed a contract (Tr. 223), that they started work on it, that they got one side pretty well finished and about half way finished on another side, that they wanted him to sign a mortgage, that since he had no deed to the property, he could not sign a mortgage, that the job was left unfinished and remains unfinished (Tr. 222). On cross-examination, the witness could not remember the name of the company.

William R. Oliver, Bauxite, Arkansas (Tr. 232–243), testified that he and his wife received a card in the mail from Superior Improvement Company, that they filled it out and mailed it back to the company (Tr. 234), that an agent for Superior called on them with the card, that the agent asked if he could bring Guziak out to see them and they agreed, that one evening Guziak, accompanied by the agent, called on them (Tr. 234), that Mr. Guziak did most

enough off of it to make these payments, get these payments down * * *" (Tr. 285), that Guziak asked if he could pay $50 a month and he said he could not, that Guziak asked if he could pay $25 and he said he might be able to, that Guziak said, "Well, we'll just put it at that" and that Guziak put down $25, that Guziak said, "If you can't pay that, if you don't get enough to pay that, I don't want to make it hard on you and we'll change that and make it where you can make the payments * * *," that Guziak said he could sell enough people around there—that he was satisfied that he had ten houses around there that he could sell right away—that the salesman added, "Why, I believe I can sell 20 in here, 18 or 20," that he [the witness] said, "Well, that would be more than a hundred dollars a house, that would be paying it out," that Guziak said, "Well, if we can make money on your house, we are glad to divide the profits with you * * * if we sell 20 houses, it will pay for your house" (Tr. 287), that Guziak said the $1,888 was a special price and it should be about $2,500 or $2,700, that Guziak told him never to tell anyone that he was letting him have it for that amount, that he signed a contract (CX 17, Tr. 287). The witness also testified that he never received any $100 payments from respondent and that to his knowledge no one came by to look at the house (Tr. 293–294).

Vernon Gilbert, Little Rock, Arkansas (Tr. 294–304), testified that he received an advertising circular through the mail from Superior Improvement Company, that his daughters detached and mailed in a reply card to get a free set of dishes that was offered, that a Mr. Collins came out and talked to him about siding, that he told him he was not financially able to make the payments, that Collins said, "Well, I believe my boss can arrange that for you * * * my boss is rich, he's got plenty of money that he ain't spent and he is wanting to spend that money somewhere out in here," that Collins returned with Guziak (Tr. 300), that they said he had "a good location and they would like to put siding on our house and show it * * * that with the siding he would put on my house that he could sell enough jobs off my siding there to do my house * * *," that they said, "Now, we will give you a hundred dollars a job, for every job that is sold off your house we will give you a hundred dollars," that they said they would bring prospects out there to sell them the job, that "he ain't brought anyone by there yet to see it in order to sell a job, or even to look at the house" (Tr. 296, 301), that he signed a contract for $1,958 (RX 1, Tr. 302–303).

Charles H. Treadway, North Little Rock, Arkansas (Tr. 304–313), testified that a man from Superior Improvement Company ap-

ing the contract Guziak told him "Every time we show a house, or you sell a siding job, I will give you a hundred dollars * * * you can pay for your house that way" (Tr. 251–252), that he has never received any bonus payments (Tr. 254).

Amos Hutcherson, Russellville, Arkansas (Tr. 255–276), testified that he received a telephone call one night from a lady (Tr. 256–57), she identified herself as secretary of the "Sevier Aluminum Company" (Tr. 258), that (after being shown the contract he signed (CX 16)), it was the "Superior Company," that a salesman came to see him three days later (Tr. 260), that the salesman came as a result of the phone call and his indication to the girl that he was interested (Tr. 261), that the salesman returned a second time with his boss, Guziak (Tr. 262), that Guziak told him he [the witness] "could sell 15 or 20 houses there in the neighborhood, because the neighborhood was building up around there around the Arkansas River, and I had lots of friends and I thought I could. He made it sound so good" (Tr. 262), that if the witness sold any he "would get a hundred dollars out of each one," that he never sold a house, that he never tried to sell any because "after I seen I got beat I was too ashamed to try anybody else" (Tr. 263). On cross-examination, the witness stated his complaint was over the financing, although he testified he had read the contract before signing it and understood it was payable either upon completion of the work in cash for $2,180 or a time payment plan in five yearly installments of $582 (Tr. 269), CX 16).

Willis O. Threlkeld, Russellville, Arkansas (Tr. 278–294), testified that Superior Improvement Company telephoned him to ascertain if he was interested in siding on his house and to arrange an appointment (Tr. 281), that a salesman from Superior called at his house (Tr. 282), that he and his wife told the salesman they were not interested, that the salesman asked if he could bring his boss to talk to them, that later that day Mr. Guziak and the salesman came to talk to them (Tr. 283), that he told Guziak he was retired and did not have much money, that Guziak measured the house and gave him a price of $1,888, that he told Guziak he could not pay that much, not even $500 (Tr. 284), that he had just retired from the Corps of Engineers, did not know the amount of his retirement benefits, had not been paid for 58 days of accrued annual leave yet and was short of funds, that Guziak said, "on account of my house being right in town * * * the main business part of town * * * on the corner * * * if I would let him put it on that he could sell enough and use this house to show people and he could sell

"We have picked your house as an example for advertising * * * we want to make a real model home out of it * * * we have the main man coming down from Nashville on Sunday * * * this will be the last chance" (Tr. 331), that the salesman returned the next day, Sunday, with a Mr. L. T. Page, that this time Page did most of the talking (Tr. 333) and he said again "this will be your last last chance, and we have picked your house for a model home and it will not cost you one dime * * * I'll take the whole end of West Tennessee and every deal that is sold from Memphis to Brownsville you'll get $100 deducted from this job until its paid off, then you won't get anything else" (Tr. 331, see also Tr. 333), that Page also said "We've already sold another job and you'll get a check within a week for $100 and we know almost that we've got another one" (Tr. 333), that he signed a contract (CX 22), that he never heard from the salesman or company again, that he wrote to the company's Nashville address but got no answer, that he sent the company eight prospects' names, that he later sent another letter to the company with 12 prospects' names, but heard nothing from either letter (Tr. 337), that he sent another letter asking why he had not heard and made three long distance telephone calls, but the manager was out each time, that on the last call he left his number and asked the secretary to have the company manager call him, that over 14 months have passed and no one has returned his call (Tr. 338), that to his knowledge no one has ever been brought by the company to see his house and he has never received any $100 bonus payments (Tr. 339, see also Tr. 342), that under his contract he was supposed to get "genuine Reynolds Aluminum" that he "carried some of the materials to Reynolds Aluminum in Memphis and they did not recognize the material and said it was not theirs" (Tr. 333).

Martin Gregory Bates, Nashville, Tennessee (Tr. 345–353), testified that he first gained knowledge of General Aluminum Company through their advertisement (CX 19; Tr. 345), that he called the telephone number given on the ad, that Guziak and a salesman came out (Tr. 346–347), that Guziak showed him samples of the material (Tr. 348), that they told him "if there happened to be any jobs sold we would receive a reimbursement of $100 per unit," that he had never received any such payments (Tr. 350), that he signed a contract (CX 23), that to the best of his knowledge no one has ever been brought to see his house (Tr. 351).

Harold Raymond Green, Nashville, Tennessee (Tr. 353–367), testified that he saw General Aluminum Company's ad in the Nashville Tennessean (CX 19), that he telephoned General Aluminum and

proached him about siding and asked if he could send a Mr. Collins and Mr. Page out to talk to him about a "special deal that they had, because they wanted a house out by Rose City for a model," that he let them come and they brought some samples of siding materials (Tr. 305), that they told him "they would give me a special price and then for each house that they would sell, my house being a model, that they would give me a hundred dollars," that he signed a contract, that after they left he "didn't think it sounded right" (Tr. 306), that he went to the Better Business Bureau and talked to them, that they gave him a pamphlet on Superior to read, that he went to Superior's office to cancel the contract but Guziak was out, that his uncle had a store on the corner across from Superior, that his uncle knew Guziak and arranged to have his contract cancelled (Tr. 307–308). On cross-examination, the witness stated that the Better Business Bureau pamphlet on Guziak indicated he [Guziak] left town before he completed jobs and the owner had to pay the full amount anyway (Tr. 312).

Mrs. Dewey Avriett, Portland, Tennessee (Tr. 317–329), testified that she first gained knowledge of General Aluminum Company through an advertisement which appeared in the Nashville Tennessean, Sunday, April 29, 1962 (CX 19), that she telephoned the General Aluminum Company at the number given in the ad, that she told the girl who answered the telephone that she was interested in aluminum siding (Tr. 323), that a salesman from the General Aluminum Company visited her at her former home in East Nashville, Tennessee, and later returned with Mr. Guziak (Tr. 324), that she and her husband had a long conversation with Guziak and the salesman, that Guziak said, "that this aluminum was the best material, made by Reynolds and Alcoa" (Tr. 325), that he (Guziak) said he would use their home in Portland, Tennessee, for "a model for others to see and a sample that they would sell, other aluminum siding for other houses, from that deal," that she "would be paid $100 for every house that was handled and having siding put in as a result of seeing that house" (Tr. 326), that she signed a contract (CX 21) that she has never received any $100 payments and to her knowledge no one has ever been brought around to look at the house (Tr. 327–328). On cross-examination, the witness stated her complaint was that she did not get the material or workmanship that was represented to her and the price was too high (Tr. 328).

Harry Albert Fite, Brighton, Tennessee (Tr. 329–345), testified that a salesman for General Aluminum Company came into his store on Saturday afternoon (Tr. 330), that the salesman said,

place," that he [Guziak] had taken a picture of it, that he [Guziak] would bring people around and show it and for every job he [Guziak] sold he would pay him $100, that no one was ever brought around and he has never received any bonus payments (Tr. 381), that he signed a contract (CX 26).

Mrs. Homer Hendrix, Dyersburg, Tennessee (Tr. 453–459), testified that she received a pamphlet through the mail from General Aluminum Company (Tr. 453), that she detached a card and mailed it back to General Aluminum Company, that a representative of the company came to her home (Tr. 454), that he returned the next Sunday with a Mr. Klein, that they asked if they could use her house as a model, that they told her she would "receive $100 for each house that was finished in Dyersburg" and that she "would get $100 for each name that she sent in," that she did send in some names, that one of the persons whose name she sent in did put on the siding, that she never received the $100, that she wrote and asked about it, but they told her they had no record of her sending the name in (Tr. 455), that a representative of the company once brought some people to look at her house, but she has never received any bonus payments (Tr. 456), that she and her husband signed a contract (CX 31).

Lottie Lovell, Medina, Tennessee (Tr. 461–466), testified that she was first contacted by a salesman for General Aluminum Company (Tr. 462), that he arranged to bring Guziak to talk to her and her husband, that Guziak came to see them (Tr. 463), that they couldn't afford the siding, but were persuaded by the statements of Guziak that they "might get some help by using it as a model house and by other people seeing our house" and they could get a discount off of theirs (Tr. 464), that they were told by Guziak that they "would get $100 each time that it was sold for another house," that they never received any compensation (Tr. 465), that they signed a contract (CX 32).

On cross-examination, respondent's counsel asked:

Q. Now, isn't it true that Mr. Guziak told you that you shouldn't rely on this, that you might receive one or that you might receive several, or you might receive not any, depending on whether or not there was any sales made, either on leads from the company or leads that came from the house and using the house as a demonstration. Now, isn't that a true statement.

A. Yes, he said it was going to be used as a demonstration. Now, he didn't tell me definitely. I mean, he didn't guarantee any of this would be put on. but, as I said, the way he told me about it, that was one of the things that swayed me toward buying it. I didn't mean that he guaranteed me any payments on it, you know. That's what I meant (Tr. 466).

told the woman he was interested (Tr. 354), that the "special discount prices" featured in the ad appealed to him (Tr. 355), that later a salesman from the company came out and set up an appointment for Guziak (Tr. 356), that Guziak and the salesman came to his house a few nights later, that they brought with them samples of aluminum siding and terox (fiberglas) stone (Tr. 357), that they stated the aluminum siding was of high quality and made by an out-of-State manufacturer (Tr. 360), that they also stated his house had been selected as a model for display purposes and he was the only one in the area to be given a special "factory discount" and would also receive a bonus of $100 for each customer that was sold after seeing his house (Tr. 361), that no one was brought to see his house and he has never received any bonus payments (Tr. 361–362), that he signed a contract (CX 24).

James G. Kent, Gallatin, Tennessee (Tr. 368–375), testified that he received an advertising folder through the mail from General Aluminum Company, that he tore off, filled out and mailed in a reply card to the company, that a salesman from the company came to his house and made an appointment for Guziak to come out (Tr. 369), that Guziak and the salesman returned about 6 o'clock the same day, that they brought samples of aluminum siding and demonstrated its qualities (Tr. 370), that Guziak made him a price and told him that it "was a wholesale, or advertising price, that would be published over television and radio and newspapers for advertising purposes and if anybody came to look at that house and bought aluminum siding from seeing that house that I would be given $100 for each one that was sold" (Tr. 371), that he signed a contract (CX 25), that the workmanship on the job was poor (Tr. 371–372), that no one came by to look at his place and he has never received any payments (Tr. 372). The witness also testified that when the salesman originally contacted him, he told him that "Guziak was partly interested in that factory that made that aluminum siding and that's where he was coming from that particular day," that they told him "that there would be some experienced people to put that siding on" (Tr. 373).

Odell Woodall, Portland, Tennessee (Tr. 376–381), testified he received a card through the mail from General Aluminum Company, that he filled it out and returned it, that a few days later Guziak came out and demonstrated the aluminum siding (Tr. 377), that Guziak said the siding would be put on by trained mechanics (Tr. 378), that Guziak told him he wanted to use his house as a "show

nolds Aluminum, that Ruse said he would give him a "special deal," that Ruse stated he was getting five homes to use as samples, that the "special deal" was only offered for that week (Tr. 528, 536), that Ruse promised to use his house as a model home, that "he [Ruse] would pay $100 for everybody that looked at it" (Tr. 531, 536), that no one ever came to look at his house (Tr. 536), that he signed a contract (CX 43) that the siding put on his house was not the same as the sample he was shown (Tr. 535).

On cross-examination, the witness stated that complaint counsel had given him, earlier that morning, a copy of the complaint in this matter to look over before testifying.

John C. Spurlin, Hopkinsville, Kentucky (Tr. 542–549), testified that he and his wife received a card through the mail from General Aluminum Company (Tr. 543), that they mailed in the attached reply card to General Aluminum (Tr. 544–545), that Mr. G. G. Ruse from General Aluminum came to their house (Tr. 545), that Ruse showed them samples, that Ruse told them he would give them a "special deal" if they would let him use their house as a model, that he said he would take pictures of it for use on TV and in newspaper advertisements, that they "would receive $100 for each house that was sold," that Ruse said these payments would help offset their cost on it, that their house was never advertised on TV or in the newspapers, that they never received any $100 payments (Tr. 546), that they signed a contract (Tr. 547), that no one ever came by to look at their house (Tr. 548).

Thomas Glass, Pembroke, Kentucky (Tr. 550–563), testified that he received a postcard from General Aluminum Company through the mail, that his daughter detached and mailed back the reply card, that a salesman from the General Aluminum Company came to his house (Tr. 554), that the salesman left and returned later in the day with Guziak (Tr. 555), that Guziak said he would take pictures of the house, advertise it on TV and radio, and "if there is any sold in your community or in the surroundings here, why, you will get paid $100 on your payments and that will lower your payments, it will eventually take care of your putting it on" (Tr. 556), that Guziak said he had responsible men to put the siding on, but "it is coming off" (Tr. 556), that he has never received any $100 payments (Tr. 560), that he signed a contract (CX 44).

On cross-examination, the witness testified that just prior to signing the contract he had been in the hospital (Tr. 560), that at the time Guziak came he was taking medicine which made him groggy (Tr. 562), and that he could not "remember clearly everything that was said, or exactly anything that they said" (Tr. 562).

Mrs. Grady Parimore, Covington, Tennessee (Tr. 467–476), testified she first noticed an advertisement of General Aluminum Company (Tr. 468), that she answered the advertisement (Tr. 469), that a salesman from the company came to her house with the card she had sent in, that he showed her samples of aluminum, that he asked to return when her husband was home (Tr. 470), that the original salesman, Mr. Miller, and a Mr. Page returned, that they told her and her husband the job might not cost them a cent because they had a corner lot, that they told them they wanted to use the house as a sample house, that Page said that for every other house that the company put the siding on they would get $100, that in the long run, they said it would not cost them anything (Tr. 471), that they signed a contract (CX 33), that Miller and Page also said they would take pictures before and after the siding was put on, that the pictures would be used in television and newspaper advertising, that Mr. Page said, "Well, I know where Mr. Miller can get two houses here in this town * * * since I do know that I'll take $200 off right now and we will reduce this $200," that they have never received any other $100 payments (Tr. 472), that Page and Miller told them that factory-trained employees would put the siding on (Tr. 473).

On cross-examination, the witness stated that before testifying complaint counsel gave her a marked copy of the complaint in this matter and asked her to read paragraph 4, subparagraphs 1 to 9 of the complaint which set forth the nine misrepresentations alleged in the complaint (Tr. 474–476).

Robert Armstrong, Dyersburg, Tennessee (Tr. 476–480), testified that he received an advertising folder in the mail from General Aluminum Company, that he filled it out and mailed it in, that a salesman from General Aluminum Company came to his house (Tr. 477), that the salesman returned that night with a Mr. Miller, that Miller told him he was getting a bargain (Tr. 478), that Miller said, "Well, now, Mr. Armstrong, every job you get me I'll give you $100 off of your job," that he signed a contract, that he called the company in Nashville and gave the girl several names, that he called her back several times, but they never did check on the leads, that the girl finally told him, "Just don't call back anymore. We are not interested," that he quit calling and never has received any payments (Tr. 479).

Robert E. Frommel, Hopkinsville, Kentucky (Tr. 527–542), testified that Mr. Ruse, a salesman for General Aluminum Company, called upon him at his home, that he showed him samples of Rey-

Based upon the foregoing oral and written representations, the examiner finds that the respondent has directly and by inference represented that he is a manufacturer of siding materials.

Respondent Guziak is not and never was a manufacturer of siding materials (Tr. 39, 44, 67–68, 502).

17. Respondent, in his advertising, has represented as follows (CX 19):

ALUMINUM SIDING
by
ALCOA
KAISER
REYNOLDS

As found above, respondent is not a manufacturer of siding materials and, as previously found in Finding No. 5, purchases aluminum siding from U. S. Aluminum Siding Corporation, Franklin Park, Illinois. The aluminum siding materials used by respondent are not manufactured by Alcoa, Kaiser or Reynolds (Tr. 502).

18. Reading together the language quoted in Findings Nos. 16 and 17 which appeared in close proximity in respondent's ad (CX 19), the examiner finds that there exists a reasonable inference that respondent represented that he was connected with or affiliated with Reynolds, Kaiser or Alcoa. In truth and in fact respondent is not now nor has he ever been connected or affiliated with these companies (Tr. 518). At best, the record shows that some of the aluminum *siding* manufactured by U. S. Aluminum Siding Corporation was made of Reynolds aluminum (Tr. 235, 239–41, 325 and 576–77; RX 3 and 4).

19. Many of the aforesaid 32 witnesses testified that respondent or his representatives represented to them that the siding materials would be applied by factory trained workmen (Tr. 158, 183, 206, 218, 235, 378, 473). Respondent, in his advertisement, also represented that he used "Factory Trained Installers" (CX 19). The record clearly shows that the men who applied the material for respondent were not factory trained men, but were carpenters recruited in the cities where respondent did business (Tr. 218, 226). Two of respondent's workmen, Fred McEwen and John Carr, testified that they were journeymen carpenters and had had no factory training (Tr. 227, 232). Several of the customer-witnesses testified that the workmanship was poor and corner pieces had fallen off (Tr. 327, 334, 371, 557, 568). The only evidence respondent Guziak offered on this point was that some of the men told him they had had factory training (Tr. 503), but he never attempted to verify their statements (Tr. 503–04). Based upon the foregoing testimony,

Nora Glass (Mrs. Thomas Glass), Pembroke, Kentucky (Tr. 564–570), took the witness stand, but before she began her testimony respondent's counsel objected to her holding a marked copy of the complaint in her hands, which was sustained and the copy of the complaint was removed from her possession. The witness then, after some hesitancy, identified Mr. Guziak as the man who came to their house and spoke to them about aluminum siding (Tr. 565–566), the witness testified that Guziak told them "that they would make a picture of the house and they would show it on TV and if there was a house, you know, by showing this, if somebody else put the siding on their house, it would be $100 off of ours, and the main reason why I signed it is because he was sick and the doctor did not want him to be worried" (Tr. 567), the witness further testified that Guziak "said that the man that would put it on there would know what he was doing, but really he didn't and he made a big mess" (Tr. 568).

15. The examiner, based upon his observation of the 32 customer-witnesses, finds that their testimony is frank, reliable, and credible. The examiner, based upon his observation of respondent and his study of the entire record, also finds that Guziak's testimony is less than candid, evasive, and contradictory and consequently must reject it. Accordingly, the examiner finds that the respondent did make representations that prospects' houses would be used by respondent for demonstration purposes, that for such use the prospective purchaser would receive a special discount price from respondent's usual and regular price, that for each house sold, as a result of its use by respondent as a demonstrator, the purchaser would receive a bonus of one hundred dollars and that purchasers would receive enough bonus money to offset the cost of their siding job. The examiner also finds that respondent did not use these prospects' houses for demonstration purposes, respondent did not make bonus payments as represented, respondent did not offer special discount prices as represented and purchasers did not receive enough bonus payments to offset the cost of the siding job.

16. Respondent or his representatives represented that they were selling at factory prices (Tr. 128, 361), or at cost (Tr. 96). Respondent's advertising read in part as follows (CX 19):

> THIS IS A DIRECT-TO-YOU
> OFFER AT TOP SAVINGS!
> Direct to you! A factory executive
> will present this fabulous offer!
> The choice is yours! The chance is
> now!

respondent has directly or indirectly represented that the said siding materials are fully and unconditionally guaranteed. Respondent's ad and oral representations do not disclose that his guarantee is limited to the workmanship in applying the siding. Moreover, even in this respect, he has failed fully to perform. Accordingly, the examiner finds that respondent does not clearly disclose a) the nature and extent of the guarantee, b) the manner in which the guarantor will perform, and c) the identity of the guarantor.

23. The respondent's statements and representations as found above in paragraphs 13, 14, 15, 16, 17, 18, 19 and 22 relating to the claims:

(1) That persons who allowed the siding materials installed by respondent to be used for model home demonstration purposes would receive,

(a) a special discount price from respondent's usual and regular price, and,

(b) a bonus of $100 for each sale made by respondent as a result of using that person's home as a model.

(2) That purchasers can be assured of receiving enough bonus money from the use of their home as a model to offset the cost of their siding job.

(3) That respondent is a manufacturer of siding materials and consequently can offer such materials at lower prices.

(4) That aluminum siding materials sold by respondent are manufactured by Alcoa, Kaiser or Reynolds Aluminum Company.

(5) That respondent is connected or affiliated with Reynolds Aluminum.

(6) That respondent's siding materials are applied by factory trained installers.

(7) That the application of siding materials by the respondent is unconditionally guaranteed.

were false, misleading and deceptive.

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

25. The annual dollar volume of business of Superior Improvement Company for each of the years 1963 and 1964 was approxi-

the examiner finds that respondent represented that the workmen who applied his siding were factory trained, but many of said workmen are not factory trained.

20. Many customer-witnesses testified that respondent or his representatives represented that the aluminum siding sold by respondent would never need any painting and would never require maintenance (Tr. 216, 236, 370, 465, 474, 549). The brochures likewise contained this representation (CX 8 and others). The record contains no substantial evidence that these representations are untrue. At best, the record shows two witnesses testified that merely hosing the aluminum siding down with water will not readily clean it (Tr. 557, 568). Typical of the comments of the witnesses regarding the respondent's materials and workmanship was the testimony of Mrs. Grady Parimore, who said:

> The material is holding up all right. The job is not. (Tr. 474).

21. Similarly, respondent or his representatives represented that the simulated stone siding sold by respondent would never chip or crack, would never require maintenance and is completely fireproof (Tr. 99, CX 19). The record contains no substantial evidence that these representations are untrue.

22. Many customer-witnesses testified that respondent or his representatives represented that the "aluminum was guaranteed for life" (Tr. 99, 117, 128, 150, 236, 534, 549). Respondent's newspaper advertisement read, "Lifetime Guarantee" (CX 19). The only guarantee given by respondent is that contained in the form contract signed by the witness-customer (CX 1, 3, 5, 9, 10, 11, 12, 14, 15, 16, 17, 18, 21, 23, 24, 25, 26, 29, 30, 31, 32, 33, 43, 44 and RX 1) which reads in pertinent part as follows:

> On or in the building at the above Job address, SUPERIOR IMPROVEMENT CO. agrees to furnish and install the following materials and GUARANTEES to do the work in a workmanlike manner in accordance with standard practices, and not to use any factory reject, factory seconds, or sub-standard materials.

Respondent admits that he only guarantees the workmanship (Tr. 505–6), and that, if specifically requested, he would provide the customer with the manufacturer's written guarantee (Tr. 607–9, RX 9, 10).

Several witnesses testified that due to the unworkmanlike application of the siding material, the corners were falling off, but either they could not contact respondent or if they did, he failed to keep an appointment to fix the job (Tr. 327, 556). By and through the use of the aforementioned advertising and oral representations,

ent also placed advertisements of his siding materials in publications with an interstate circulation.

It is well settled that "intercourse or communication between persons in different States, by means of correspondence through the mails, is commerce among the States within the meaning of the Constitution, * * *." *International Textbook Co.* v. *Pigg*, 217 U.S. 91, 107 (1910). This has also been held to include trade in news and the circulation of newspapers across State lines. *Associated Press* v. *United States*, 326 U.S. 1; *Mabee* v. *White Plains Publishing Co.*, 327 U.S. 178; see also denial of interlocutory appeal *In the Matter of S. Klein Department Stores, Inc.*, Docket No. 7891, November 18, 1960 [57 F.T.C. 1543].

The Federal Trade Commission only recently expressed its views on this subject *In the Matter of Gadget-of-the-Month Club, Inc.*, Docket No. 7905, July 31, 1963 [63 F.T.C. 1138, 1156, 1157], wherein it said:

The scope of federal power to regulate interstate commerce will never be such as to make it an easy matter to formulate and expound nice compact definitions into which all cases fit. See *United States* v. *South-Eastern Underwriters Association*, 322 U.S. 533, 550–551 (1944). In an economy such as ours with businessmen free to follow the dictates of their own ideas it is sure that new commercial practices unlike any that were known before are bound to make their presence felt. It is for just such unknown eventualities that the commerce power must be comprehensive enough to fit any new situation as it arises. *United States* v. *South-Eastern Underwriters Association*, *supra* at 551; *Wickard* v. *Filburn*, 317 U.S. 111, 120 (1942).

There is no question but that, "Interstate communication of a business nature, whatever the means of such communication is interstate commerce regulable by Congress under the Constitution." *Associated Press* v. *NLRB*, 301 U.S. 103, 128 (1937). In any case where, as here, "the mails and the instrumentalities of interstate commerce are vital to the functioning * * *" of a business enterprise, there can be no doubt of our jurisdiction under the Act. *North American Co.* v. *SEC*, 327 U.S. 686, 694–695 (1946).

In *Progress Tailoring Co.* v. *Federal Trade Commission*, 153 F. 2d 103 (7th Cir. 1946), circulars were sent by mail falsely representing that free clothing would be given to salesmen who accepted employment with the respondent. Our finding of jurisdiction was sustained, the court holding that the passage of information from one state to another was a transaction in interstate commerce. 153 F. 2d at 105. See also *Federal Trade Commission* v. *Civil Service Training Bureau*, 79 F. 2d 113, 114 (6th Cir. 1935). *Bernstein* v. *Federal Trade Commission*, 200 F. 2d 404 (9th Cir. 1952), involved a respondent in the business of seeking out absconding debtors. Solicitors traveled in several states seeking to get creditors to execute a contract assigning past due accounts for collection. These contracts were mailed to the respondent, who then used the mails to locate the defaulting debtors. The court had no trouble in reaching the conclusion that, "* * * The [respondent] regularly uses the channels of interstate communication. His activities, while not trade in the ordinary sense,

mately $400,000 (Stipulation, Tr. 313). General Aluminum Company did approximately 475 jobs in Tennessee between 1960 and November 1962. Superior Improvement Company did approximately 450 jobs in Arkansas during 1963–1964 (Tr. 638–639).

26. In the conduct of his business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of aluminum and simulated stone home and building siding materials of the same general kind and nature as that sold by respondent (Ans. para. 6).

27. In the course and conduct of his business, (1) respondent has caused significant quantities of his siding materials, when sold, to be shipped from his warehouse in Nashville, Tennessee, to purchasers located in and around Hopkinsville, Kentucky; (2) respondent, as an integral and important part of his business, has used the United States mails to solicit business, obtain important leads to prospective customers and induce substantial sales of his siding materials by disseminating brochures depicting his siding materials from Medford, Wisconsin, to addresses in Tennessee and Arkansas and receiving replies thereto on detachable cards self-addressed to Medford, Wisconsin; and (3) respondent, through the use of newspaper advertising in a Nashville, Tennessee, newspaper having a substantial interstate circulation, particularly in Kentucky, has published statements and representations designed and intended to induce sales of his siding materials. By the aforesaid means in the course and conduct of his business, respondent has been engaged in commerce, as "commerce" is defined in the Constitution and in the Federal Trade Commission Act.

DISCUSSION

Respondent urges that he "has not or is not engaging in interstate commerce," that he "has never made a sale in commerce and most all that can be said is that an overzealous salesman of a corporation of which respondent was president, without authority, entered into contracts for three jobs in another State."

As set forth above in findings numbered 8 and 27, respondent shipped significant quantities of his siding materials from his warehouse in Nashville, Tennessee, to three or four purchasers located in and around Hopkinsville, Kentucky. In addition, respondent disseminated brochures through the United States mails to obtain important leads to prospective customers. The initial leads, of necessity, constitute a vital and important link in respondent's activities without which there would have been no transactions at all. Respond-

(3) Respondent manufactures the siding products which he sells.

(4) Aluminum siding materials sold by respondent are manufactured by Alcoa, Kaiser or Reynolds Aluminum Company or misrepresenting in any way the identity of the manufacturer or the source of any of respondent's products.

(5) Respondent is connected or affiliated with Reynolds Aluminum Company, or that respondent is connected with any business concern or organization with which respondent is not so connected or affiliated.

(6) Respondent's products are applied by factory trained personnel.

(7) Respondent's products are unconditionally guaranteed when there are any conditions or limitations to such a guarantee.

(8) Using the word "Lifetime" or any 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 representing, in any manner, that the duration of a guarantee is other than respondent can affirmatively establish is the fact.

(9) Any of the respondent's products are guaranteed, unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

Opinion of the Commission

JUNE 28, 1965

By Reilly, *Commissioner:*

By its complaint issued on January 20, 1964,[1] the Commission charged respondent with a variety of false and deceptive practices in the advertising and sale of aluminum siding and simulated stone siding. After hearing the testimony of over twenty of respondent's customers, the hearing examiner issued an order sustaining all the charges in the complaint except the charge pertaining to simulated stone siding. Respondent has appealed this decision.

Initially, the claim is made that the respondent is not engaged in commerce and that the proceeding is not in the public interest. Further, respondent asserts that the examiner's decision was "not supported by the weight of the reliable and probative evidence." More specifically, according to respondent, the evidence proved that

[1] Incorrectly shown as January 30, 1964, in the initial decision.

are a species of commerce and constitute commerce within the meaning of that term as used in the Constitution and in the Federal Trade Commission Act." 200 F. 2d at 405. See *Rothschild* v. *Federal Trade Commission*, 200 F. 2d 39, 42 (7th Cir. 1952), *cert. denied*, 345 U.S. 941 (1953), recognizing our jurisdiction when the mails are used as a conduit for deception.

It is concluded, therefore, on the basis of the evidence as found that respondent is, or has been during times material to the complaint, engaged in commerce, within the meaning of the Constitution and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44 (1958).

CONCLUSIONS

1. The aforesaid acts and practices of respondent, as herein found, were and are all to the prejudice and injury of the public and of respondent's 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.

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

3. The complaint herein states a cause of action, and this proceeding is in the public interest.

4. The public interest requires the issuance of an order to cease and desist to prevent a recurrence of the activities herein found to be illegal.

ORDER

It is ordered, That respondent, John A. Guziak, individually or through any agent, representative, agency or other instrumentality, in connection with the offering for sale, sale or distribution of aluminum and simulated stone home and building siding materials or any other similar products, 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) Any saving or discount is afforded purchasers or a special or reduced price is granted by respondent, unless such saving, discount or special prices constitutes a reduction from the price which respondent usually and regularly charged for the materials and their application in the recent regular course of his business.

(2) Respondent will pay a bonus, commission or any other compensation to purchasers or prospective purchasers on sales made as a result of demonstrating or advertising the purchaser's or prospective purchaser's house or building.

plication that he will * * * pay a bonus, commission or any other compensation to purchasers or prospective purchasers on sales made as a result of demonstrating or advertising the purchaser's or prospective purchaser's house or building."

In regard to this practice, the record shows that respondent told customers that:

(1) In attempting to sell siding to other prospective purchasers he would show these prospective purchasers the customer's house, and

(2) If as a result of this showing, the prospective purchaser bought respondent's siding, then a bonus would be given to the customer owning the model home.

All but one of the witnesses stated that no one ever came to look at their homes. Further, they all testified that no bonuses were received. On the other hand, respondent Guziak testified that he had made bonus payments; none of the alleged recipients, however, were called to the stand by him. Respondent also argued that "The hearing examiner did not find any instance where the bonus payments were actually *earned* and not paid." (Emphasis added. Resp. Brief p. 11). Perhaps under other circumstances we might be forced to decide the issue of casuality. Here, however, the examiner credited testimony that respondent not only did not pay the bonuses, but never even bothered to show the houses. We find no reason to disturb that factual finding.

And, because on this record the failure to fulfill the promise to display the customer's home prevents any possibility of bonuses being *earned*, we have revised Paragraph (2) of the order, as set out below, to prohibit both deceptive practices.

2(a) Respondent will bring prospective customers to see the purchaser's "model home"; or that respondent will call on prospective purchasers referred to him by his customers.

(b) Respondent will pay a bonus, commission or any other compensation to purchasers or prospective purchasers on sales made as a result of demonstrating or advertising the purchaser's or prospective purchaser's house or building.

We have also slightly modified the language in Paragraph (8) of the order, and as so modified the order [2] is affirmed.

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[2] We note that respondent seems to find some inconsistency between Paragraphs (3), (4) and (5) of the order. But there is nothing contradictory in prohibiting respondent from representing (1) that it is a manufacturer of the *finished aluminum* siding; (2) that *the materials from which the siding* is made were in turn manufactured by Alcoa, Kaiser or Reynolds; and (3) broadly claiming that it is affiliated with Reynolds or any "organization with which respondent is not so connected or affiliated."

the responsible parties were the corporations involved, not Mr. Guziak, as an individual. Therefore, the corporations should have been joined in the complaint as separate entities. And, the examiner is said to have made an erroneous ruling in not recalling "certain witnesses after it was learned previous witnesses had been shown Federal Trade Commission confidential investigator's report * * *." Finally, error is alleged in not allowing into evidence a letter from the Memphis Better Business Bureau to the Washington Better Business Bureau.

After carefully examining the record in this matter, we affirm the examiner's findings that respondents were engaged in commerce; that the examiner's decision is supported by the weight of the reliable and probative evidence; and that the proceeding is in the public interest.

The complaint names Guziak, trading as General Aluminum Co. and Superior Improvement Co. The order is against Guziak "individually or through any agent, representative, agency or other instrumentality * * *." The record completely justifies such an order. For respondent Guziak is shown by this record to be the prime mover behind the false and deceptive practices proven on this record. There is no question that "respondent Guziak is president of both corporations (General Aluminum Co. and Superior Improvement Company), sole owner of all the stock of each corporation and formulates, directs, manages and controls the policies, acts and practices of the two corporations" (I.D. p. 1276). So we find no fault in the complaint's failure to join the corporations separately, or in the order being limited to Mr. Guziak's activities "individually or through any agent, representative, agency or other instrumentality * * *." To hold otherwise would be to elevate form over substance.

The relevance of the letter from one Better Business Bureau to another is questionable at best. And it is clear that its presence or absence in the record would neither prejudice respondent nor change the result of this case.

Finally, the hearing examiner specifically indicated that little weight would be given to the testimony of witnesses whose memories were refreshed by showing them investigative reports. Moreover, we have given no weight to the testimony of these witnesses. In our opinion, the record, even without any of the allegedly questionable testimony, clearly supports the examiner's findings of fact.

One aspect of the order, however, does trouble us. Paragraph (2) thereof prohibits respondent from representing directly or by im-

(6) Respondent's products are applied by factory trained personnel.

(7) Respondent's products are unconditionally guaranteed when there are any conditions or limitations to such guarantee.

(8) Using the word "Lifetime" or any 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.

(9) Any of the respondent's products are guaranteed, unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

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

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

IN THE MATTER OF

DALY BROS. ET AL.

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

Docket C-911. Complaint, June 28, 1965—Decision, June 28, 1965

Consent order requiring retailers of fur and textile fiber products located in Eureka, Calif., to cease violating the Fur Products Labeling Act by misbranding, falsely advertising, and deceptively invoicing fur products; and to cease violating the Textile Fiber Products Identification Act by misbranding and falsely advertising textile fiber products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Fur Products Labeling Act, and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Daly Bros., a partnership, and Charles F. Daly, Jack F. Daly, John S. Daly, Cornelius Daly, Catherine Matthewson, Marian Biord,

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision denying the appeal and directing modification of the hearing examiner's order:

It is ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

It is ordered, That respondent, John A. Guziak, individually or through any agent, representative, agency or other instrumentality, in connection with the offering for sale, sale or distribution of aluminum and simulated stone home and building siding materials or any other similar products, 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) Any saving or discount is afforded purchasers or a special or reduced price is granted by respondent, unless such saving, discount or special price constitutes a reduction from the price which respondent usually and regularly charged for the materials and their application in the recent regular course of his business.

(2) (a) Respondent will bring prospective customers to see the purchaser's "model home"; or that respondent will call on prospective purchasers referred to him by his customers.

(b) Respondent will pay a bonus, commission or any other compensation to purchasers or prospective purchasers on sales made as a result of demonstrating or advertising the purchaser's or prospective purchaser's house or building.

(3) Respondent manufactures the siding products which he sells.

(4) Aluminum siding materials sold by respondent are manufactured by Alcoa, Kaiser or Reynolds Aluminum Company or misrepresenting in any way the identity of the manufacturer or the source of any of respondent's products.

(5) Respondent is connected or affiliated with Reynolds Aluminum Company, or that respondent is connected with any business concern or organization with which respondent is not so connected or affiliated.

(b) Information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was not set forth in the required sequence, in violation of Rule 30(a) of said Rules and Regulations.

(c) Required item numbers were not set forth on labels, in violation of Rule 40 of said Rules and Regulations.

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

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to show the true animal name of the fur used in the fur product.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) Information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder was set forth on invoices in abbreviated form, in violation of Rule 4 of said Rules and Regulations.

(b) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 7. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that certain advertisements intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements but not limited thereto, were advertisements of respondents which appeared in issues of The Humboldt Standard, a newspaper published in the city of Humboldt, State of California.

PAR. 8. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder in that the term "natural" was not used to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artifically colored, in violation of Rule 19(g) of the said Rules and Regulations.

and Annette Falk, individually and as copartners, trading as Daly Bros., hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act and the Textile Fiber Products Identification 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:

PAR. 1. Respondent Daly Bros. is a partnership existing and doing business in the State of California.

Respondents Charles F. Daly, Jack F. Daly, John S. Daly, Cornelius Daly, Catherine Matthewson, Marian Biord, and Annette Falk are copartners in said partnership.

Respondents are retailers of fur products and textile fiber products with their office and principal place of business located at 405 "F" Street, Eureka, California.

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

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

Among such misbranded fur products, but not limited thereto, were fur products to which no labels whatever were affixed.

PAR. 4. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in that information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in the following respects:

(a) The team "natural" was not used on labels to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

Also among such misbranded textile fiber products were finished drapes manufactured specifically for particular customers after the sales were consummated by means of properly labeled swatches of the same fiber content as the drapes, which textile fiber products were not labeled to show the information required by the Textile Fiber Products Identification Act and the Rules and Regulations thereunder and which were not accompanied by invoices or other paper showing the information otherwise required to appear on the labels as permitted by Rule 21(b) of the Rules and Regulations promulgated under said Act.

PAR. 13. Certain of said textile fiber products were misbranded in violation of the Textile Fiber Products Identification Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

A. Fiber trademarks appeared on labels without the generic names of the fibers appearing on such labels, in violation of Rule 17(a) of the aforesaid Rules and Regulations.

B. Fiber trademarks appeared on labels without a full and complete fiber content disclosure appearing on such labels, in violation of Rule 17(b) of the aforesaid Rules and Regulations.

PAR. 14. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote, and assist directly or indirectly in the sale or offering for sale of said products, failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

Among such textile fiber products, but not limited thereto, were articles of wearing apparel which were falsely and deceptively advertised in The Humboldt Times, a newspaper of interstate circulation, in that such terms as "Arnel," "Dacron," "Orlon," "Pima," "Satin," and "Estron" were used without the true generic names of the fibers in such articles being set forth.

PAR. 15. Certain of said textile fiber products were falsely and deceptively advertised in violation of the Textile Fiber Products Identification Act in that they were not advertised in accordance with the Rules and Regulations promulgated thereunder.

Among such textile fiber products but not limited thereto, were textile fiber products which were falsely and deceptively advertised in The Humboldt Times and The Humboldt Standard, newspapers

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

PAR. 10. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 11. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of constitutent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products which were falsely and deceptively advertised in The Humboldt Standard and The Humboldt Times, newspapers published in Humboldt, California, and having interstate circulation, in that certain of said advertisements contained such terms as "linen-look" and "Linen Weaves" which represented either directly or by implication, that linen fiber was present in said products when such was not the case.

PAR. 12. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act to disclose the true generic names of the fibers present.

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, the Fur Products Labeling Act and the Textile Fiber Products Identification 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 Daly Bros. is a partnership existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 405 "F" Street, Eureka, California.

Respondents Charles F. Daly, Jack F. Daly, John S. Daly, Cornelius Daly, Catherine Matthewson, Marian Biord and Annette Falk are copartners in said partnership. Their address is the same as that of the said partnership.

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 Daly Bros., a partnership, and Charles F. Daly, Jack F. Daly, John S. Daly, Cornelius Daly, Catherine Matthewson, Marian Biord, and Annette Falk, individually and as copartners trading as Daly Bros., and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from introducing into commerce, or selling, advertising or offering for sale in commerce, or transporting or distributing in commerce, any fur product; or selling, advertising, offering for sale, transporting or distributing any

published in Humboldt, California, and having interstate circulation, in the following respects:

A. A fiber trademark was used in advertising textile fiber products, without a full disclosure of the fiber content information required by the said Act and the Rules and Regulations thereunder in at least one instance in said advertisement, in violation of Rule 41(a) of the aforesaid Rules and Regulations.

B. A fiber trademark was used in advertising textile fiber products, containing more than one fiber and such fiber trademark did not appear in the required fiber content information in immediate proximity and conjunction with the generic name of the fiber in plainly legible type or lettering of equal size and conspicuousness, in violation of Rule 41(b) of the aforesaid Rules and Regulations.

C. A fiber trademark was used in advertising textile fiber products, containing only one fiber and such fiber trademark did not appear, at least once in the said advertisement, in immediate proximity and conjunction with the generic name of the fiber in plainly legible and conspicuous type, in violation of Rule 41(c) of the aforesaid Rules and Regulations.

D. The generic name of a fiber was used in advertising textile fiber products, in such a manner as to be false, deceptive, and misleading as to fiber content and to indicate, directly or indirectly, that such textile fiber product was composed wholly or in part of such fiber when such was not the case, in violation of Rule 41(d) of the aforesaid Rules and Regulations.

Among such products, but not limited thereto, were textile fiber products, namely ladies' coats advertised as "linen-look" and "Linen Weaves," thus implying that such products were composed wholly or in part of linen when in fact the products contained no Linen.

E. In advertising textile fiber products in such a manner as to require disclosure of the information required by the Act and Regulations, all parts of the required information were not stated in immediate conjunction with each other in legible and conspicuous type or lettering of equal size and prominence, in violation of Rule 42(a) of the aforesaid Rules and Regulations.

PAR. 16. The acts and practices of respondents as set forth above were and are in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute unfair methods of competition and unfair and deceptive acts or practices, in commerce, under the Federal Trade Commission Act.

3. Failing to set forth on invoices the item number or mark assigned to fur products.

B. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly in the sale, or offering for sale of any fur product, and which fails to set forth the term "Natural" as part of the information required to be disclosed in advertisements under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

It is further ordered, That respondents Daly Bros., a partnership, and Charles F. Daly, Jack F. Daly, John S. Daly, Cornelius Daly, Catherine Matthewson, Marian Biord, and Annette Falk, individually and as copartners trading as Daly Bros., and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from introducing, delivering for introduction, selling, advertising, or offering for sale, in commerce, or transporting or causing to be transported in commerce, or importing into the United States, any textile fiber product; or selling, offering for sale, advertising, delivering, transporting, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or selling, offering for sale, advertising, delivering, transporting, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

A. Which is falsely or deceptively stamped, tagged, labeled, invoiced, advertised or otherwise identified as to the name or amount of constituent fibers contained therein.

B. Which is falsely or deceptively stamped, tagged, labeled, invoiced, advertised or otherwise identified by any representation either directly or by implication, through the use of such terms as "linen-look," "Linen Weaves," or any other terms, that any fibers are present in a textile fiber product when such is not the case.

C. Unless such textile fiber product has affixed thereto a label showing each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

D. Which has a label affixed setting forth a fiber trademark without the generic name of the fiber appearing on the said label.

fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act:

A. Unless each such fur product has securely affixed thereto a label:

1. Correctly showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

2. Setting forth the term "natural" as part of the information required under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

3. Setting forth information required under Section 4(2) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in the sequence required by Rule 30 of the aforesaid Rules and Regulations.

4. Setting forth an item number or mark assigned to the fur product.

It is further ordered, That respondents Daly Bros., a partnership, and Charles F. Daly, Jack F. Daly, John S. Daly, Cornelius Daly, Catherine Matthewson, Marian Biord, and Annette Falk, individually and as copartners trading as Daly Bros., and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices as the term "invoice" is defined in the Fur Products Labeling Act showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Setting forth information required under Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder in abbreviated form.

4. Using a generic name of a fiber in advertising textile fiber products in such a manner as to be false, deceptive or misleading as to fiber content or to indicate, directly or indirectly, that such textile fiber products are composed wholly or in part of such fiber when such is not the case.

5. Using a fiber trademark in advertising textile fiber products containing only one fiber without such fiber trademark appearing at least once in the advertisement, in immediate proximity and conjunction with the generic name of the fiber in plainly legible and conspicuous type.

6. Failing to set forth all parts of the required information in advertisements of textile fiber products in immediate conjunction with each other in legible and conspicuous type or lettering of equal size and prominence.

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

HOME DELIVERY FOOD SERVICE, INC., ET AL.

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

Docket C-912. Complaint, June 28, 1965—Decision, June 28, 1965

Consent order requiring a Springfield, Mass., seller of freezers and foods by means of a freezer-food plan, to cease using false pricing, savings, and guarantee claims and other misrepresentations in advertisements in newspapers, brochures, and by radio broadcasts, to sell its freezers and freezer-food plan.

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 Home Delivery Food Service, Inc., a corporation, and Bernard Brodsky and Abraham J. Tevelov, 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:

E. Which has a label affixed setting forth a generic name or fiber trademark, whether required or non-required, without marking a full and complete fiber content disclosure in accordance with the Act and Regulations the first time such generic name or fiber trademark appears on the label.

It is further ordered, That respondents Daly Bros., a partnership, and Charles F. Daly, Jack F. Daly, John S. Daly, Cornelius Daly, Catherine Matthewson, Marian Biord, and Annette Falk, individually and as copartners trading as Daly Bros., and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, sale, advertising or offering for sale, in commerce, or transportation or causing to be transported in commerce, or the importation into the United States, of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from falsely and deceptively advertising textile fiber products by:

1. Making any representations, directly or by implication, as to the fiber content of any textile fiber product in any written advertisement which is used to aid, promote, or assist, directly or indirectly, in the sale or offering for sale of such textile fiber product, unless the same information required to be shown on the stamp, tag, label or other means of identification under Section 4(b)(1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, in the manner and form required, except that the percentages of the fibers present in the textile fiber product need not be stated.

2. Using a fiber trademark in advertisements without a full disclosure of the required content information in at least one instance in the said advertisement.

3. Using a fiber trademark in advertising textile fiber products containing more than one fiber without such fiber trademark appearing in the required fiber content information in immediate proximity and conjunction with the generic name of the fiber in plainly legible type or lettering of equal size and conspicuousness.

letters and by radio broadcasts by stations having sufficient power to carry such broadcasts across State lines, for the purpose of inducing and which were likely to induce, directly or indirectly the purchase of food as the term "food" is defined in the Federal Trade Commission Act; and have disseminated and caused the dissemination of advertisements by various means, including those aforesaid, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of freezers and food in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. By means of advertisements disseminated as aforesaid and by oral statements of sales representatives, respondents represent, directly or by implication:

1. That, by use of the corporate name, "Home Delivery Food Service Inc.," separately, and in conjunction with oral representations to purchasers, they are engaged in the business of processing, storing, marketing and delivering food and food products.

2. That purchasers cannot purchase the food plan unless a freezer is purchased from the respondents or, if a purchaser did not buy a freezer, a substantial sum of money must be paid for membership in the food plan.

3. That purchasers of respondents' freezer-food plan can buy unlimited unrestricted quantities and selections of food through or from respondents at specific reduced prices and realize thereby "tremendous" savings.

4. That the advertised, reduced prices of the food plan are guaranteed for a period of three years and that a member of the food plan can continue food service after the freezer was paid for with no quality, service or price difference.

5. That the combined freezer and food payments under the freezer-food plan would be no more than the purchaser was then paying for food alone.

6. That the food order as advertised, would last four months.

7. That purchasers of the freezer-food plan would receive both the freezer and the food at payments from as low as $9.99 and $11.99 per week.

8. That, to purchasers of the freezer-food plan, dependent on the number of persons in the purchaser's family, certain specific amounts of annual savings were possible, based on figures from the U.S. Department of Agriculture, U.S. Bureau of Labor Statistics and the U.S. Bureau of Human Nutrition and Home Economics.

9. That the food orders are free of delivery charges.

10. That meats are "U.S. Choice" or "U.S. Prime" grades.

PARAGRAPH 1. Respondent Home Delivery Food Service, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Massachusetts with its principal office and place of business located at 233 Orange Street, Springfield, Massachusetts.

Respondents Bernard Brodsky and Abraham J. Tevelov are officers and directors of the said corporation, being president and vice-president respectively. They formulate, direct and control the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. Their addresses are currently as follows: Bernard Brodsky, 28 Daviston Street, Springfield, Massachusetts and Abraham J. Tevelov, 122 Wolfswamp Road, Longmeadow, Massachusetts.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of freezers and in the taking of orders for food for delivery by others by means of a so-called freezer-food plan.

PAR. 3. Respondents cause the said freezers when sold, to be transported from their place of business in the State of Massachusetts, and the premises of suppliers of said freezers located in the State of Massachusetts and various other States of the United States to purchasers thereof located in the States of Massachusetts, Connecticut and other States of the United States. Respondents further cause the food, when sold through their food plans, to be transported from the suppliers thereof, located in the States of Massachusetts, Connecticut and New York, to the purchasers thereof, located in the States of Massachusetts, Connecticut and other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said freezers and food plans in commerce, as "commerce" is defined in the Federal Trade Commission Act. Their volume of business in such commerce is, and has been, substantial.

PAR. 4. In the course and 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 freezers, food and freezer-food plans.

PAR. 5. In the course and conduct of their business, respondents have disseminated and caused the dissemination of certain advertisements concerning the said freezer and food plan, by United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to the advertisements inserted in newspapers, brochures, circulars and

Labor Statistics and the U.S. Bureau of Human Nutrition and Home Economics.

9. The food orders are not free of delivery charges.

10. The substantial portion of the meats provided under the freezer-food plan are not "U.S. Choice" or "U.S. Prime" grade meats, inspected and graded as such by inspectors of the U.S. Department of Agriculture.

11. The individuals sent to help purchasers of the aforesaid freezer-food plans in planning their food orders are not Home Economists nor have they had sufficient or proper training to be called Home Economists.

12. The price of a new freezer or refrigerator-freezer is so inflated that the trade-in allowance of $200 or any other amount is absorbed in said selling price and savings from said trade-in are not realized.

13. The freezers and refrigerator-freezers, supplied by respondents, do not have five-year Manufacturer's Warranty, nor are they guaranteed for a lifetime.

14. The freezers and refrigerator-freezers supplied by respondents are not commercial types nor built to commercial standards.

15. All foods do not carry an unconditional money-back guarantee.

16. A member, under the conditions of the respondents' referral plan is not able to qualify to win the major awards of a Caribbean Cruise or $500 in cash or 100,000 Green trading stamps.

Therefore, the advertisements referred to in Paragraph Five, were, and are misleading in material respects and constituted and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act, and the statements and representations referred to in Paragraph Six were, and now are, 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 substantial quantities of freezers and freezer-food plans from the respondents by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination by respondents of false advertisements, as aforesaid, 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, within the intent

11. That a member of respondents' freezer-food plan, upon request, would be provided with services of a Home Economist to assist in the preparation of food reorders.

12. That a trade-in allowance of $200 will be given with the purchase of a new freezer or refrigerator-freezer combination.

13. That the freezer or refrigerator-freezer supplied by the respondents has a five-year Manufacturer's Warranty, or a lifetime guarantee.

14. That the freezer or refrigerator-freezer is a commercial type, or built to commercial standards.

15. That all foods ordered through the freezer-food plan carried an unconditional money-back guarantee.

16. That a member was eligible in connection with respondents' referral plans for awards which included, but were not limited, to a Caribbean Cruise, $500 in cash or 100,000 Green trading stamps.

PAR. 7. In truth and in fact:

1. The respondents never were, nor are they now, engaged in the business of processing, storing, marketing or delivering food and food products.

2. The purchasers can purchase food without the necessity of purchasing a freezer or refrigerator-freezer or paying a membership fee in any amount.

3. Purchasers cannot buy unlimited or unrestricted quantities or selections of food through or from respondents at specific reduced prices or realize thereby tremendous or any other substantial savings in that the purchase of groceries was limited to $25 per food order and that the selection of many food items could be made only by paying a higher price than the advertised price.

4. The advertised, reduced prices of the food plan are not guaranteed for a period of three years and the purchasers thereof cannot continue the food service after the freezer was paid for with no quality, service or price difference.

5. The combined freezer and food payments are higher than the prices the purchasers were paying for the food alone.

6. The food order as advertised is not sufficient to last for four months.

7. The purchasers of the freezer-food plan cannot receive both the freezer and the food at payments as low as $9.99 and $11.99 per week.

8. It is not possible for the purchasers of the freezer-food plan to realize certain specific amounts of annual savings, allegedly based on figures of the U.S. Department of Agriculture, U.S. Bureau of

sale and distribution of freezers, refrigerator-freezers and freezer-food plans in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing in any manner, through their corporate or trade name or otherwise, that they are engaged in the business of processing, storing, marketing, or delivering food or food products.

2. Representing, directly or by implication that:

(a) purchasers cannot buy food under respondents' advertised food plan without the purchase of a freezer or refrigerator-freezer from respondents, or without the payment of a membership fee;

(b) purchasers of respondents' freezer-food plan can buy unlimited or unrestricted quantities or selections of food through or from respondents at specific reduced prices; or realize thereby tremendous or other substantial savings;

(c) the advertised, reduced prices of the food plan, are guaranteed for a period of three years;

(d) members of the food plan could continue food service after the freezer was paid for with no quality, service or price difference;

(e) the combined freezer and food payments under the freezer-food plan would be no more than the purchaser was then paying for the food alone;

(f) any food order, as advertised, will be sufficient for the purchasers' needs for any specified period of time; unless the respondents are able to establish that the quantities of food or food products are sufficient for the purchasers' needs for the specified period of time;

(g) the purchasers of the freezer-food plan would receive both the freezer and the food at payments from as low as $9.99 and $11.99 per week;

(h) the purchasers of the freezer-food plan would realize specific amounts of annual savings, based on figures from the U.S. Department of Agriculture, U.S. Bureau of Labor Statistics and the U.S. Bureau of Human Nutrition and Home Economics;

(i) the food orders are free of delivery charges;

(j) the meats are "U.S. Choice" or "U.S. Prime," unless the respondents are able to establish that such meats are inspected and so graded by the U.S. Department of Agriculture;

and meaning of the Federal Trade Commission Act, and in violation of Sections 5 and 12 of said 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 Home Delivery Food Service, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Massachusetts, with its office and principal place of business located at 233 Orange Street, in the city of Springfield, State of Massachusetts.

Respondents Bernard Brodsky and Abraham J. Tevelov are officers of said corporation. The address of Bernard Brodsky is 28 Daviston Street, Springfield, Massachusetts. The address of Abraham J. Tevelov is 122 Wolfswamp Road, Longmeadow, Massachusetts.

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

PART I

It is ordered, That respondents Home Delivery Food Service, Inc., a corporation, and its officers and Bernard Brodsky and Abraham J. Tevelov, 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,

directly or through any corporate or other device in connection with the offering for sale, sale and distribution of food or any purchasing plan involving the sale of food do forthwith cease and desist from:

1. Disseminating or causing to be disseminated any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations or misrepresentations prohibited in Paragraphs 1 through 5 inclusive of Part I of this Order.

2. Disseminating or causing to be disseminated any advertisement by any means for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of any food, or any purchasing plan involving food in commerce, as "commerce" is defined in the Federal Trade Commission Act, which advertisement contains any of the representations or misrepresentations prohibited in Paragraphs 1 through 5 inclusive of Part I of this Order.

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

THE LOVABLE COMPANY ET AL.

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

Docket 8620. Complaint, Apr. 20, 1964—Decision, June 29, 1965

Order requiring an Atlanta, Ga., manufacturer and distributor of women's wearing apparel, such as brassieres, girdles, panties and other related products, with annual sales of approximately $20,000,000, to cease violating Sec. 2(d) of the Clayton Act, by paying promotional and advertising allowances to some customers without making such payments available on proportionally equal terms to all other competing customers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly designated and described, have violated and are now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-

(k) "Home Economists" or other formally educated and trained individuals will assist purchasers of respondents' freezer-food plan in planning their food orders;

(l) a trade-in allowance of $200 will be given with the purchase of a new freezer or refrigerator-freezer combination;

(m) such products or any part thereof are guaranteed in any manner unless the identity of guarantor, the nature and extent of the guarantee and the manner in which the guarantor will perform are clearly and conspicuously disclosed in immediate conjunction with any such representation;

(n) the freezer or refrigerator-freezer is a commercial type or built to commercial standards;

(o) all foods ordered through the freezer-food plan carry an unconditional money-back guarantee; or representing that under any other money-back guarantee that any article or articles carry an unconditional money-back guarantee unless respondents are able to establish that such is the fact;

(p) a member of the freezer-food plan is eligible for a Caribbean Cruise, $500 in cash, 100,000 Green trading stamps or any other award for which such persons do not have an actual, fair and equal chance of winning or misrepresenting in any manner the benefits to be realized by purchasers participating in respondents' referral plan.

3. Misrepresenting in any manner that the meats supplied to purchasers of their freezer-food plan have been inspected and graded by inspectors of the United States Department of Agriculture.

4. Misrepresenting, in any manner, the minimum monthly plans for, or the kind, quality, grade, quantity availability, or price of the food or food products offered for sale by respondent.

5. Misrepresenting in any manner the savings, cost of purchase or trade-in allowances granted to or realized by purchasers of respondents' freezer-food plan.

PART II

It is further ordered, That respondents Home Delivery Food Service, Inc., a corporation, and its officers and Bernard Brodsky and Abraham J. Tevelov, individually and as officers of said corporation, and respondents' agents, representatives and employees,

tion or in consideration for services or facilities furnished by or through such customers in connection with the handling, offering for sale, or sale of products sold to them by said respondents, and such payments, sometimes hereinafter referred to as promotional allowances, were not available on proportionally equal terms to all other customers competing in the distribution of their products.

PAR. 5. Included among and illustrative of the payments alleged in Paragraph Four were credits, paid by way of check or allowances, as compensation for respondents' share of the cost of promotional services or facilities, including but not limited to newspaper advertising, furnished by customers pursuant to the terms of respondents' various cooperative advertising plans, in connection with the offering for sale or sale of respondents' products.

PAR 6. During 1961 and for some time prior thereto, respondents offered to pay, and did pay, some customers fifty percent of the net cost of a 100-line newspaper advertisement, devoted exclusively to Lovable products, pursuant to a "Cooperative Advertising Policy" plan and such payments were not to exceed 1½% of the customer's total purchases for a year. Also, the payments were to be made only if the customer conformed to other conditions specified by respondents

PAR. 7. Respondents supplemented their cooperative advertising plan by a so-called "Lovable Incentive Fund Terms" (LIFT) plan. The additional promotional allowance provided by this plan was alleged to be based upon respondents' net shipments (after discount) of only first class regular "Lovable" brand merchandise for each six-month period, ending December 31 and June 30, and provided in part as follows:

(a) On six-month net shipments to a store that exceeded $2500 (but less than $5000) the LIFT plan provided an additional promotional allowance of 2%. No allowance was provided for the first $2500 in shipments but 2% was granted as soon as that figure was reached.

(b) On shipments that exceeded $5000 (but less than $15,000) LIFT provided an allowance of 2½% of the amount exceeding $5000.

(c) On shipments that exceeded $15,000 LIFT provided an allowance of 3% on amounts exceeding $15,000.

PAR. 8. On or about January 1, 1963, respondents inaugurated a "TOTAL RETAIL PROMOTION PLAN" whereby customers earned a percentage of the total net amount of the merchandise shipped to them during each six-month period, January through June and

Patman Act, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, The Lovable Company, formerly trading as The Lovable Brassiere Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Georgia, with its principal factory and executive offices located at 2400 Piedmont Road, N.E., Atlanta, Georgia. This respondent owns and operates two subsidiary companies, both factories, located in Hollywood, Florida, called the Enterprise Manufacturing Company and the Hollywood Brassiere Company. Respondent corporation also maintains a sales office at 200 Madison Avenue, New York 16, New York, which includes some executive offices and an advertising department.

Arthur Garson, an individual, is president of the above corporation, with principal offices at 200 Madison Avenue, New York 16, New York. Dan Garson, an individual, is executive vice president, with principal offices at 2400 Piedmont Road, N.E., Atlanta, Georgia, and Bernard Howard, an individual, is secretary of the same corporation, with principal offices at 200 Madison Avenue, New York 16, New York. These individual respondents, having acted in the same official capacities in The Lovable Brassiere Company, currently formulate, direct and control the policies, acts and practices of The Lovable Company, the above-named corporate respondent.

PAR. 2. Respondents are now, and for many years past have been engaged in the manufacture of brassieres, girdles, panties and garter belts which are sold and distributed under various trade names, including "Lovable" and "Graduate." Respondents also manufacture and sell similar products for pre-teen-aged girls. Respondents' sales of these products amount to approximately $20,000,000 per year. The respondents sell these products for resale at retail to many customers, such as department stores, chain stores, women's specialty shops and dress shops, with places of business located in various cities throughout the United States.

PAR. 3. In the course and conduct of their business, respondents engaged in commerce, as "commerce" is defined in the Clayton Act, as amended, having shipped their products or caused them to be transported from their principal places of business in the States of Georgia and Florida to customers located in the same and in other States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of their business in commerce, respondents paid or contracted for the payment of something of value to or for the benefit of some of their customers as compensa-

2. Respondents made or offered to make such allowances to some customers and failed to make or offer to make similar allowances to all competing customers; and

3. Respondents made or offered to make allowances in excess of the amounts specified in these plans to some customers and failed to make or offer to make allowances available on proportionally equal terms to other customers who competed with these favored customers in the resale and distribution of respondents' products.

PAR. 11. The acts and practices of the respondents as alleged above violate subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Sec. 13).

Mr. Austin H. Forkner and *Mr. Francis A. O'Brien* for the Commission.

Blumberg, Singer, Ross & Gordon, by *Mr. Matthew H. Ross* and *Mr. Alfred K. Kestenbaum* of New York City, for respondents.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

OCTOBER 30, 1964

Preliminary Statement

On April 20, 1964, the Federal Trade Commission issued its complaint against The Lovable Company, a corporation (hereinafter called Lovable), and Arthur Garson, Dan Garson, and Bernard Howard, individually and as officers of said corporation (all hereinafter collectively called respondents), charging them with granting discriminatory promotional allowances in violation of Section 2(d) of the Clayton Act (hereinafter called the Act), 15 U.S.C. 12, *et seq.*, as amended by the Robinson-Patman Act. Copies of said complaint together with a notice of hearing were duly served on respondents.

Respondents appeared by counsel and filed an answer as amended admitting the corporate, commerce, and certain other factual allegations of the complaint, denying any violation of the Act, and alleging certain affirmative defenses. Pursuant to motion, opposed by respondents, their affirmative defense of lack of competitive effect was stricken by order of the undersigned.

Thereafter, pursuant to negotiations between the parties, a stipulation was entered into and made a part of the record, agreeing, *inter alia*, to amend the answer as provided in said stipulation. As so amended, respondents withdrew their affirmative defense of a good faith meeting of competition, and in substance admitted the

July through December, as a fund to be used by the customer for promoting respondents' "regular-running LOVABLE brassieres, girdles and garter belts presented at nationally advertised or suggested retail prices * * *."

Pursuant to this program customers earned up to 4% of the total net amount of merchandise shipments, of which 2% could be used for cooperative advertising payments and 2% for all "Store Assistance (fixtures, display cards, mats, etc.)." The customer employing newspaper advertising could receive allowances up to 3% of its purchases for that purpose and 1% for "Store Assistance." The customer who did not or could not use cooperative newspaper advertising could receive a maximum of 3% of its net shipments for "Store Assistance."

In connection with its requirements for newspaper ads the plan provided for a maximum size ad of 200 lines to qualify for a 50% payment and payments of 62½% and 75% for ads consisting of 400 lines or more for a series of such larger ads.

The materials and services under the "Store Assistance" portion of respondents' plan consist of fixtures, display materials, mats, demonstrators and other promotional aids made available to the customer by respondents at values fixed by respondents and chargeable against the customer's promotional allowance fund established as indicated above. In addition, requests for certain Lovable fixtures must be accompanied by specified minimum orders and the expense of crating those fixtures is billed to the customer.

PAR. 9. In addition to the payments for advertising services made under the cooperative advertising plans referred to in Paragraphs Six, Seven and Eight, respondents have also granted allowances, hereinafter referred to as "P.M.'s," or "Push or Prize Monies," to sales employees of certain customers to promote the sale of respondents' products, and such payments have not been made available on proportionally equal, or any terms, to customers competing with the customers so favored in the resale at retail of respondents' products.

PAR. 10. Payments made by respondents pursuant to the plans referred to in Paragraphs Six, Seven and Eight, were not made available on proportionally equal terms to all of respondents' customers competing in the resale and distribution of respondents' products in that:

1. The term and conditions of respondents' plans were and are such as to preclude some competing customers from accepting and enjoying the benefits to be derived from these plans;

II. Interstate Commerce

Lovable is now and has been engaged in the manufacture and sale of brassieres, girdles, panties and garter belts under various trade names, including "Lovable" and "Graduate," and similar products for pre-teen-age girls, with annual sales of approximately $20,000,000. Lovable sells these products for resale at retail to department stores, chain stores, women's specialty shops and dress shops located in various cities throughout the United States. In the course and conduct of its business, Lovable is engaged in commerce as "commerce" is defined in the Act.

III. The Unlawful Practices

A. Section 2(d)

Section 2(d) of the Act makes it illegal for any person engaged in commerce to:

> * * * pay * * * to a customer * * * for any services * * * furnished by or through such customer in connection with the * * * sale * * * of any products * * * manufactured * * * by such person, unless such payment * * * is available on proportionally equal terms to all other customers competing in the distribution of such products * * *.

As noted above, respondents admit a violation of Section 2(d) in that the terms and conditions of some of Lovable's cooperative advertising plans preclude some competing customers from their use, and in that Lovable made or offered allowances in excess of the amounts specified in the plans to some customers and failed to make or offer similar allowance to other competing customers, and accordingly it is so concluded and found. Respondents also admitted that the individual respondents formulate, direct and control the policies, acts and practices of Lovable, and accordingly it is concluded and found that, as individuals, they are responsible and liable for such practices and should be included in the order in their individual capacities.[2]

B. Voluntary Discontinuance

Respondents alleged as a defense, but offered no proof, that the practices found above were voluntarily discontinued, either before or upon receipt of notice that the Commission intended to issue a complaint, and will not be resumed. The Commission and the

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[2] *Pacific Molasses Co.*, 65 F.T.C. 675, D.N. 7462 (1964); *Flotill Products, Inc.*, 65 F.T.C. 1099, at p. 21 [p. 1118], D.N. 7226 (1964), and cases cited therein and in the initial decision.

allegations of Paragraph 10 (1) and 10 (3) of the complaint, *i.e.*, that the terms and conditions of Lovable's cooperative advertising plans precluded some competing customers from their use, and that Lovable made or offered allowances in excess of the amounts specified in the plans to some customers and failed to make or offer similar allowances to other competing customers, respectively. Respondents further admitted that such admitted acts and practices violated Section 2(d) of the Act.

While denying the allegations of Paragraph 10 (2) of the complaint that they failed to make or offer allowances under the cooperative advertising plans to all competing customers, respondents in said stipulation agreed that if an order in the form prayed for in the complaint be entered, the failure thereafter of Lovable to offer any such cooperative promotional plan to all competing customers shall be deemed a violation of such order. Respondents did not withdraw two affirmative defenses, namely: one, voluntary discontinuance of the alleged practices, and two, their contention that because of the prevalence of such practices in the industry either an order should not be issued or if issued should be held in abeyance pending like orders against their competitors.

As a result of said stipulation, both parties waived hearings and the submission of proposed findings, conclusions, orders and reasons in support thereof, reserving however the right of appeal from the initial decision. Upon the entire record in this case the undersigned makes the following findings of fact, conclusions and order.

FINDINGS OF FACT

I. Corporate Organization and Individual Responsibility [1]

Lovable, formerly called The Lovable Brassiere Company, is a Georgia corporation with a factory and executive offices at 2400 Piedmont Road N.E., Atlanta, Georgia, and sales and executive offices at 200 Madison Ave., New York 16, New York.

Arthur Garson, an individual, formerly president, is now Chairman of its Board of Directors, with his principal office at said New York address. Dan Garson, an individual, formerly executive vice president, is now President, and Bernard Howard, an individual, formerly secretary, is now Vice President, with their principal offices at said Atlanta address. Said individual respondents formulate, direct and control the policies, acts and practices of Lovable.

[1] All facts found are based upon respondents' admission in their answer as amended, inasmuch as the case was submitted on the pleadings and there are no other facts in the record.

as to indicate identical treatment of the entire industry by an enforcement agency. Moreover, although an allegedly illegal practice may appear to be operative throughout an industry, whether such appearances reflect fact and whether all firms in the industry should be dealt with in a single proceeding or should receive individualized treatment are questions that call for discretionary determination by the administrative agency. It is clearly within the special competence of the Commission to appraise the adverse effect on competition that might result from postponing a particular order prohibiting continued violations of the law. Furthermore, the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.[5]

It will be noted that the Court referred to various relevant facts and factors. No proof having been offered in this proceeding in support of respondents' alleged defense, there is no evidence in the record with respect to any such facts or factors. To the contrary, in fact the Commission has issued a Section 2(d) cease and desist order against one of respondents' competitors based upon substantially the same practice.[6] Accordingly, respondents' alleged defense cannot be sustained.

CONCLUSION OF LAW

The acts and practices of respondents, as above found, violate Section 2(d) of the Act.

ORDER

It is ordered, That respondents, The Lovable Company, a corporation, and its officers, and Arthur Garson, Dan Garson, and Bernard Howard, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the manufacture, sale and distribution of women's wearing apparel, such as brassieres, girdles, panties, garter belts and other related products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

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

[5] *Moog Industries, Inc.* v. *F.T.C.*, 355 U.S. 411, 413 (1957).
[6] *Exquisite Form Brassiere, Inc.*, 64 F.T.C. 271, D.N. 6966 (1964).

courts in scores of decisions have delineated the circumstances under which discontinuance or abandonment warrants dismissal. In general, when the discontinuance is after the commencement of investigation, *i.e.*, when the Commission's "hand is on one's shoulder," such dismissal is not granted. The Commission recently summarized the applicable principle as follows:

In weighing pleas of abandonment or discontinuance, the Commission considers a wealth of factors, but in the final analysis the decision must be based upon a conviction that the practice has been surely stopped and will not be resumed in the future. *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321, 330–331 (7th Cir. 1934).[3]

Since no proof was offered by either party, there is no evidence in the record of any discontinuance, let alone when and under what circumstances, nor any evidence that the practice will surely not be resumed. Accordingly, it is concluded and found that such defense has not been sustained.

C. Common Competitive Practice

Respondents also alleged as a defense, but offered no proof, that the discriminatory practices found above are common and widespread in the industry and that therefore the Commission in the public interest and in fairness to respondents should either not issue a cease and desist order or hold such order in abeyance pending the issuance of like cease and desist orders against respondents' competitors. As the Commission recently observed:

As has been held many times, the *fact* that an unfair method of competition is widespread in an industry is not a defense on the merits to an action brought against a single competitor, although it should be considered by the Commission in exercising administrative discretion as to how most effectively to stop the practice. *Moog Industries, supra*, at 413. (Emphasis added.) [4]

The Supreme Court has held that such action is within the specialized, experienced judgment and administrative discretion of the Commission, and delineated some of the relevant factors in making such a determination. The Court said:

Thus, the decision as to whether or not an order against one firm to cease and desist from engaging in illegal price discrimination should go into effect before others are similarly prohibited depends on a variety of factors peculiarly within the expert understanding of the Commission. Only the Commission, for example, is competent to make an initial determination as to whether and to what extent there is a relevant "industry" within which the particular respondent competes and whether or not the nature of that competition is such

[3] *Chesebrough-Ponds, Inc.*, 66 F.T.C. 252, D.N. 8491 (1964).
[4] *Max Factor & Company*, 66 F.T.C. 184, D.N. 7717, n. 2, p. 251.

(3) that the individual respondents should not be named in the order because they did not personally authorize or participate in the challenged practices,

(4) that the challenged practices are flagrant and industry-wide and that respondents should not therefore be singled out.

The simple answer to the first alleged ground for appeal is that we have no way of knowing whether it has merit because there is no factual basis in the record for it.

In regard to the breadth of the Commission's order, respondents would have the Commission limit the order to plans of the precise kind involved in this proceeding and not draft it in terms having plenary application to all of respondents' promotional and advertising practices.

Such a limitation is obviously unwarranted since there is nothing in the record suggesting that, having violated Section 2(d) through the instrumentality of the two plans involved, the likelihood is that any future violations would occur only within the framework of identical plans. Respondents have violated Section 2(d) and because the violation took a particular form there is no justification for the Commission confining the proscriptive effect of its order to violations of precisely the same kind. *Federal Trade Commission* v. *Ruberoid*, 343 U.S. 470, 473. There is nothing unique about the advertising plans of respondents in this case so as to require a specially tailored order. As we said recently in *All-Luminum Products*, Docket No. 8485 (1963) [63 F.T.C. 1268, 1279], "Respondents' conduct * * * might be repeated in a variety of ways difficult to anticipate precisely in the future." An order sufficiently broad to cover variations on the basic theme of discriminatory promotional allowances is warranted. *Vanity Fair Paper Mills* v. *Federal Trade Commission*, 311 F. 2d 480 (1962).

In the case of the applicability of the order to the individual respondents, we feel that respondents' argument has merit. There is nothing in the record justifying an assumption by the Commission that these individual respondents might in the future violate Section 2(d) *in their individual capacities*. Respondents admit only that the individual respondents formulate, direct and control the policies, acts and practices of respondent corporation. There is no warrant in the record for finding that they do any of these things except in their capacities as officers. To justify naming an officer as an individual there must be something in the record suggesting that he would be likely to engage in these practices in the future *as an individual*. To argue otherwise would be to hold that in every order

It is further ordered, That the failure of The Lovable Company after the date hereof to offer any cooperative promotional plan to all competing customers shall be deemed a violation of this order.

Opinion of the Commission

This matter is before the Commission on appeal of the respondents from the initial decision of the hearing examiner.

The complaint, issued April 20, 1964, charged the corporate and three individual respondents with granting of discriminatory promotional and advertising allowances in violation of subsection (d), Section 2, of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act.

Respondent corporation is engaged in the manufacture and sale of women's wearing apparel including brassieres, girdles, panties, garter belts and other related products.

In an amended answer and stipulation respondent corporation admitted: (a) the material allegations of the complaint, (b) that by virtue of some of the terms and conditions of respondents' promotional plans some competing customers were precluded from accepting and benefiting from these plans and (c) that respondents made or offered allowances in excess of the limitations specified in the plans to some customers and failed to make them available on proportionally equal terms to other competing customers. Respondents further admit that the foregoing acts and practices violated Section 2(d) of the Clayton Act, as amended.

As to the individual respondents, the answer admits "* * * that the individual respondents formulate, direct and control the policies, acts and practices of respondent corporation."

The hearing examiner made findings of fact and conclusions based upon the record consisting solely of the complaint, answer and stipulation and issued an order in statutory language prohibiting the payment of discriminatory advertising and promotional allowances.

Having reserved their right of appeal, respondents have argued before the Commission:

(1) that the challenged practices have been voluntarily abandoned in good faith without likelihood of resumption and that therefore an order is inappropriate,

(2) that the order is too sweeping in its language prohibiting violations generally when the practices forming the basis of complaint were specific and the products limited,

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

2. Failing to offer any cooperative promotional plan to all competing customers when a plan is offered to any of respondent's customers.

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

Commissioner Elman concurring in the result.

In the Matter of

SPRING HOSIERY CONVERTORS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-913. Complaint, June 30, 1965—Decision, June 30, 1965

Consent order requiring New York City sellers of ladies' imperfect hosiery—repaired, dyed, packaged and sold to wholesalers, distributors, and jobbers—to cease misrepresenting their "irregular" and "second" hosiery products as first or perfect quality, falsely representing their business as manufacturers of nylon hosiery, and omitting required information on labels.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Spring Hosiery Convertors, Inc., a corporation, and Yale Raul, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promul-

running against a corporation the officers who control its policies, acts and practices should be named. If acts are done as an officer they are done for the corporate respondent, and the order against the corporation will run against the officer as officer. That is all that is required in this case on this record.

Respondents' assertion that the practices which they have engaged in are prevalent throughout the industry is no more than an assertion and has no basis in the record, since respondents did not see fit to adduce evidence that these practices were prevalent or that their prevalence required them to adopt them as a defensive measure to meet competition. This being so, the Commission has no reason for withholding an order against respondent corporation.

An appropriate order will issue.

Commissioner Elman concurred in the result.

FINDINGS OF FACT; CONCLUSIONS; FINAL ORDER

FINDINGS OF FACT

The Commission adopts the findings of fact contained at pages 1331 to 1334 of the hearing examiner's initial decision as its own findings of fact except page 1332, third paragraph, last sentence, which is stricken, as is footnote 2.

CONCLUSIONS

The acts and practices of respondent corporation herein found were and are to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute a violation of Section 2(d) of the Clayton Act, as amended.

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

FINAL ORDER

It is ordered, That respondent, The Lovable Company, a corporation, its officers, Arthur Garson, Dan Garson and Bernard Howard, and its other representatives, agents and employees, directly or through any corporate or other device, in connection with the manufacture, sale and distribution of women's wearing apparel, such as brassieres, girdles, panties, garter belts and other related products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

or more persons subject to Section 3 of the said Act, with respect to such product.

2. To disclose the percentage of fibers present by weight.

PAR. 4. The acts and practices of respondents, as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute unfair methods of competition and unfair and deceptive acts or practices, in commerce, under the Federal Trade Commission Act.

PAR. 5. In the course and conduct of their business, respondents purchase hosiery which is imperfect. They cause such hosiery to be repaired, if required, and dyed and then sell such hosiery to wholesalers, distributors and jobbers who in turn sell it to the purchasing public. Such hosiery products are known in the trade as "irregulars" or "seconds," depending upon the nature of the imperfection.

PAR. 6. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, including hosiery when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 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 products of the same general kind as that sold by respondents.

PAR. 8. Respondents did not mark their said hosiery as "irregulars" or "seconds," or otherwise so as to inform purchasers thereof of its imperfect quality. The purchasing public in the absence of markings showing that hosiery products are "irregulars" or "seconds" understands and believes that they are of perfect quality. Respondents' failure to mark or label their product in such a manner as will disclose that said products are imperfect, has had, and now has, the capacity and tendency to mislead dealers and members of the purchasing public into the erroneous and mistaken belief that said products are perfect quality products and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

Official notice is hereby taken of the fact that, in connection with the sale or offering for sale of imperfect hosiery, the failure to disclose on such hosiery products that they are "irregulars" or

gated under the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its compaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Spring Hosiery Convertors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent Yale Raul 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. The respondents are convertors of ladies' hosiery, purchasing said hosiery as seconds and after having said hosiery repaired and dyed, respondents then package said hosiery for sale to wholesalers, distributors and jobbers. The respondents have their office and principal place of business at 67 Spring Street, New York, New York.

PAR. 2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(b) of the Textile Fiber Products Identification Act and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded textile fiber products but not limited thereto were textile fiber products, namely ladies' hosiery, with labels which failed:

1. To disclose the name or other identification issued and registered by the Commission of the manufacturer of the product or one

violation of the Federal Trade Commission Act and the Textile Fiber Products Identification 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 Spring Hosiery Convertors, 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 67 Spring Street, New York, New York.

Respondent Yale Raul 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, Spring Hosiery Convertors, Inc., a corporation, and its officers, and Yale Raul, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce, or in the importation into the United States, of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, of any textile fiber product which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other tex-

"seconds," as the case may be, is misleading, which official notice is based upon the Commission's accumulated knowledge and experience, as expressed in Rule 4 of the Commission's amended Trade Practice Rules for the Hosiery Industry promulgated August 30, 1960 (amended June 10, 1964).

PAR. 9. Respondents in selling their hosiery as aforesaid have labeled certain of said packaged hosiery as "finest quality" thereby representing that said hosiery is of first quality. Respondents' practice of labeling their packaged hosiery as "finest quality" has had, and now has, the capacity and tendency to mislead dealers and members of the purchasing public into the erroneous and mistaken belief that said products are first quality products and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 10. In the course and conduct of their business the aforesaid Spring Hosiery Convertors, Inc., on their invoices refer to their corporation as "manufacturers of nylon hosiery" thus stating or implying that said corporation is a manufacturer of nylon hosiery. In truth and in fact, the respondents do not own or control the mills or factories where the hosiery sold by them is manufactured. Thus, the aforesaid representation is false, misleading and deceptive.

PAR. 11. There is a preference on the part of many members of the public to deal directly with a manufacturer, including the manufacturer of clothing, in the belief that by doing so, certain advantages accrue, including better prices.

PAR. 12. The use by such respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead dealers and other purchasers into the erroneous and mistaken belief that said statements and representations were, and are, true, and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with

ents are manufacturers of hosiery or other textile products unless respondents own and operate, or directly and absolutely control a mill, factory or manufacturing plant wherein said hosiery or other textile products are manufactured.

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.

tile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

Misbranding textile fiber products by:

Failing to affix labels to such textile fiber products showing each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

It is further ordered, That respondents, Spring Hosiery Convertors, Inc., a corporation, and its officers, and Yale Raul, 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 "irregular" or "second" hosiery, as these terms are defined in Rule 4(c) of the Amended Trade Practice Rules for the Hosiery Industry (16 CFR 152.4(c)), in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Selling or distributing any such hosiery without clearly and conspicuously marking thereon the words "irregular" or "second," as the case may be, in such degree of permanency as to remain on the product until the consummation of the consumer sale and of such conspicuousness as to be easily observed and read by the purchasing public.

2. Using any advertisement or promotional material in connection with the offering for sale of any such hosiery unless it is disclosed therein that such article is an "irregular" or "second," as the case may be.

3. Using the words "finest quality" or words of similar import on the package in which such product is sold or in reference to any such product in any advertisement or promotional material.

4. Representing in any other manner, directly or by implication, that such products are first quality or perfect quality.

It is further ordered, That respondents, Spring Hosiery Convertors, Inc., a corporation, and its officers, and Yale Raul, 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 hosiery or other textile products, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or indirectly that the respond-

respondents' motion and complaint counsel's reply thereto, having concluded that respondents have raised issues which may be more properly considered and disposed of on the basis of a full and complete record:

It is ordered, That respondents' Motion to Reconsider Order Denying Request to File Interlocutory Appeal be, and it hereby is, denied.

Commissioner Elman dissenting.

DIAMOND ALKALI COMPANY

Docket 8572. Order, Jan. 21, 1965

Order that respondent's motion for the postponement of oral argument be denied.

ORDER DENYING MOTION FOR POSTPONEMENT OF ORAL ARGUMENT

Respondent has filed a motion to postpone the date of oral argument before the Commission of the appeal in the above-captioned proceeding from January 26, 1965, to April 1, 1965, or any other date in April 1965. The ground for the motion is that respondent's attorneys are currently required to devote a large amount of time to other pending litigation and investigatory matters. Complaint counsel has filed an answer opposing respondent's request for a postponement.

Section 6(a) of the Administrative Procedure Act provides: "Every agency shall proceed with reasonable dispatch to conclude any matter presented to it except that due regard shall be had for the convenience and necessity of the parties or their representatives." A number of provisions of the Commission's Rules of Practice are designed to assure reasonable dispatch of Commission adjudicatory proceedings. For example, Section 3.16(d) provides that "Hearings shall proceed with all reasonable expedition" and that "all hearings shall be held at one place and shall continue without suspension until concluded." And Section 3.21 requires the hearing examiner to file his initial decision within ninety days after completion of the reception of evidence in a proceeding. Obviously, the effectiveness of these and other provisions requiring the expeditious handling and reasonable dispatch of Commission proceedings would be vitiated if the Commission were to allow repeated and undue delays in the filing and argument of appeals to the Commission from the hearing examiner's initial decision. The requirement of reasonable dispatch does not terminate with the filing of the initial decision.

The initial decision in the above-captioned proceeding was filed on May 15, 1964 [72 F.T.C. 700], and respondent has requested and been granted extensions of time for the filing of its apppeal and reply briefs. If the Commission were to grant the present motion to postpone the date of oral argument, the result would be that almost a year would be

INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

ALHAMBRA MOTOR PARTS ET AL.

Docket 6889. Order, Jan. 5, 1965

Order granting the request of an automotive parts trade association to file an *amicus curiae* brief.

Order Granting Leave To File Brief Amicus Curiae

Upon consideration of the application of Automotive Warehouse Distributors Association, Inc., filed December 21, 1964, for leave to intervene in the above-captioned proceeding pursuant to Section 3.9 of the Commission's Rules of Practice (effective August 1, 1963) or to file a brief as *amicus curiae*, and of the answers thereto filed by complaint counsel and respondents in the above-captioned proceeding on December 23 and 28, 1964, respectively; and it appearing that the applicant desires only to file a brief with the Commission in support of the appeal from the hearing examiner's initial decision,

It is ordered, That the applicant, Automotive Warehouse Distributors Association, Inc., be, and it hereby is, granted leave to file an *amicus curiae* brief, provided that such brief does not exceed sixty (60) pages in length and is filed within the period provided for the filing of the appeal brief in this proceeding.

RODALE PRESS, INC., ET AL.

Docket 8619. Order, Jan. 5, 1965

Order denying motion to reconsider order which denied request for permission to file interlocutory appeal.

Order Denying Motion To Reconsider Order Denying Request for Permission To File Interlocutory Appeal

Respondents having moved that the Commission reconsider its Order Denying Request for Permission to File Interlocutory Appeal, dated December 3, 1964; and the Commission, after duly considering

initial decision based on the record developed therein, with direction that such further proceeding be conducted as expeditiously as possible.

SOUTHERN FRUIT DISTRIBUTORS, INC.

Docket 7566. Order, Jan. 26, 1965

Order denying respondent's petition to reopen proceeding involving the brokerage section of the Clayton Act.

Order Denying Petition of Respondent To Reopen Proceeding

This matter is before the Commission on petition of respondent to reopen proceeding, filed December 28, 1964, and answer in opposition thereto filed by the Bureau of Restraint of Trade January 7, 1965.

On February 13, 1960, the Commission issued its order to cease and desist against respondent prohibiting discounts in lieu of brokerage to buyers of its products. The complaint had alleged discounts in lieu of brokerage to "certain favored buyers," not otherwise identified, purchasing for their own accounts in violation of Section 2(c) of the Clayton Act as amended, U.S.C., title 15, sec. 13.

The matter was disposed of without hearings upon acceptance by the Commission of an Agreement Containing Consent Order to Cease and Desist executed pursuant to the then effective Rule 3.25, of the Commission's Rules, governing consent orders.

Thus, the entire record upon which the Commission's decision and order rests consists of the complaint and consent order.

The respondent's petition to reopen, citing the Commission's decision in *Hruby Distributing Company*, Docket 8068, December 26, 1962 [61 F.T.C. 1437], states that the challenged discounts in this matter paid by respondent were not discounts in lieu of brokerage because the recipient was an independent food distributor not competing on the same functional level with the wholesalers to whom he sold.

In support of this, respondent's petition cites *In the matter of Smith Grain Company, Inc., et al.*, Docket 7641, wherein the Commission's complaint, issued October 29, 1959 [58 F.T.C. 1058], charged Smith Grain Company with violation of 2(c) of the amended Clayton Act based upon discounts received by Smith from petitioner herein.

Petitioner states that it was sales by it to Smith Grain which formed the basis also of the Commission's complaint against petitioner in the instant matter and that a fair reading of the complaint in Docket 7641 reveals that Smith Grain was operating at a different functional

permitted to elapse between the completion of the proceedings before the examiner and the oral argument of the appeal from the examiner's decision. Such a delay would not be consistent with the Commission's policy of reasonable dispatch and, on the showing made by respondent in its motion, cannot be justified in terms of "due regard * * * for the convenience and necessity of the parties or their representatives." Accordingly,

It is ordered, That respondent's motion to postpone oral argument be, and it hereby is, denied.

THE ELECTRA SPARK COMPANY ET AL.

Docket 8274. Order, Jan. 18, 1965

Order vacating the initial decision and final order of June 5, 1964, 65 F.T.C. 877, reopening the proceeding and remanding the case to the hearing examiner.

Order Reopening Proceeding

The Commission having issued its order on December 30, 1964 [66 F.T.C. 1590], granting respondents Electra Spark Company, Lectra Sales Corporation, Fred P. Dollenberg and Bernard L. Silver certain alternatives in response to their motion requesting that this proceeding be reopened for the purpose of setting aside or modifying the final order issued herein on June 5, 1964; and

The aforesaid respondents by motion filed January 11, 1965, and respondent Harry J. Petrick by motion filed January 12, 1965, having elected to withdraw the document entitled "Stipulation as to Facts and Proposed Order" received in the record by the hearing examiner by order filed February 27, 1964, and to proceed to trial; and

The Commission having noted that the parties requesting withdrawal of the document are the principal respondents named in the complaint and being of the opinion that the other respondents would desire the same action; and

The Commission having duly considered said requests and having determined that they should be granted:

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

It is further ordered, That the final order issued by the Commission on June 5, 1964, and the hearing examiner's initial decision filed March 31, 1964, be, and they hereby are, vacated and set aside.

It is further ordered, That the document entitled "Stipulation as to Facts and Proposed Order" dated November 20, 1963, and accepted by the hearing examiner's order filed February 27, 1964, be, and it hereby is, withdrawn from the record.

It is further ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for trial of this case and for an

On December 10, 1964, respondent filed its Motion to Vacate Complaint Addressed to Hearing Examiner. A subsequent amendment to its motion was filed December 31. Counsel supporting the complaint filed an answer in opposition to respondent's motion on December 22.

The hearing examiner by order dated January 4, 1965, denied respondent's motion on the ground that he had no authority to grant the relief requested, and he further refused to certify the motion to the Commission.

On January 5, 1965, respondent filed a Reply to Answer in Opposition to Motion to Vacate Complaint and on January 14, 1965, complaint counsel filed motion to strike this reply.

Respondent has now filed with the Commission its Memorandum Regarding Respondent's Motion to Vacate Complaint or in the Alternative Request for Interlocutory Appeal asserting that its original Motion to Vacate was filed "* * * *with the Commission*" and the hearing examiner had no alternative but to certify it. Complaint counsel on January 18, 1965, filed answer in opposition to respondent's memorandum.

The hearing examiner in his order denying request to certify motion and denying motion to vacate complaint dated January 4, 1965, stated that while he had no authority under the Commission's Rules to grant the relief requested, nonetheless, it did not follow that he had no authority to deny it.

We think the hearing examiner's ruling was in error and that respondent's motion should have been certified.

Under § 3.6(a) of the Commission's Rules of Practice the hearing examiner must certify to the Commission any question on which he "* * * has no authority to rule." He correctly concluded that he had no authority to grant the relief but construed the Section as implicitly authorizing him to deny it. Since the denial of a motion is as much a ruling as the granting of one, we conclude that the hearing examiner should have certified it to the Commission. And since the motion is before us on respondent's request for interlocutory appeal, we can dispose of it now.

Briefly, respondent's motion to vacate embraces three prayers: (1) a request for an informal conference with the Commission to show that the Commission's complaint was improvidently issued, (2) a motion to vacate complaint and (3) an opportunity to negotiate a consent order.

Regarding respondent's request for opportunity to dispose of this matter by consent order we have decided that § 2.4(d) of the Com-

level from the wholesalers to whom it sold and that under the ruling in *Hruby*, neither Smith nor Southern should be charged with a violation of Section 2(c).

Notwithstanding petitioner's assertion that the Commission's complaint herein was based on Southern's dealings with Smith Grain, it is obvious that the only record upon which the Commission can rely in this matter consists of the complaint and consent order wherein the challenged discounts in lieu of brokerage were alleged and found to be paid to "favored buyers," not further identified.

Whatever the character of Smith Grain in its relationship to petitioner, it cannot be held on this record to either identify or exhaust the class of customers described in the complaint and consent order as "favored buyers." *Russell-Ward Company, Inc.*, Docket 8207, order of June 24, 1963 [62 F.T.C. 1563].

Moreover, for the Commission to attempt to determine, at this time, whether in fact the complaint was predicated solely on transactions declared to be lawful in the *Hruby* decision would require inquiry into acts and practices now several years in the past. In this connection, we note that respondent has offered no explanation as to why it waited two years after the *Hruby* decision was rendered to file this petition. And since conduct in compliance with the requirements of law as stated in the *Hruby* decision would not violate the terms of the order against respondent, we fail to see, and respondent has made no attempt to explain, how it is prejudiced by the order.

Respondent has not therefore shown changed conditions of fact or law necessary under § 3.28(b)(2) of the Commission's Rules to support a petition to reopen for purposes of altering or modifying the order herein. Accordingly,

It is ordered, That respondent's petition to reopen be, and it hereby is, denied.

Commissioner MacIntyre not concurring.

R. H. MACY & CO., INC.

Docket 8650. Order, Feb. 4, 1965

Order denying respondent's request for informal conference and motion to vacate, suspending proceedings for thirty days, and granting opportunity to settle by consent order.

Order Denying Motion To Vacate Complaint and Granting Request for Opportunity for Consent Settlement

This matter is before the Commission on respondent's Memorandum Regarding Respondent's Motion to Vacate Complaint or in the Alternative Request for Interlocutory Appeal, filed January 13, 1965.

ORDER GRANTING LEAVE TO PARTICIPATE IN ORAL ARGUMENT AND ALLOTTING TIME THEREFOR

Upon consideration of the request of Automotive Warehouse Distributors Association, Inc., which has heretofore been granted leave to submit an *amicus curiae* brief in the above-captioned proceeding, for leave to participate in oral argument of the appeal,

It is ordered, That the request be, and it hereby is, granted, and a period of thirty (30) minutes is allotted to the *amicus curiae* for such purpose.

It is further ordered, That respondents be, and they hereby are, granted an additional fifteen (15) minutes for presentation of their oral argument.

RICHARD S. MARCUS trading as STANTON BLANKET COMPANY

Docket 8610. Order, March 4, 1965

Order denying respondent's motion to reopen case on the grounds of introducing more evidence.

ORDER DENYING PETITION TO REOPEN PROCEEDING

The Commission issued its final order in the above-captioned proceeding on December 18, 1964 [66 F.T.C. 1290]. In the order, the Commission stated:

Especially since respondent, who is not a lawyer, has appeared throughout this proceeding *pro se*, the Commission has given the most careful consideration to the record of this proceeding, the initial decision of the hearing examiner, and the briefs and arguments of the parties. We are satisfied that respondent has had a fair hearing and full opportunity to conduct his defense; that he conducted his defense with vigor and skill throughout the entire proceeding; and that he was not handicapped by not having the aid of counsel.

The record clearly demonstrates that respondent has engaged not only in serious, but in flagrant, violations of the Wool Products Labeling Act; and an order to cease and desist is clearly necessary in the public interest to prevent recurrence of the unlawful conduct. The Commission has concluded that the findings and conclusions of the hearing examiner in the initial decision adequately and correctly disposes of all the issues of this case, and that the cease and desist order contained in the initial decision is appropriate in all respects.

On February 15, 1965, after respondent had filed a petition for review of the Commission's order in the United States Court of Appeals for the Second Circuit but before the filing of the record in the court, respondent, by counsel, filed with the Commission a motion to reopen the above-captioned administrative proceeding for the reception of additional evidence. See Section 3.28(a) of the Commission's Rules

mission's Rules should be waived and respondent be given an opportunity under §§ 2.3 and 2.4 of the Rules to execute an appropriate agreement for consideration by the Commission Accordingly,

It is ordered, That respondent's request for informal conference and its motion to vacate be, and they hereby are, denied.

It is further ordered, That proceedings in connection with the Commission's complaint herein be suspended for thirty (30) days following service of this order and that respondent be afforded an opportunity to dispose of this matter by the entry of a consent order.

MAGNAFLO COMPANY, INC., ET AL.

Docket 8422. Order, Feb. 18, 1965

Order remanding case to the hearing examiner pursuant to a decision of the U.S. Court of Appeals for the District of Columbia, 7 S.&D. 1112.

ORDER REOPENING CASE AND REMANDING IT TO HEARING EXAMINER

The United States Court of Appeals for the District of Columbia Circuit, by its judgment entered on February 4, 1965 [7 S.&D. 1112], having remanded this case for the further proceedings directed in its opinion of the same date:

It is ordered, That the matter be, and it hereby is, reopened.

It is further ordered, That the matter be, and it hereby is, remanded to Hearing Examiner Joseph W. Kaufman for such further proceedings, including hearings, as are necessary to comply fully with the directions contained in the opinion and judgment of the Court that respondent be given an expeditious and full opportunity to show that its trade name can be limited by the use of qualifying words so as to make unambiguous the claim that its product will conserve battery charge and prolong battery effectiveness.

It is further ordered, That the hearing examiner, upon completion of the further proceedings, shall file a supplemental initial decision based upon the record made prior to the remand and any additional evidence that may be received.

ALHAMBRA MOTOR PARTS ET AL.

Docket 6889. Order, Mar. 2, 1965

Order granting leave to a trade association which had filed an *amicus curiae* brief to participate in the oral argument.

himself. As the presiding member of the Commission stated at the conclusion of oral argument on respondent's appeal, "I think I should say that the Commission is very much impressed by the vigor and the skill with which you have handled yourself not only this afternoon but throughout this entire proceeding. Not being represented by counsel certainly has been no handicap to you. No matter how the case comes out I think you should feel you have not been prejudiced." (Transcript of Oral Argument, p. 56.) Respondent's motion completely fails to demonstrate wherein respondent would have benefited materially from being represented by counsel and how the additional evidence which respondent now seeks to adduce could change the Commission's decision.

Respondent in his motion states that he "did not realize that he should have, or could have, introduced testimony from the manufacturers of his blankets as to the unavailable variation, the exercise of due care, and what would constitute a reasonable manufacturing variance," so as to bring himself within one of the defenses provided in the Wool Products Labeling Act to a charge of misbranding. From our reading of the record we were, and remain, convinced that respondent was well aware of what kind of evidence was required to establish the defense. In any event, since respondent testified that he destroyed all labels placed by suppliers on the blankets sold by him during the period relevant to the charges in the complaint, and since it appears, therefore, that the blankets which the Commission found to be misbranded cannot be traced to particular lots manufactured by particular manufacturers, it does not appear that evidence as to a particular manufacturer's manufacturing processes would excuse respondent's misbranding. Moreover, respondent's blankets were found to be misbranded not only because they misstated the fiber content, but also because they failed to reveal the presence of certain fibers. The defense of unavoidable variations in manufacture would not be pertinent to this phase of respondent's misbranding, and it would not affect the cease and desist order which the Commission has entered.

The second area in which respondent in his present motion seeks leave to adduce additional evidence relates to the finding that respondent's employees removed the suppliers' labels and substituted therefor labels setting forth different fiber amounts. Respondent characterizes such evidence as "highly prejudicial," as a "complete surprise," and as improper rebuttal. On the contrary, it was proper rebuttal. Respondent had testified that he placed the same information that appeared on his suppliers' labels on his own labels. (Transcript of Hearings, pp. 7, 361.) The rebuttal testimony introduced by complaint counsel contradicted respondent's testimony on this point. In his

of Practice (effective August 1, 1963), and Section 5(c) of the Federal Trade Commission Act. In the motion it is alleged that respondent, in representing himself without the aid of legal counsel throughout the entire proceeding before the Commission, was denied a fair trial. On February 19, 1965, complaint counsel filed an answer in opposition to respondent's motion to reopen. The Commission has determined that the motion should be denied.

First. No contention is made that respondent was not aware from the outset of this proceeding of his right to be represented by counsel, or that he was unable for financial or other reasons to retain counsel, or that he was in any way discouraged or prevented by the Commission or by anyone from retaining counsel, or that he was incompetent to decide for himself whether or not he desired the services of counsel. At the outset of the hearings in this matter, respondent stated to the hearing examiner: "Well, if your Honor doesn't mind, I feel I can represent myself." (Transcript of Hearings, p. 2.)

When respondent advised the examiner that he would represent himself, the examiner and the Commission were, of course, bound by his decision. The Commission could not compel respondent, a competent adult, to retain counsel to assist him if he wished to represent himself. All the Commission could do was to take every possible step to ensure that respondent would not be penalized or prejudiced by his lack of counsel but would have every reasonable opportunity to make his defense; and a reading of the record will show that the hearing examiner, complaint counsel, and the Commission, fully mindful that respondent is a layman, made every effort to assist respondent in presenting his defense. Nor does respondent contend otherwise.

In these circumstances, to grant respondent a new trial (which is what, in effect, he requests in the motion to reopen) simply because he has belatedly decided that he could have made a better defense with the aid of counsel would open the door to widespread abuse of the administrative hearing process. A respondent who, like the present respondent, is perfectly free and able to retain counsel to represent him may not, except in extraordinary circumstances not shown here, insist on two successive trials on the same charges before the Commission—the first without, and the second with, counsel. We think the principle of *Colorado Radio Corp.* v. *F.C.C.*, 118 F.2d 24, 26 (D.C. Cir. 1941), is applicable here:

> [W]e cannot allow the applicant to sit back and assume that a decision will be in its favor and then when it isn't to parry with an offer of more evidence. No judging process in any branch of government could operate efficiently or accurately if such a procedure were allowed.

Second. We do not think respondent was, in the circumstances, prejudiced in the presentation of his defense by his choice to represent

WILMINGTON CHEMICAL CORPORATION ET AL.

Docket 8648. Order, Mar. 18, 1965

Order denying leave to file an interlocutory appeal challenging hearing examiner's ruling.

Order Denying Leave To File Interlocutory Appeal

On March 17, 1965, the Commission received a letter from counsel for respondents in the above-captioned proceeding, which letter will be treated as an application for leave to file an interlocutory appeal from the hearing examiner's order of March 16, 1965. By this order the examiner denied respondents' motion for a sixty-day postponement of the hearings in this matter now scheduled to commence on March 18, 1965. The examiner's written ruling upon respondents' motion reflects a full and fair evaluation of all the relevant considerations. The Commission's Rules of Practice and Procedure accord the hearing examiner a considerable discretion in regulating the course of hearing, and respondents have entirely failed to suggest any basis for concluding that the examiner's ruling of March 16, 1965, constitutes an abuse of discretion. Accordingly, it appearing that there are no extraordinary circumstances justifying a review of the examiner's decision by means of interlocutory appeal under Section 3.20 of the Commission's Rules of Practice and Procedure,

It is ordered, That respondents' application for leave to file an interlocutory appeal be, and it hereby is, denied.

LAFAYETTE RADIO ELECTRONICS CORPORATION

Docket C-788. Order, Mar. 24, 1965

Order denying petition to suspend effectiveness of order until similar orders involving three competitors are issued.

Order Denying Petition To Reopen Proceedings

Respondent, by petition filed March 1, 1965, has requested that this proceeding be reopened for the purpose of setting aside or modifying the final order, issued on July 14, 1964 [66 F.T.C. 142], based on an agreement containing a consent order. In substance, respondent requests that the effectiveness of the order be suspended until substantially similar orders are issued and become final against three named competitors.

present motion, respondent states that he "did not have an opportunity * * * to answer these charges." No explanation is offered as to why respondent did not have such an opportunity. In any event, the point is a peripheral one. The evidence that respondent's employees substituted false labels in this fashion was merely corroborative. (See initial decision, finding no. 14, 66 F.T.C. 1290, 1296.) The Commission's decision and order would be the same even if the evidence were completely discounted.

It is ordered, That, for the reasons set forth above, respondent's motion to reopen the above-captioned proceeding be, and it hereby is, denied.

COLUMBIA BROADCASTING SYSTEM, INC., ET AL.

Docket 8512. Order, Mar. 15, 1965

Order denying respondent's request to file a 200-page answering brief.

Order Denying Motion

On January 25, 1965, the Commission issued an order granting respondents' motion for an additional 2 months in which to file their answering brief. Considering at the same time respondents' motion for leave to file an answering brief not exceeding 200 pages, the Commission granted leave to file a brief of 150 pages in length, including all appendices. Respondents have now renewed their request that they be granted leave to file an answering brief not exceeding 200 pages in length and they request that the filing date be further extended to May 19, 1965. The sole reason given by respondents for requiring a 200-page answering brief is that it is necessary to answer in detail what they regard as "the appeal brief's distortions of the record." The Commission is of the view that the authorization heretofore granted respondents should enable them to make a clear and complete presentation of the issues of the case and that they have failed to demonstrate the "reasonableness and necessity" of filing a brief so greatly in excess of the limit set forth in Section 3.22(e) of the Commission's Rules of Practice and Procedure. *Shulton, Inc.*, Docket No. 7721, order issued February 14, 1964. Since respondents' accompanying motion for an extension of time until May 19, 1965, has been premised entirely upon the ground that additional time would be needed to prepare a brief of 200 pages in length, denial of the latter motion also requires a denial of the former. Accordingly,

It is ordered, That respondents' motion be, and it hereby is, denied in all respects.

FRUEHAUF TRAILER COMPANY

Docket 6608. Order, Mar. 25, 1965

Order directing that oral reargument be held before Commission on April 22, 1965, with each side allotted 45 minutes to present its views.

Order Directing Oral Reargument

This matter is before the Commission on the appeals of complaint counsel and respondent from the initial decision of the hearing examiner. The Commission has determined that the appeals should be orally reargued. The Commission invites counsel to focus their attention on reargument on two areas: (1) evidence in the record with respect to post-acquisition events; and (2) the significance of that evidence with respect to the application of Section 7 of the Clayton Act, as amended, to the acquisitions involved in the appeals. Accordingly,

It is ordered, That oral reargument of the appeals in the above-captioned matter be held before the members of the Commission on April 22, 1965, at 2 p.m., in Room 532 of the Federal Trade Commission Building, Washington, D.C., with each side alloted 45 minutes to present its views.

TOPPS CHEWING GUM, INC.

Docket 8463. Order, April 5, 1965

Order reopening proceeding to admit into the record additional documentary evidence.

Order Ruling on Petitions to Reopen

Respondent has filed two motions pursuant to Section 3.27 of the Commission's Rules of Practice for a reopening of the record for the reception of additional evidence. The first of these motions, filed February 24, 1965, seeks the reopening "for the purpose of introducing into evidence the attached player agreement and Exhibits A and B attached to its reply brief." Complaint counsel did not oppose this petition, but requested that a document attached to their answer be similarly accepted into the record. On March 17, 1965, respondent filed an answer thereto stating that it did not oppose complaint counsel's petition, but went on to "answer the additional comments" in complaint counsel's papers.

We cannot say, at least at this point, that the three (3) documents offered by respondent and the one (1) document offered by complaint counsel, all of which apparently concern matters that arose after the

As grounds for its request, respondent states that the practices proscribed by the final order are industrywide and, in particular, are engaged in by its principal competitors, and that it agreed to a consent order, in large part, because of its understanding that its principal competitors were under investigation and that that meant comparable orders would be issued against them in due course.

The order in this case, in principal part, prohibits respondent from misrepresenting prices and the savings available to consumers in the sale of radios, phonograph equipment, radio electronic equipment or any other articles of merchandise. Additionally, the order requires respondent to cease misrepresenting the terms of its guarantees as to such merchandise and prohibits certain claims as to the quality of respondent's phonograph needles. In view of the general nature of these practices and the broad range of products sold by respondent, the Commission, in the exercise of its administrative discretion, determined that the public interest did not warrant suspension of formal action against this respondent pending an investigation of its competitors. Respondent has alleged no facts in support of its present motion which would justify the Commission in revoking the earlier determination. Respondent, while requesting the Commission to take "judicial notice" that its business will suffer by compliance with the order, has made no factual showing whatever of present or prospective business injury as a result of compliance. Indeed, respondent assures the Commission that it will continue to comply with the order even if the Commission grants its request to suspend the effectiveness thereof.

Respondent contends that it agreed to accept a consent order in part because it understood that comparable orders would be issued against its competitors. In support of this contention respondent states only that it was advised that the practices of its competitors were under investigation. But respondent is surely aware that formal proceedings could not be instituted against its competitors unless the Commission, after appropriate investigations, found sufficient evidence of unlawful conduct by the firms under investigation to justify the issuance of complaints.

We conclude that respondent has failed to establish that changed conditions of fact or law, or the public interest, require any change in the order. Accordingly,

It is ordered, That respondent's petition filed March 1, 1965, be, and it hereby is, denied.

REPORT OF THE FEDERAL TRADE COMMISSION UPON ITS INVESTIGATION OF ALLEGED VIOLATIONS OF ITS ORDER TO CEASE AND DESIST

APRIL 12, 1965

The Proceedings

On July 22, 1964, the Commission having reason to believe that Jantzen, Inc., may have violated the provisions of the order to cease and desist issued herein on January 16, 1959, and modified on March 26, 1959 [55 F.T.C. 1065, 1068], directed that an investigational hearing be conducted pursuant to § 1.35 and related rules of the Commission's Rules of Practice to ascertain the extent to which such violations may have occurred. A hearing examiner of the Commission was duly designated to preside at hearings to be conducted for that purpose and it was directed that he, in lieu of rendering an initial decision upon completion of the hearing, certify the record to the Commission, together with his report upon the investigation.

Pursuant to and in accordance with the foregoing, a hearing was set by the hearing examiner for November 30, 1964, in Portland, Oregon, for the purpose of taking testimony in evidence concerning the nature and extent of compliance by Jantzen, Inc., with the said order to cease and desist. Prior to said hearing a prehearing conference was ordered herein for Washington, D.C., on November 23, 1964. During the course of this conference a stipulation signed by counsel for the Commission and for respondent, Jantzen, Inc., and a motion, agreed upon by counsel to close the proceedings before the hearing examiner, were submitted to the hearing examiner and incorporated into the record. On November 23, 1964, the hearing examiner issued his order, as requested by counsel for both respondent and the Commission, cancelling the investigational hearing set for Portland, Oregon, quashing the subpoenas directed to the respondent's officials, excusing their appearance, and closing the record in this proceeding. On January 14, 1965, the hearing examiner's "Report and Certification to the Commission of Record of Investigational Hearing" was duly recorded and filed in the office of the Commisson. The Commission having duly considered the report filed by the hearing examiner and the record herein and being now fully advised in the premises, and having accepted the said stipulation entered into by counsel for the respondent and the Commission, makes this its report upon the investigation of the alleged violations of the order to cease and desist.

closing of this record, are irrelevant to any of the issues. They will be received.

Respondent's second motion to reopen was filed on March 29, 1965, almost on the eve of the scheduled oral argument of the case before the Commission (April 6, 1965). Merely to give complaint counsel the usual 10 days to answer this petition would thus compel a postponement of the argument. Respondent presents nothing here to warrant such further delay in an already protracted proceeding. It proffers an affidavit of respondent's president, together with a tabulation and several photographs. The substance of this material is that respondent has discovered new "competition" from a variety of sources, particularly from firms selling cards bearing the likenesses of persons other than baseball players. It indicates, for example, that another bubble gum seller has, within the last few weeks, commenced selling a set of picture cards called "The Addams Family" (picturing the persons and objects depicted in the current television program by that name). This material seems to us to be clearly cumulative; the hearing examiner received voluminous evidence of this character during the course of the hearing (initial decision, pp. 754–760 herein) and later denied a motion by respondent to reopen the case and receive more (*id.*, p. 758). This proceeding could be prolonged interminably if it must be halted and the record reopened each time the television networks create a new personality or subject that can be copied on picture cards and offered for sale to children.

It is ordered, Therefore, that respondent's petition filed on February 24, 1965, and the petition of complaint counsel contained in their answer thereto filed March 8, 1965, be, and they hereby are, granted to the extent herein indicated; that the record be, and it hereby is, reopened for the limited purpose of receiving into evidence the three (3) documents described in respondent's petition and the one (1) document described in complaint counsel's answer thereto; that those documents be, and they hereby are, received in evidence as respondent's and the Commission's exhibits, respectively; and that the record be, and it hereby is, thereafter closed.

It is further ordered, That respondent's petition for reopening filed March 29, 1965, be, and it hereby is, denied.

JANTZEN, INC.

Docket 7247. Order and Report, Apr. 9, 1965

Order denying respondent's request for informal disposition of the case under Section 1.21 of the Rules of Practice.

or through such customers in connection with the offering for sale, sale or distribution of respondent's products, without making such advertising or promotional allowance payments available on proportionally equal terms to all other customers competing in the distribution of respondent's products with the aforementioned and other favored customers, respondent has failed to comply with provisions of the said order to cease and desist.

Conclusion

It is our conclusion, after giving due consideration to the acts and practices of the respondent as evidenced by the admissions in the said stipulation, that the respondent, Jantzen, Inc., has paid advertising or promotional allowances to certain customers as compensation or in consideration for advertising or promotional services furnished by or through such customers in connection with the offering for sale, sale or distribution of respondent's products, without making such advertising or promotional allowance payments available on proportionally equal terms to all other customers competing in the distribution of respondent's products with the favored customers in direct violation of the Commission's order to cease and desist issued January 16, 1959, and amended March 26, 1959 [55 F.T.C. 1065, 1068].

ORDER DENYING RESPONDENT'S REQUEST FOR INFORMAL DISPOSITION

This matter is before the Commission on the hearing examiner's "Report and Certification of Record of Investigational Hearing," filed January 14, 1965. Respondent filed its application on January 28, 1965, requesting informal disposition of this proceeding under § 1.21 of the Rules of Practice, and Commission counsel, on February 5, 1965, filed their answer in opposition thereto.

The Commission, upon consideration of respondent's application and Commission counsel's answer, has determined that this matter is not suitable for disposition under § 1.21 of the Rules of Practice. Further, the Commission has reviewed respondent's contentions, first, that the consent order to cease and desist of January 16, 1959, and modified March 26, 1959 [55 F.T.C. 1065, 1068], is invalid, and, second, that there is no statutory method for enforcement of Clayton Act orders issued prior to July 23, 1959. These contentions are without merit. Accordingly,

It is ordered, That respondent's "Application For Disposition Of Investigation Under Section 1.21" be, and it hereby is, denied.

The Order

The order to cease and desist which issued on January 16, 1959, and which was amended on March 26, 1959 [55 F.T.C. 1065, 1068], is as follows:

It is ordered, That respondent Jantzen, Inc., a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in, or in connection with, the sale of clothing in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondent as compensation, or in consideration, for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of any of respondent's products, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

Report on the Facts

As shown by the stipulation submitted during the prehearing conference of November 23, 1964, respondent acknowledges and admits the following facts:

1. Respondent is a corporation organized and existing under the laws of the State of Nevada with its principal office and place of business located in Portland, Oregon. It is now and has since prior to 1959 engaged in the manufacture and sale in commerce, as "commerce" is defined in the amended Clayton Act, of a wide variety of men's, women's and children's clothing, apparel and accessories.

2. In the course of conduct of the aforesaid business, respondent has failed to comply with provisions of said order to cease and desist in the following respects:

(a) That in or about December 1962, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $111.15 to its customer, Loveman's 800 Market Street, Chattanooga, Tennessee.

(b) That in or about August 1960, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $235.50 to its customer, Savoy Shops, 4512 13th Avenue, Brooklyn, New York.

(c) That in or about July 1962, respondent, in violation of the said order to cease and desist, paid an advertising or promotional allowance of $66.66 to its customer, the said Savoy Shops.

3. In paying the said advertising or promotional allowances to the aforementioned and other favored customers of respondent as compensation or in consideration for advertising services furnished by

Respondents have not shown why the Commission should reconsider and rescind its determination that issuance of complaints here is in the public interest and is consistent with the Commission's expressed concern to prevent future unlawful acquisitions in this industry through exercise of its powers of industrywide inquiry and correction. Accordingly,

It is ordered, That the motions of respondents in the above-captioned proceedings to suspend further adjudicative proceedings be, and they hereby are, denied.

HOFFMANN AIRCRAFT COMPANY ET AL.

Docket 8136. Order, Apr. 29, 1965

Order denying respondent's petition that Commission's order of May 13, 1961, 58 F.T.C. 730, be reopened and modified.

Order Denying Petition To Reopen Proceedings

This matter is before the Commission upon respondents' petition, filed April 5, 1965, requesting that this proceeding be reopened for the purpose of modifying the Commission's order to cease and desist issued on May 13, 1961 [58 F.T.C. 730], based on an agreement containing a consent order.

As grounds for their request, respondents allege that there was a misunderstanding as to the meaning of certain paragraphs of the order to cease and desist as the result of representations made by counsel supporting the complaint during the negotiations leading to the consent order. Respondents have made no showing in verification of the allegations in their petition.

The Acting Director, Bureau of Deceptive Practices, has filed an answer in opposition to respondents' petition. Attached to the answer is the affidavit of counsel supporting the complaint wherein he denies making the alleged representations concerning the phraseology or interpretation of the order to cease and desist. Complaint counsel has attached to his affidavit a copy of a draft of a proposed order which he discussed with respondents' counsel, and handwritten notations thereon tend to refute respondents' allegations.

The Commission, upon consideration of respondents' unverified petition and the answer thereto, has determined that respondents' request must be denied.

Respondents do not contend that there have been any changed conditions of fact since the order to cease and desist became final. The Commission's action in denying the present motion is not intended to pre-

TEXAS INDUSTRIES, INC., Docket 8656
MISSISSIPPI RIVER FUEL CORPORATION, Docket 8657

Order, April 14, 1965

Order denying requests of two respondents to suspend proceedings pending completion of an industrywide investigation.

Order Denying Motions To Suspend Complaints

On March 31, 1965, the hearing examiner certified to the Commission motions by counsel for respondent in each of the above-captioned proceedings to suspend the proceeding pending completion of an industrywide investigation, inquiry, or other action by the Commission.

On December 7, 1964, the Commission announced the commencement of an investigation designed to aid the Commission in enforcing Section 7 of the Clayton Act, as amended, in the cement industry. Respondents in the motions before us argue that in light of the Commission's announced intention of proceeding on a broad industrywide basis to prevent unlawful mergers in this industry, the Commission should, as a matter of fair enforcement policy, not prosecute adjudicative proceedings against these respondents in regard to past acquisitions by them in this industry.

This argument misconceives the purpose of the Commission's investigation and of any industrywide proceeding that might arise out of it. Such a proceeding would be concerned with preventing future unlawful mergers, by providing business men with guidance as to the probable legality of proposed mergers; it would not adjudicate the legality of specific past mergers. The Commission issued complaints in the present cases because it had reason to believe that the challenged acquisitions endangered competition in the markets affected; and the ill-effects of such specific acquisitions, if found illegal, could not be dissipated merely by a nonadjudicatory, industrywide inquiry of the kind projected by the Commission. That is why, as the Commission stated in *Permanente Cement Co.*, Docket 7939, decided April 24, 1964, p. 9 [65 F.T.C. 410, 494], commencement of a general industrywide inquiry "is not tantamount to declaring a moratorium on all enforcement activities with respect to transactions [previously] consummated." Here, too, the challenged past acquisitions could be found to "have profound and even irreversible adverse effects upon competition in substantial markets" which no industrywide action looking to the prevention of future unlawful actions by cement producers would, in itself, be effective in correcting.

trative action aimed at dealing promptly and effectively with the basic merger problems out of which the cases arise.

I reiterate my view that the Commission, without further delay, should decide these cases, and also that it should not continue to delay in acting immediately on a broad administrative basis to prevent further unlawful mergers in the retail food industry. The initial decision of the hearing examiner in Docket 7453 was rendered more than two years ago—on April 5, 1963 [69 F.T.C. 226]. Oral argument on the appeal from the initial decision was heard by the Commission on November 6, 1963—a year and half ago. The initial decision in Docket 8458 was rendered on October 4, 1963 [67 F.T.C. 999], and oral argument was heard on May 7, 1964—almost a year ago. If "remedies and solutions" for the serious, industrywide problems in the food industry are to be found, as I hope they will, we should delay no longer in deciding these particular cases and moving along into a broad industrywide administrative approach.

One such approach might be for the Commission to extend an opportunity to all of the large retail food chains to cooperate with the Commission in the prevention in this industry of mergers proscribed by Section 7. The companies that have been active in making acquisitions could be directed to file with the Commission periodically such reports as might be necessary to keep the Commission informed, well in advance, as to all prospective mergers and acquisitions involving such companies. See Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. § 46(b); *United States* v. *Morton Salt Co.*, 338 U.S. 632. On the basis of the information obtained through such reports concerning the terms, conditions, business reasons, etc., of proposed acquisitions, as well as on the basis of the Commission's extensive accumulated knowledge and experience concerning the competitive conditions and problems of the retail food industry, the Commission could, where practicable, advise companies as to the probable legality of such proposed acquisitions, as well as take such other action as might be required to prevent unlawful mergers. In addition, the Commission could utilize such information to aid in keeping itself abreast of current merger trends in the industry.

The merger movement in the retail food industry warrants the Commission's closest scrutiny; and unlawful mergers in the industry should be prevented. But we must choose wisely the "remedies and solutions" that are likely to achieve our enforcement goals in an effective and fair manner. To protract the present cases still further while ignoring the larger question of how the Commission is to deal effectively with a merger movement that is continuing and that is industrywide in scope seems to me the least efficient, the least expeditious, the least economical, and the least equitable approach for an administrative agency to take.

clude respondents from filing a new motion if and when supported by a factual showing that would warrant modification of the order to cease and desist.

On the basis of the foregoing:

It is ordered, That respondents' petition, filed April 5, 1965, be, and it hereby is, denied.

NATIONAL TEA CO., Docket 7453
THE GRAND UNION COMPANY, Docket 8458

Order and Statements, May 3, 1965

Order providing for reargument of two cases before the full Commission involving the merger movement in the retail food industry.

Separate Statement

By Elman, *Commissioner:*

I agree that the merger movement in the retail food industry is industrywide in scope; that it raises serious problems; and that all the members of the Commission as now constituted should participate in formulating "remedies and solutions." I do not agree, however, that the way to remedy and solve these problems effectively is by setting these cases down for reargument, as the full Commission has now decided to do.

In both cases there is a quorum for deciding the appeals on the merits. The cases can be decided now, without reargument, and I think they should be. By deciding *not* to decide these cases now and to set them down for reargument, the Commission has delayed the process of seeking and finding "remedies and solutions." In these cases, and in others, the central goal of merger enforcement in this industry should be the same: the preservation of a competitive market structure. In this industry particularly, the Commission should be primarily concerned with arresting further concentration through acquisitions, whether by these respondents or by other major chains, that could result in the industry's becoming substantially less competitive than it is today.

A quorum of the Commission is now available, without reargument, to dispose of the present cases in harmony with what should be the Commission's primary enforcement objectives in this industry. It is true that the members of the Commission who did not hear oral argument in these cases may properly decline to participate in adjudicating the merits of the appeals. But those members, who have now voted to set the cases down for reargument, could with equal propriety refrain from entering into the adjudication of these cases, permitting them to be decided now, and at the same time join in appropriate adminis-

Such a situation can readily arise when there are four Commissioners sitting. And while hearing oral argument is not necessary to participation, those Commissioners not having had the benefit of earlier oral argument feel the need for the enlightenment and clarification which oral argument might provide. Neither Commissioner Jones nor I heard National Tea, nor has Commissioner Jones heard Grand Union. Our judgment that the public interest requires our full participation in these cases must outweigh a call, however insistent, that these matters must now be pressed to conclusion.

This rather uncomplicated state of affairs, which would defer these matters at most a few weeks, should not, it seems to me, give rise to a public debate as to the methods and objectives of Commission merger enforcement policy.

Order Directing Oral Reargument

These matters are before the Commission on appeals of counsel supporting the respective complaints. Oral argument *In the Matter of National Tea Co.*, Docket No. 7453 [69 F.T.C. 226], was heard on November 6, 1963, by the full Commission as then composed, which included three of the present Commissioners. Oral argument *In the Matter of The Grand Union Co.*, Docket No. 8458 [67 F.T.C. 999], was heard on May 7, 1964, by four members of the present Commission. Realizing the seriousness of the industrywide scope of the merger movement in the food retail industry, as shown by the records in these cases, and the problems associated with the remedies and solutions to be applied, and being of the opinion that all of the members of the Commission as now constituted should participate in the consideration of these cases and in the formulation of the remedies and solutions, the Commission has determined that the appeals of counsel supporting the complaints in both of these matters should be orally reargued. Although aware that reargument will lengthen somewhat the span of time between issuance of the complaints and ultimate disposition of the cases, the Commission is of the opinion that the advantages of a single aproach to the mutual problems presented by these cases more than outweigh the disadvantages inherent in lengthened proceedings. Accordingly,

It is ordered, That oral reargument on the appeals *In the Matter of National Tea Co.*, Docket No. 7453, and *In the Matter of The Grand Union Co.*, Docket No. 8458, be held before the members of the Commission on dates to be established by the Secretary of the Commission at times agreeable to counsel for respondents and counsel in support of the complaints.

SEPARATE STATEMENT

BY MACINTYRE, *Commissioner:*

Since I have always opposed procedures which tend to inject delay into the administrative process, I feel called upon to express my reasons for not opposing the Commission's decision to hear reargument in these cases.

The first and most important consideration is to afford all five Commissioners the opportunity to hear oral argument and to participate in the final decisions. Only three of the present Commissioners heard the first oral argument of the *National Tea* matter and only four Commissioners heard the *Grand Union* argument. I doubt that I would ever vote to deny a colleague who desires to participate in the decision of a case the right to hear oral argument thereon.

Another important reason for hearing reargument is to shed additional light on an important subject which the parties have not as yet adequately explored. It is my view that the briefs and arguments heretofore submitted did not give sufficient coverage to the question of remedy in the event violations are found. After these reargruments the Commission will be better equipped to decide whether to enter orders for outright divestitures, injunctions against future acquisitions, some combination of the two, or other orders with which respondents could comply without disruption to their businesses and would accept as appropriate. The reargruments we have provided for will enable all counsel in these matters to inform us more about the answers we should supply to these questions.

And, finally, the law in this field is developing at a very rapid rate and the interval since the last arguments has seen the issuance of many important court decisions. I am sure that all counsel will be benefited by this opportunity to bring their legal arguments up to date.

SEPARATE CONCURRING STATEMENT

BY REILLY, *Commissioner:*

The majority has ordered reargument in these aging cases because it finds itself unable to decide them without the participation of the full Commission. This is dictated in part by the majority's conviction that these cases are important in the Commission's larger concern with competition in the food industry and thus should be considered by the full Commission, and in part by the fact that the number of Commissioners participating in a matter may be large enough for a quorum but not large enough to provide a clear majority for satisfactory Commission action.

8512. Counsel for Columbia Broadcasting System, in a motion requesting that I withdraw from participation in the *Columbia Broadcasting* case, argue that the practices allegedly engaged in by the Columbia Broadcasting System are similar to the practices which Doubleday allegedly had pursued and with respect to which the Commission had dismissed the complaint many years ago.

Respondents request that I withdraw from participation in this case because during my tenure on the staff of the Commission as Assistant Director of the Bureau of Antimonopoly and Chief of the Division of Investigation and Litigation my name appeared on various briefs in *Doubleday*. Respondents claim, as a result, I must have had important administrative responsibilities with respect to the investigation or prosecution or appeal in *Doubleday*. In this connection, respondents contend that in view of my participation in *Doubleday* it must be inferred that I was an advocate of the specific positions advanced by complaint counsel in that case with respect to the alleged injurious effect on dealers of mail order clubs. Respondents contend that *Doubleday*, which was dismissed, is the decision controlling this case and in fact was relied upon by the hearing examiner below in dismissing the complaint.

Respondents, citing Section 5(c) of the Administrative Procedure Act, 5 U.S.C. § 1004(c), argue that *Doubleday* and the instant proceeding are "factually related" and contend that as a result my continued participation herein would entail a commingling of the adjudicative and prosecutorial or investigative functions. I have examined the authorities cited by respondents and certainly none of them support the proposition that under these circumstances the *Doubleday* case and the instant proceeding should be considered "factually related" within the meaning of that term as used in Section 5(c). Respondents straightforwardly admit that they have found no judicial authority construing the words "factually related" in the statute. Further, they are to be commended for candidly directing the Commission's attention to the definition of this phrase in the *Attorney General's Manual on the Administrative Procedure Act* (1947).[1] As I construe that definition, a factually related case within the meaning of the Act refers to two cases involving at least to some degree the same party out of the same or a connected set of facts. The Manual further states: "* * * [agency employees] would not be prevented from assisting the agency in the decision of other cases (in which they had not engaged either as investigators or prosecutors) merely because the facts of these other cases may form a pattern similar to those which they had theretofore investigated or prosecuted." In this case it is

[1] At p. 54, n. 6.

The views of Commissioners Elman and MacIntyre are set forth in separate statements, and the views of Commissioner Reilly are set forth in a separate concurring statement.

RODALE PRESS, INC., ET AL.

Docket 8619. Order, May 11, 1965

Order denying respondent's request that a news release following the initial decision be made part of the record on appeal.

Order Denying Motion to Enlarge Record on Appeal

Respondent Rodale Press, Inc., having moved to enlarge the record on appeal by making a news release relating to the hearing examiner's initial decision, which release was issued by the Commission subsequent to the date of said initial decision, a part of the record on appeal, and the Commission having determined that any issue respecting the accuracy or completeness of said news release is irrelevant to any issue before the Commission on the appeal of respondent:

It is ordered, That said motion be, and it hereby is, denied.

Commissioner Elman dissenting.

COLUMBIA BROADCASTING SYSTEM, INC., ET AL.

Docket 8512. Order and Opinion, May 13, 1965

Order denying respondent's motion that Commissioner MacIntyre be disqualified from participating in this proceeding.

Commissioner MacIntyre's Statement on Motion That He Be Disqualified

MAY 12, 1965

During the late 1940's and the early 1950's, when I was serving on the staff of the Federal Trade Commission as Assistant Director of the Bureau of Antimonopoly and Chief of the Division of Investigation and Litigation, I supervised a substantial number of investigations and a substantial amount of litigation. Included was a case entitled *In re Doubleday and Co., Inc.*, F.T.C. Docket No. 5897 [52 F.T.C. 169]. It involved a factual situation confined to the practices allegedly pursued by that firm. The Federal Trade Commission dismissed the complaint in part. Quite recently the Commission instituted proceedings *In re Columbia Broadcasting System, Inc.*, F.T.C. Docket No.

The Commission having considered Commissioner MacIntyre's statement and being in agreement with the reasoning therein and his determination that the *Doubleday* case* and the instant proceeding are not "factually related" within the meaning of that term as used in Section 5(c) of the Administrative Procedure Act; and

The Commission having determined that respondents have failed to justify the action requested:

It is ordered, That respondents' motion requesting that Commissioner MacIntyre be disqualified from participating in this proceeding be, and it hereby is, denied.

Commissioner MacIntyre not participating.

PHILADELPHIA CARPET COMPANY ET AL.

Docket 7635. Order, May 14, 1965

Order extending the closing date for the respondent to file a report of compliance.

SUPERSEDING ORDER AS TO TIME WITHIN WHICH RESPONDENTS SHALL FILE REPORT OF COMPLIANCE

Respondents have filed a petition with the Commission requesting that the period of time within which they are required to comply with the Commission's cease and desist order be extended for a period of time coextensive with that accorded their competitors in companion cases. The Commission, on April 2, 1964, extended the time in which eight of respondents' competitors [1] were required to file reports of compliance to sixty (60) days after the latest date of any final judicial determination on appellate review in *Callaway Mills Co.*, Docket No. 7634, *Cabin Crafts, Inc.*, Docket No. 7639, and the instant case. Appeals from the Commission's decision in *Callaway Mills Co.*, *supra*, and *Cabin Crafts, Inc.*, *supra*, are currently pending before the United States Court of Appeals for the Fifth Circuit. On April 1, 1965, the Commission's order in the instant case was affirmed by the United States Court of Appeals for the Third Circuit. *Philadelphia Carpet Co.* v. *Federal Trade Commission*, 342 F. 2d 994 (3d Cir. 1965). The final decree of that court ordering compliance with the Commission's order to cease and desist was issued on April 26, 1965.

In the circumstances, the Commission has determined that the period of time within which the respondents in this case should be required

*In re *Doubleday and Company, Inc.*, 52 F.T.C. 169 (1955).

[1] Bigelow-Sanford Carpet Company, Inc., Docket No. 7420; Mohasco Industries, Inc., Docket No. 7421; The Magee Carpet Company, Docket No. 7631; C. H. Masland & Sons, Docket No. 7632; The Beattie Manufacturing Company, Docket No. 7633; A. & M. Karagheusian, Inc., Docket No. 7636; Roxbury Carpet Company, Docket No. 7637; The Firth Carpet Company, Docket No. 7638.

obvious that the proceeding brought against CBS can in no way be considered an outgrowth of the *Doubleday* proceeding. Assuming for the moment that both cases involve the same legal theory as to similar facts,[2] in my view that does not constitute a factual nexus so as to warrant my disqualification in this proceeding under section 5(c) of the Administrative Procedure Act. The mere circumstance that *Doubleday*, which was dismissed, may have rested on the same or a similar legal theory as the instant proceeding is insufficient to bring my participation in this case within the area forbidden by Section 5(c). Needless to say, I intend to judge this matter on the facts in this record and in the context of this industry.

If respondent's construction of the term "factually related case" were to be upheld, obviously no staff member could ever sit on any Commission or administrative board having a quasi-judicial function. There would be too many instances where he would have to disqualify himself. Furthermore, by way of analogy, if the phrase were to be given the broad sweep for which respondents contend, few United States Attorneys could become elevated to a Federal judgeship and probably no Attorney General could ever sit on the Supreme Court. For example, if a United States Attorney had once participated in a murder proceeding involving a particular set of facts, under respondents' interpretation of the doctrine there would be a commingling of the prosecutorial and judicial function in another homicide involving similar circumstances because he had, in the course of prosecution, once taken the position that murder under analogous facts was illegal. This is clearly an absurd result. The doctrine to be applied here obviously is that the prior expression of legal views as to the lawfulness of certain practices does not disqualify the adjudicative officer if it does not involve the particular party being proceeded against. As a noted authority has stated, "Bias in the sense of [a] crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification." [3] I might add that my views on this proceeding have, in fact, not yet crystallized.

Order Denying Motion To Disqualify

Respondents, by motion filed May 12, 1965, having requested that Commissioner MacIntyre be disqualified from any further participation in this proceeding; and

Commissioner MacIntyre having filed with the Commission a statement that he has determined not to withdraw; and

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[2] At this time I have reached no final conclusion on that point.

[3] 2, Davis, *Administrative Law Treatise*, § 12.01 at 131 (1958); Comment, *Prejudice and the Administrative Process*, 59 Nw. U. L. Rev. 216, 218 (1964); see also *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948).

amended, respondent Nash-Finch's answer in opposition thereto, and respondent's motion to terminate the proceeding. In addition, respondent Nash-Finch concurrently filed a motion that I be disqualified from further participation in this proceeding. In support of its motion for my disqualification, respondent cites my participation as staff counsel in the negotiation and settlement leading up to the entry of the cease and desist order against Nash-Finch in 1947 and asserts, further, that I participated in discussions relating to respondent's proposed compliance with that order. Respondent argues that under the circumstances my disqualification is mandatory under the rule announced in *Amos Treat & Co.* v. *S.E.C.*, 306 F.2d 200 (D.C. Cir. 1962). Finally, respondent contends that I should not participate since this proceeding is adjudicative and the Commission herein purports to act as a master in making findings of fact for the court of appeals.

Every adjudicator is under a positive duty to fulfill his adjudicative functions unless actually disqualified, and it is almost as great a fault to employ self-disqualification too readily as too sparingly.[1] The same considerations are, of course, equally applicable to agency members' participation in the administrative functions entrusted to them when faced with a request for withdrawal. Careful consideration of the issues raised by respondent's motion is therefore required in the context of this proceeding and the manner in which it developed.

The cease and desist order under consideration here issued in 1947 and the provisions of the so-called Finality Act, enacted July 23, 1959, do not apply. Accordingly, it is the purpose of this proceeding to determine whether the facts warrant a petition to one of the courts of appeals for affirmance and enforcement of the order to make it final. The determination as to whether an order of enforcement should issue rests with the courts and not with the Commission. Respondent nonetheless claims that in proceeding the Commission is acting as a master for the court of appeals and therefore it is entitled to all of the procedures applicable to an adjudicative trial. In short, respondent asserts that if I continue to sit in this proceeding there will result a commingling of the adjudicative and prosecutorial and investigative functions prohibited by the Administrative Procedure Act. The crux of the situation, therefore, is whether this is an investigative, an adjudicative or a hybrid proceeding. That question can best be resolved after an examination of how this proceeding was instituted and how it has developed over the last two years.

On February 1, 1963, the Commission issued its order directing an investigation as to whether respondents had complied with the order

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[1] Comment, *Prejudice and the Administrative Process*, 59 Nw. U. L. Rev. 216, 233–34 (1964).

to file a report of compliance should be extended for a period coextensive with that of their aforementioned eight competitors. Accordingly,

It is ordered, That the paragraph in the Commission's order to cease and desist, issued February 10, 1964 [64 F.T.C. 762], referring to the time within which respondents are required to file a report of compliance with said order be, and it hereby is, stricken.

It is further ordered, That the respondents shall, within sixty (60) days after the date of the final judicial determination in *Callaway Mills Co.*, Docket No. 7634, or *Cabin Crafts, Inc.*, Docket No. 7639 [362 F. 2d 435 (1966)], whichever is later, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the Commission's order to cease and desist.

C. H. ROBINSON COMPANY AND NASH-FINCH COMPANY

Docket 4589. Memorandum, May 17, 1965

To avoid further delay Commissioner MacIntyre withdraws from the case in which respondents allege that his participation would result in a commingling of adjudicative, prosecutorial, and investigative functions prohibited by the Administrative Procedure Act.

Memorandum of Commissioner MacIntyre With Respect to Respondent's Motion That He Be Disqualified

Approximately nineteen years ago, while serving as a member of the staff of the Federal Trade Commission, in my capacity as Chief of the Division of Investigation and Litigation, I participated in conferences with Federal Trade Commission counsel and counsel for the C. H. Robinson Company and the Nash-Finch Company, held for the purpose of negotiating a consent settlement of alleged violations of law taking place approximately twenty years ago or more. Such conferences did result in the negotiation of a consent settlement and a cease and desist order was issued in F.T.C. Docket No. 4589 [43 F.T.C. 297]. The current investigation, initiated on February 1, 1963, is for the purpose of collecting information regarding the present practices of the C. H. Robinson Company and the Nash-Finch Company. If it should appear that the present practices of the respondents violate the terms of the aforesaid cease and desist order, then the Commission may refer the information to the appropriate court for a determination of whether violation of the cease and desist order has occurred and whether the order should be enforced.

This matter is now before the Commission on Commission counsel's request that the order directing the investigational hearings be

torney in seeking enforcement of a court order. Respondent's motion for clarification made it clear, to me at any rate, that it would have been desirable for the Commission to differentiate sharply between the adjudicative and investigative functions in this matter and I did not concur in the order of November 4. While this procedure may have been approved by the courts,[2] it seems clear that the interaction of the adjudicatory form given to this investigation and the procedural questions continually raised by respondents throughout this proceeding has created a procedural bog, out of which the Commission has yet to find its way. When respondent objected to the so-called undefined nature of this proceeding, the Commission should have amended its order directing the investigation, making it plain that this proceeding is solely investigative, to which only the Rules of Practice applicable to investigations will be applied. This the Commission has not chosen to do and the result has evidently been confusion compounded.

Respondent, not satisfied with the "clarification" contained in the order of November 4, 1963, petitioned the United States District Court for the District of Minnesota, Fourth Division, for a declaratory judgment and injunction. Nash-Finch requested that the Commission and its staff be enjoined from further proceeding in this matter until respondent had been informed as to whether the hearings are adjudicative or investigative, the purpose of the hearings clarified, the duties and functions of the presiding official defined, and the rules applicable to the proceeding affirmatively promulgated.

The district court, denying respondent's petition, adopted essentially the position set forth in the Commission brief filed with the court, to the effect that in an enforcement proceeding the Commission may, to expedite the proceedings, hold investigative hearings in advance of going to the court of appeals and to such hearings apply its adjudicative rules.[3] The court further held that under this procedure the Commission proceeds as if it had been appointed as a master and that this was the procedure adopted in this instance.[4]

As heretofore stated, it is my view that this proceeding is essentially an investigative proceeding and, although the courts have judicially approved what the Commission has done here in prior cases, it is obvious that the engrafting of adjudicatory procedures on the Commission's essentially investigative function in this instance led only to confusion and delay. This case and similar cases, I believe, could be

[2] See *F.T.C.* v. *Standard Brands* [1950–1951 TRADE CASES ¶ 62,797], 189 F. 2d 510 (2d Cir. 1951); and *F.T.C.* v. *Washington Fish & Oyster Co.* [1959 TRADE CASES ¶ 69,487], 271 F. 2d 39 (9th Cir. 1959).

[3] In this case the procedure utilized has, if anything, slowed down the proceeding.

[4] *F.T.C.* v. *Nash-Finch Co.*, 1964 Trade Cas. ¶ 71,204 [7 S.&D. 973].

to cease and desist in Docket No. 4589. The order specified that a public investigational hearing should be conducted for that purpose pursuant to § 1.34 and the related rules of the Commission's Rules of Practice which were then in effect. It was further ordered that the chief hearing examiner should appoint and designate a hearing examiner to preside at the hearing with all the powers and duties as provided by § 4.13 of the Commission's Rules of Practice then in effect. The order provided that respondents were to have the right of notice, cross-examination, production of evidence in rebuttal, and that the hearings should be conducted in accordance with the Commission's Rules of Practice for adjudicative proceedings insofar as such rules were applicable.

The ensuing months were consumed by procedural maneuvering until on October 14, 1963, respondent Nash-Finch filed a motion requesting the Commission to clarify the order of February 1, 1963, directing an investigation of the respondent. It was the burden of respondent's motion that the order of February 1, 1963, was defective because it did not specify whether the proceeding initiated was adjudicatory or investigatory and that it failed to make clear whether the examiner was appointed to act as an impartial adjudicative officer subject to the provisions of Section 5(c) of the Administrative Procedure Act. Respondent, at that time, argued strenuously that it should be advised as to whether these hearings were supposed to be an "actual trial" and that it should not be left to speculate as to whether these hearings were the proper time to make its defense. In short, respondent claimed that it could not be sure of the procedural rights to which it was entitled under this proceeding. On November 4, 1963, the Commission issued its memorandum and order disposing of the petition for clarification of the prior order. The Commission did not change the format of the proceeding, merely holding, essentially, that the same procedure had been previously approved by the Ninth Circuit in *F.T.C.* v. *Washington Fish & Oyster Co.* [1959 TRADE CASES ¶ 69,487], 271 F. 2d 39 (1959) [6 S. & D. 666], where the court stated that any reasonable and fair method or procedure not forbidden by statute would be appropriate as a foundation for an enforcement proceeding.

I have always been of the opinion, and am of the opinion now, that investigational proceedings leading up to enforcement under Section 11 of the Clayton Act prior to its amendment by the so-called Finality Act are inherently investigational procedures, irrespective of whether the indicia of adjudicative proceedings are engrafted thereon. The Commission's function here is strictly an administrative one; it is in the same position as the Justice Department or a United States at-

proceedings to such an extent that as a result many persons might be misled as to its true character. I do not wish my participation herein to be the occasion of another delay in a case which has been plagued by too many procedural pitfalls since its inception.

TEXAS INDUSTRIES, INC.

Docket 8656. Order, May 18, 1965

Order denying respondent's request that the Commission furnish respondent with special reports obtained in the Commission's industrywide investigation of the cement industry.

ORDER DENYING MOTION FOR PRODUCTION OF DOCUMENTS

On April 22, 1965, counsel for respondent in the above-captioned proceeding filed with the hearing examiner a motion for production of documents pursuant to Section 3.11 of the Commission's Rules of Practice (effective August 1, 1963). Respondent, by this motion, sought to have produced for its inspection and copying certain Special Reports submitted to the Commission in response to orders issued under Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. § 46(b), pursuant to a resolution of the Commission dated December 1, 1964, directing an investigation of corporations engaged in the production and distribution of portland cement. On April 28, 1965, complaint counsel filed an answer in opposition to respondent's motion. The hearing examiner determined that he did not have the authority to rule upon respondent's motion. Accordingly, pursuant to Section 3.6(a) of the Rules of Practice the examiner on May 5, 1965, certified respondent's motion to the Commission, recommending that the motion be denied.

The examiner acted correctly in certifying for the Commission's determination a motion seeking the production of material obtained by the Commission through the exercise of its investigatory powers under Section 6(b) of the Federal Trade Commission Act and placed in the Commission's confidential files. See *L. G. Balfour Co.*, F.T.C. Docket 8435 (Interlocutory Opinion, May 10, 1963) [62 F.T.C. 1541]. In the *Balfour* opinion the Commission explained in detail the considerations bearing on whether to release material from the Commission's confidential files for use by a respondent in preparing his defense in a Commission adjudicative proceeding. The Commission emphasized (p. 1546) that the question of whether to release such materials in a particular case "should be met with flexibility and discretion, not rigid formula," and that a determination of the question would depend

disposed of more expeditiously if the Commission proceeding were kept purely investigative in form as well as substance prior to assumption of jurisdiction by the courts in enforcement proceedings. The Commission could request enforcement simply by affidavit or other appropriate pleading and at that point the courts are in the best position to specify the nature of and ground rules for the hearing, on the basis of which they must exercise their judicial function in determining whether the order should be enforced.[5]

This history of this proceeding makes it abundantly clear that the distinction between adjudicative and investigative hearings should be kept well-defined. As far as can be determined after two years of procedural maneuvering, the investigation is very little, if any, closer to resolution than at its inception. The Commission should take heed of the Supreme Court's warning that the investigative process can be completely disrupted if investigative hearings are transformed into trial-like proceedings and that burdening of investigative proceedings with trail-like procedures may render them sterile.[6] Here it is evident that the procedures governing this investigation have become ossified to the point where the Commission, the examiner, and counsel alike are in danger of losing sight of the fact that flexibility is at once the goal and justification of the administrative process.

The significance of what has happened here lies not so much in the sphere of enforcement of Commission orders under the Clayton Act; with the passage of the Finality Act in 1959, in all likelihood there will be a diminution of such proceedings. The implications of this case, however, should be carefully examined by the Commission in the context of all its investigative proceedings, for the record makes it plain that where an inherently investigative proceeding is given an adjudicative form, the result may well be an exercise in contrived futility.

In any event, I intend to refrain from participating further in this proceeding, either in ruling on the scope of this investigation or ultimately on the question of whether the Commission should apply to a court of appeals for affirmance and enforcement. Recent developments have made it clear to me that putting a hearing examiner in charge of investigative hearings tends to compromise both his position and the nature of the proceeding. As I have noted above, this essentially administrative matter has now taken on the appearance of adjudicatory

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[5] It has apparently been hitherto the "usual practice" if the assertion of violation is disputed for the court to remand the matter to the Commission for formal proceedings *F.T.C.* v. *Washington Fish & Oyster Co., supra* n. 2, at 42 [6 S.&D. 666, 669].

[6] *Hannah* v. *Larche,* 373 U.S. 420, 443, 448 (1960) ; see also *F.C.C.* v. *Schreiber,* 329 F. 2d 517, 526 (9th Cir. 1964), *cert. granted,* 379 U.S. 927 (1964). As I noted in my dissent in *Mead Corporation,* File No. 571 0656, issued January 3, 1963 with respect to a similar situation, "I shall not join in this game of hare and hounds, where the facts are to be cornered only after the long and perhaps never-ending chase * * *".

reason to believe, their expectation and understanding that these Reports would not be released for the use sought in the present motion for production.

While we have determined that there is a very substantial public interest in not releasing the Special Reports in question to respondent in this case, we would do so if the needs of basic fairness so dictated. They do not. As noted above, no part of these Reports has been or will be turned over to complaint counsel to be introduced as evidence in this proceeding. Since no part of these Reports will become evidence in this proceeding, denial of access to them on the part of respondent is not a case of the Commission's denying a respondent "access to evidence which it controlled." *Union Bag-Camp Paper Corp.* v. *F.T.C.*, 233 F. Supp. 660, 666 (S.D. N.Y. 1964) [7 S.&D. 991, 998]. As the hearing examiner noted in his certification of May 5, 1965, recommending that the Commission deny respondent's motion for production, "the nature, outline and substance of the evidence upon which [complaint counsel] * * * intend to rely will be fully disclosed to respondent before the hearings begin." All evidence in the possession of complaint counsel will be subject to full discovery, which, under the Commission's Rules of Practice, is available to respondent as well as to complaint counsel. Therefore, we do not see how denying respondent production of the Special Reports obtained in the Commission's industrywide inquiry can materially prejudice respondent in preparing and conducting its defense to the complaint.

The court in the *Union Bag-Camp* case, cited above, held that the Section 6(b) procedure for obtaining information and data is an extraordinary power vested in the Federal Trade Commission as an agency charged with protecting the public interest, and was not intended by Congress to be available as a matter of right to private parties in preparing their defense in proceedings before the Commission. Just as a respondent cannot compel the Commission to conduct a Section 6(b) survey on his behalf, so he may not compel the Commission to turn over to him the fruits of such a survey where it has not been conducted by the Commission for the purpose of aiding in the prosecution of the case against respondent, and where release of the material obtained in the 6(b) inquiry would interfere with the Commission's effective performance of its statutory functions and duties. Here the only basis for respondent's motion for production is that the Special Reports may contain material that would be relevant or helpful in the preparation of its defense, and for the reasons stated, such a ground is, in the circumstances, insufficient. Accordingly,

It is ordered, That respondent's motion for production of documents dated April 22, 1965, be, and it hereby is, denied.

Commissioner MacIntyre not participating.

on all of the relevant facts. The Commission also stated: "In general, however, it may be said that an applicant must satisfy the Commission not only that the material sought is relevant and useful for defensive purposes, but also that its release would not impair any overriding public interest in preserving its confidentiality. In making its judgment the Commission will also necessarily take into account such considerations as basic fairness to the parties * * *." *Ibid.* Applying the criteria of the *Balfour* opinion to the present facts, the Commission has determined that respondent's motion for production of documents must be denied.

There is an overriding public interest in preventing the release of the Special Reports obtained through Section 6(b) orders in the Commission's industrywide investigation of cement producers from confidential status for use in this adjudicative proceeding. These Special Reports, submitted by fifty portland cement manufacturers, are an integral and important part of a broad administrative inquiry into certain serious and prevalent competitive problems of the cement industry (see the Commission's press release of December 7, 1964, announcing commencement of the inquiry)—an inquiry that is still continuing. The Reports have not been and will not be made available to complaint counsel for use as evidence in the present case. The concern of the inquiry, as the Commission explained in its order of April 14, 1965 [p. 1363 herein], in the above-captioned proceeding, denying respondent's motion to suspend the complaint, is "with preventing future unlawful mergers, by providing businessmen with guidance as to the probable legality of proposed mergers," and not with gathering evidence to be used in adjudicating the legality of already consummated mergers, such as the one challenged in this case.

The Commission's ability to conduct a sound and comprehensive industrywide inquiry in the cement industry and complete it with reasonable expedition is likely to be seriously impaired by releasing the Special Reports obtained in the inquiry for use in adjudicative proceedings such as the present one. Such release would be likely to engender resistance on the part of the companies filing the reports to further requests or demands by the Commission for information, and to seriously retard voluntary and constructive collaboration between the Commission and the industry in obtaining facts and data necessary to the industrywide inquiry. For much of the information contained in these Reports is highly confidential, and the parties filing the Reports would be extremely reluctant to see such information find its way into the hands of competitors, or into the public record of this adjudicative proceeding. The substantial cooperation the Commission has received from the reporting companies reflects in part, we have

York membership corporation, and that said International Paper Company Foundation has sold or contracted to sell said 5,000 shares to a purchaser or purchasers to whom International Paper Company would have been entitled to sell the same under the terms of the Commission's order of June 25, 1957.

MODERN MARKETING SERVICE, INC., ET AL., Docket 3783
C. H. ROBINSON COMPANY AND NASH-FINCH COMPANY, *Docket 4589*

Orders, June 2, 1965

Order broadening an earlier order authorizing an investigation, denying a motion to terminate and for oral argument, and dismissing motion to disqualify Commissioner MacIntyre as moot.

ORDER BROADENING INVESTIGATION, DENYING MOTION TO TERMINATE AND FOR ORAL ARGUMENT, AND DISMISSING MOTION TO DISQUALIFY COMMISSIONER MACINTYRE AS MOOT

The hearing examiner appointed to preside over the investigational hearings in Docket No. 4589 has certified to the Commission a motion by Commission counsel for an amendment of the order directing the investigation. Respondents have submitted an answer opposing that amendment, a motion of their own "to terminate this proceeding," a motion for oral argument on both Commission counsel's request for amendment and their own motion to terminate, and a motion requesting that Commissioner A. Everette MacIntyre be disqualified from further participation in the proceeding.

The order in question, issued by the Commission on February 1, 1963 [62 F.T.C. 1486], directed an investigation to determine whether respondents have violated the provisions of a cease and desist order entered by the Commission under Section 2(c) of the amended Clayton Act, 15 U.S.C. 13(c), in a proceeding entitled *In the Matter of C. H. Robinson Company and Nash-Finch Company*, Dkt. 4589, 43 F.T.C. 297, 301–303 (1947). The substance of that order is that Robinson, a wholly owned subsidiary of Nash-Finch, is prohibited from accepting brokerage payments on its own or its parent's behalf, and Nash-Finch, a wholesale dealer in various fruit and vegetable products, is prohibited from receiving such brokerage payments through or from that subsidiary.

Commission counsel requests that the investigation be broadened to include, in addition to the question of whether respondents have violated that 1947 order, the further question of whether respondent Nash-Finch has also violated an earlier order issued by the Commission, *In re Modern Marketing Service, Inc., et al.*, Dkt. 3783, 37 F.T.C.

INTERNATIONAL PAPER COMPANY

Docket 6676. Order, June 1, 1965

Order granting consent to respondent corporation to transfer 5,000 shares of Longview Fibre Company stock held in the voting trust.

ORDER CONSENTING TO THE TRANSFER OF 5,000 SHARES OF LONGVIEW FIBRE COMPANY STOCK HELD IN THE VOTING TRUST

Whereas, the Commission by order issued June 25, 1957 [53 F.T.C. 1192], in the above entitled matter ordered International Paper Company to divest itself absolutely, in good faith, within ten years, of all stock in Longview Fibre Company which was acquired through the merger of The Long-Bell Lumber Corporation and The Long-Bell Lumber Company with respondent; and

Whereas, pursuant to said order as an initial step in such divestiture International Paper Company with the Commission's approval transferred said stock, *viz.*, 160,000 shares to The Hanover Bank, as voting trustee under a Voting Trust Agreement dated August 29, 1957, between the International Paper Company and said Bank, in a form approved by the Commission; and

Whereas, said voting trust agreement provides for transfer of any or all of said shares to International Paper Company on the Commission consenting thereto or on certification by International Paper Company to said Bank that it has sold or contracted to sell the same in accordance with the terms of the order; and

Whereas, International Paper Company has petitioned the Commission to consent to the transfer to it (under appropriate safeguards for carrying out the requirements of the Commission's Order) of 5,000 shares of the 14,000 shares of capital stock of Longview Fibre Company now in the hands of the Voting Trustee, in connection with the donation of such shares to the International Paper Company Foundation, a nonprofit corporation incorporated in 1952 under the Membership Corporations Law of New York to receive funds exclusively for religious, charitable, scientific, literary and educational purposes;

Now therefore, upon consideration thereof,

It is ordered, That consent is hereby given to the transfer pursuant to the said Voting Trust Agreement, by The Hanover Bank to the International Paper Company, of 5,000 shares of capital stock of Longview Fibre Company held by said Bank as Voting Trustee under said Voting Trust Agreement upon the certification of International Paper Company to said Bank by an instrument signed by its president or vice president that it has assigned all its right, title and interest in said 5,000 shares to International Paper Company Foundation, a New

52, 55 (4th Cir. 1950). It can be avoided here; the hearings, having been delayed by litigation in the courts,[2] have not yet begun. Respondents will have ample opportunity to rebut any evidence Commission counsel might offer.

Respondents' position on these motions having been argued at great length in the voluminous papers already before us, nothing but further delay could be accomplished by an oral argument on them.

Commissioner A. Everette MacIntyre has withdrawn from any further participation in this proceeding. Respondents' motion that he be disqualified is therefore moot.

It is ordered, That the Commission's order of February 1, 1963, directing an investigation as to whether C. H. Robinson Company and Nash-Finch Company have complied with the order to cease and desist in Docket No. 4589 be, and it hereby is, amended to include an investigation as to whether Nash-Finch Company has complied with the order to cease and desist in Docket No. 3783.

It is further ordered, That respondents' motion to terminate the investigation in Docket No. 4589, for oral argument on Commission counsel's motion for amendment of the order directing that investigation, and on respondents' motion to terminate, be, and they hereby are, denied.

It is further ordered, That respondents' motion requesting that Commissioner A. Everette MacIntyre be disqualified from participation in this proceeding be, and it hereby is, dismissed as moot.

It is further ordered, That this matter be, and it hereby is, returned to the hearing examiner for expeditious hearings in accordance with the accompanying amended order directing an investigation as to whether C. H. Robinson Company and Nash-Finch Company have complied with the order to cease and desist in Docket No. 4589, and whether Nash-Finch Company has complied with the order to cease and desist in Docket No. 3783.

Commissioner MacIntyre not participating.

Order Amending Prior Order and Directing an Investigation as to Whether Nash-Finch Company and C. H. Robinson Company Have Complied With Orders To Cease and Desist

The Commission on February 1, 1963 [62 F.T.C. 1486], having issued an order directing an investigation as to whether C. H. Robinson Company and Nash-Finch Company have complied with an order to cease and desist issued by the Commission in Docket No. 4589 on January 6, 1947; and

[2] *Nash-Finch Co.* v. *Federal Trade Commission et al.*, 233 F. Supp. 910 (D.C. Minn. 1964) [7 S.&D. 973].

386, 407–409 (1943), *aff'd Modern Marketing Service, Inc.* v. *Federal Trade Commission*, 149 F. 2d 970 (7th Cir. 1945). This order was also issued under Section 2(c) of the amended Clayton Act, and prohibits, *inter alia*, Nash-Finch and other named buyers of fruit and vegetable products from receiving or accepting from suppliers, directly or indirectly, brokerage payments or discounts in lieu of such brokerage payments.

Commission counsel argue, in effect, that respondents are attempting to prevent the introduction of evidence showing respondents are continuing to violate Section 2(c) of the amended Clayton Act, and the earlier 1943 order, by urging upon the hearing examiner and unduly narrow construction of the 1947 order. Commission counsel, therefore, seek to have respondents' compliance or noncompliance with the 1943 order added as a subject of the investigation "before actual hearings commenced to avoid possible endless arguments and bickering as to the proper questioning of witnesses and the propriety of introducing certain relevant evidence."

The Commission need not review the elaborate arguments advanced by respondents as to why it should not inquire into the question of whether they are complying with the 1943 order, but should, instead, terminate this inquiry as to their compliance with the 1947 order. The substance of those contentions is that (1) "no violation of law can be proven in regard to these matters," [1] and (2) the Commission, having once started an investigation of respondents' compliance with one of the two cease and desist orders, is barred or "estopped" from investigating their compliance with the order. Both of these arguments are plainly without merit. The question of whether respondents have in fact violated one or more orders of this Commission is to be determined after an investigation, not before it. Moreover, that is a question to be decided by the courts, not the Commission.

Respondents' "estoppel" argument is equally ill-conceived. There can be no doubt that the Commission, had it so desired at the time this investigation was ordered in 1963, could have directed it to respondents' compliance with either or both of the cease and desist orders in question. *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950). And even if it be assumed that the Commission made a "mistake" of some sort in not anticipating that the investigation of the one order might disclose violations of the other, "it is unthinkable that the public interest should be allowed to suffer as a result of inadvertence or mistake on the part of the Commission or its counsel where this can be avoided." *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d

[1] Respondents' Answer to Commission Counsel's Request for Amendment of Order, etc., April 26, 1965, p. 14, n. 1.

acting under the control of and in fact for and on behalf of said respondent Nash-Finch Company.

2. Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made for respondent's own account or while acting for or in behalf of a purchaser as an intermediary or agent or subject to the direct or indirect control of such purchaser.

3. Paying, transmitting, or delivering to or for the benefit of any purchaser, either directly or in the form of money or credits or indirectly in the form of dividends, or otherwise, any commission or brokerage, or any compensation, allowance, or discount in lieu thereof, received from any seller while acting as an intermediary or agent for such purchaser or while subject to the direct or indirect control of such purchaser; and

Whereas by the said order to cease and desist in said Docket No. 4589 the respondent Nash-Finch Company and its officers, agents, representatives and employees, directly or through any corporate or other device in connection with the purchase of fruits, vegetables, and other commodities in commerce, as "commerce" is defined in the aforesaid Clayton Act, were ordered to forthwith cease and desist from—

1. Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made for respondent's own account, either directly or by or through respondent C. H. Robinson Company.

2. Receiving or accepting from respondent C. H. Robinson Company, either directly in the form of money or credits or indirectly in the form of dividends, or otherwise, any commission or brokerage, or any compensation, allowance, or discount in lieu thereof, received by said C. H. Robinson Company from any seller while acting for or in behalf of said respondent Nash-Finch Company as an intermediary or agent for said respondent or while subject to the direct or indirect control of said respondent; and

Whereas the said orders to cease and desist have not at any time been modified or set aside and are now, and have for many years last past been in full force and effect; and

Whereas the Commission has reason to believe that respondent Nash-Finch Company and its officers, agents, representatives and employees, while engaged in commerce in the purchase of certain fruit and other products, may have violated the provisions of the said order

The Commission on June 2, 1965 [p. 1382 herein], having issued an order granting Commission counsel's motion that said order of February 1, 1963, be amended to direct, in addition to an investigation as to whether C. H. Robinson Company and Nash-Finch Company have complied with the order to cease and desist issued by the Commission in Docket No. 4589, an investigation as to whether Nash-Finch Company has complied with an order to cease and desist issued by the Commission in Docket No. 3783 on September 8, 1943:

It is ordered, That the said order of February 1, 1963, be, and it hereby is, amended to read as follows:

Whereas, pursuant to the provisions of an Act of Congress entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," 38 Stat. 730 (1914), as amended by the Robinson-Patman Act, 49 Stat. 1526 (1936), 15 U.S.C. Sec. 13, the Federal Trade Commission on September 8, 1943, after due process and proceedings of record in Docket No. 3783 and in accordance therewith, issued and served upon respondent Nash-Finch Company an order to cease and desist under subsection (c) of Section 2, thereof, and on January 6, 1947, after due process and proceedings of record in Docket No. 4589 and in accordance therewith, issued and served upon respondents C. H. Robinson Company and Nash-Finch Company an order to cease and desist under the said subsection (c) of Section 2, thereof; and

Whereas by the said order to cease and desist in Docket No. 3783 the respondent Nash-Finch Company and its officers, agents, representatives, and employees, in connection with the purchase by such respondent of commodities in commerce, as "commerce" is defined in said Act, were ordered to forthwith cease and desist from—

> "receiving or accepting from the sellers of such commodities, directly or indirectly, any brokerage fee, commission, or other compensation, or any allowance or discount in lieu thereof; * * *" and

Whereas by the said order to cease and desist in Docket No. 4589 the respondent C. H. Robinson Company and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the purchase of fruits, vegetables, and other commodities in commerce, as "commerce" is defined in the aforesaid Clayton Act, were ordered to forthwith cease and desist from—

> 1. Receiving or accepting from any seller, directly or indirectly, anything of value as a commission or brokerage, or any compensation, allowance, or discount in lieu thereof, on or in connection with purchases made by respondent Nash-Finch Company while

ORDER DENYING RESPONDENT'S MOTION FOR ISSUANCE OF ORDERS UNDER SECTION 6(b) OF THE FEDERAL TRADE COMMISSION ACT

The hearing examiner has certified to the Commission a motion by respondent that the Commission issue a large number of orders to file special reports under Section 6(b) of the Federal Trade Commission Act for the purpose of acquiring information respondent alleges to be relevant and necessary to its defense. The examiner included with his certification a recommendation that the motion be denied. The Commission granted respondent leave to file a supplementary statement in support of its motion, and has also considered an answer in opposition filed by complaint counsel and respondent's reply thereto.

The complaint in this proceeding alleges that respondent violated Section 7 of the Clayton Act by the acquisition of a competitor, S. K. Wellman Company. Paragraph 9 of the complaint alleges that "the relevant product markets for the purposes of this complaint are the production, distribution, and sale of friction materials in general, and sintered metal friction material in particular, exclusive of friction materials used by the railroad industry." During the course of the prehearing conference and in the present motion, respondent has indicated an intention to challenge this definition of the relevant market. Respondent takes the position that the probable competitive effects of the acquisition must be viewed within the framework of all "systems, devices, and/or components for the transmission, conversion, and/or retardation of motion."

The survey that respondent seeks to have the Commission conduct by means of Section 6(b) orders is largely premised upon respondent's view of the relevant market. As the first part of the survey, respondent would have the Commission issue Section 6(b) orders upon some 309 companies which respondent believes to be engaged in manufacturing and selling "systems, devices and/or components for the transmission, conversion and/or retardation of motion." Principally each company would be required to specify the nature of the products of this type that it produces and the dollar value of sales of each such product. Additional and more detailed information would be sought from the relatively few firms within the relevant market defined by the complaint. As the second part of its survey, respondent would have the Commission issue Section 6(b) orders upon some 259 companies which are believed to be purchasers of systems, devices or components within the relevant market asserted by respondent. Purchasers would be required to indicate the specific type of such components purchased and the dollar value of the purchases of each such type. Finally, respondent wishes to survey all those companies (the number of which

to cease and desist in Docket No. 3783, and that respondents C. H. Robinson Company and Nash-Finch Company and their officers, agents, representatives and employees, while engaged in the purchase of such fruit and other products, may have violated the provisions of the said order to cease and desist in Docket No. 4589, as heretofore set forth; and

Whereas it is deemed by the Commission to be in the public interest to ascertain the extent to which such violations may have occurred:

Now, therefore, it is ordered, That a public investigational hearing be conducted for this purpose pursuant to Rule No. 1.35 and related rules of the Commission's Rules of Practice.

It is further ordered, That the Chief Hearing Examiner shall appoint and designate a hearing examiner to preside at such hearing with all the powers and duties as provided by Section 3.15 of the Commission's Rules of Practice, except that of making and filing an initial decision; that upon completion of the hearing, the hearing examiner shall certify the record to the Commission with his report on the investigation; that respondents C. H. Robinson Company and Nash-Finch Company shall have the right of due notice, of cross-examination, of production of evidence in rebuttal; and that the hearing shall be conducted in accordance with the Commission's Rules of Practice for adjudicative proceedings insofar as such rules are applicable.

It is further ordered, That the hearings shall be held at such time and at such places as may be necessary, the initial hearing to be held at a place to be fixed by the said hearing examiner on a day occurring at least thirty (30) days after the service of notice thereof upon respondents C. H. Robinson Company and Nash-Finch Company.

It is further ordered, That the proceedings heretofore conducted pursuant to the Commission's order of February 1, 1963, have the same force and effect as though conducted under that order as amended herein.

It is further ordered, That the Secretary shall cause service of this order to be made on said respondents C. H. Robinson Company and Nash-Finch Company.

Commissioner MacIntyre not participating.

AMERICAN BRAKE SHOE COMPANY

Docket 8622. Order, June 2, 1965

Order denying respondent's motion for orders requiring special reports authorized by Sec. 6(b) of the Federal Trade Commission Act.

under a duty to conduct those proceedings in accordance with Section 7(c) of the Administrative Procedure Act which provides that "every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, and unduly repetitious evidence * * *." Without intruding upon the province of the examiner to determine the admissibility of specific evidence offered at the hearings, we can appropriately indicate the following: Nothing that respondent has revealed to date about the intended nature and scope of its defense provides any reason to suppose that respondent would find it necessary to offer, or that the examiner would find it necessary to admit, so vast a volume of testimony as respondent now suggests as the alternative to a Section 6(b) survey.

It is apparent from the proposed survey itself and from respondent's present arguments that respondent has misconceived the scope of the product-market issue in this case. The complaint alleges that the relevant product market is the production, distribution, and sale of friction materials in general and sintered metal friction materials in particular. If complaint counsel is able to establish that the line of commerce specified in the complaint is a valid one under the standards established by the Supreme Court, *e.g.*, *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 325; *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 356–57; and *United States* v. *Aluminum Co. of America*, 377 U.S. 271, it is entirely irrelevant that there might also be some broader market, encompassing additional products and additional sellers, which would also constitute a proper framework in which to consider the acquisition. See *United States* v. *Continental Can Co.*, 378 U.S. 441. In other words, it makes no difference whether the product market specified in the complaint constitutes a primary market or merely a well-defined submarket.[1] Section 7 prohibits any acquisition which may substantially lessen competition or tend to create a monopoly "in any line of Commerce."

Although the proposed survey (or the subpoenaed testimony of hundreds of sellers and purchasers, which respondent poses as the alternative) might incidentally yield a certain amount of information bearing on the only relevant-market issue in the case, this issue

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[1] Complaint counsel during the prehearing conference acknowledged the limitations imposed by the complaint:

"Hearing Examiner SCHRUP. Do I understand you to say that if the proposed market or the line of commerce was expanded to the extent asked for by the respondent, that then the case in chief would fall on the basis of the material you have?

"Mr. GRUNDMAN. We have alleged a line of commerce which we must establish. Unless we establish this, the complaint must be dismissed, or in the unlikely event that evidence is adduced which might call for us to amend the complaint, it would have to be within the scope of the original complaint. I think that we must make our case on the basis that we have alleged in the complaint.

"Hearing Examiner SCHRUP. In other words, you have the burden of proof, of proving the product market.

"Mr. GRUNDMAN. Yes, sir."

is unspecified) that are engaged as resellers of friction materials (within the definition of the complaint) in the Boston, Chicago, and Los Angeles areas.

In this case, as distinguished from several others in which respondents have sought to have the Commission conduct surveys pursuant to Section 6(b), the Commission has not heretofore issued any Section 6(b) orders in connection with its investigation of the acquisition and thus none of the evidence that complaint counsel will offer in evidence has been obtained from special reports. Respondent thus makes no contention that the Commission should conduct the proposed survey in order to afford equal access to the Commission's discovery and investigational procedures.

Indeed, respondent does not assert that it has a legal right to have the Commission conduct a survey on its behalf pursuant to Section 6(b) (it states, however, that it does not waive such a contention). It contends only that such a survey would be a speedier and more efficient method of acquiring the information needed in its defense than would the issuance of subpoenas upon a responsible official of each of the several hundred companies from which it desires to obtain information. Moreover, respondent urges that the market-share information which it supplied to the Commission staff prior to issuance of the complaint, and which complaint counsel now intends to introduce in evidence, is inadequate and inaccurate and that without some further survey of companies within the relevant market as defined in the complaint, complaint counsel could not possibly establish a *prima facie* case.

As respondent recognizes, the Commission has on a number of recent occasions denied similar motions by respondents in merger cases on the ground that the discovery procedures and compulsory process provided by the Commission's Rules of Practice for Adjudicative Proceedings had not been shown to be inadequate or unavailable. *Union Bag-Camp Paper Corp.*, Docket No. 7940, orders issued July 30, 1962, and April 5, 1963; *Frito-Lay, Inc.*, Docket No. 8606, order issued July 30, 1964 [66 F.T.C. 1533]. See also *Union Bag-Camp Paper Corp.* v. *Federal Trade Commission*, 233 F. Supp. 660 (S.D.N.Y. 1964) [7 S.&D. 991].

Despite American Brake Shoe's vigorous efforts to distinguish these cases, we are unable to conclude that it has made a more convincing showing of the necessity for the Commission's undertaking a vast, expensive and time-consuming survey by means of Section 6(b) orders. We are not persuaded by respondent's argument that it will be more economical to have several hundred companies fill out a form than to have a representative of each appear at a hearing or deposition in response to subpoenas. Examiners in Commission proceedings are

tion or recurrence of the practices charged against Federated in the complaint.

SCHENLEY INDUSTRIES, INC., ET AL.

Docket 6048. Statement, June 11, 1965

Statement of Commissioner MacIntyre withdrawing from consideration of this case on the grounds that as a staff member in 1954 he had supervised its prosecution.

STATEMENT OF COMMISSIONER MACINTYRE RE RESPONDENTS' PETITION TO REOPEN PROCEEDINGS

On June 10, 1965, respondents in this matter filed a Petition to Reopen Proceedings for Purpose of Modifying Order to Cease and Desist. The order to cease and desist was issued on March 2, 1954 [50 F.T.C. 747], pursuant to a consent settlement.

Disposition of the pending Petition will call for the Commission to exercise its judgment on matters of public policy, fact, and law as provided for in 15 U.S.C. § 45(b). It appears that in doing this the Commission will be passing judgment on some of the public policy and other questions which were before the Commission when it decided to issue the complaint in Docket No. 6048 and again when it issued its order to cease and desist in this case on March 2, 1954. Under these circumstances, the task of the Commission here is to resolve issues under § 3.28(b)(2) of the Commission's "Rules of Practice for Adjudicative Proceedings."

When the Commission issued its complaint in Docket No. 6048 and subsequently until after the Commission had issued its order to cease and desist in this case on March 2, 1954, I served as Assistant Director of the Commission's Bureau of Antimonopoly and Chief of its Division of Investigation and Litigation. In that capacity I not only supervised the prosecuting staff which handled this matter, but also actively participated in the formulation of the order to cease and desist, the modification of which is sought by the pending petition.

In view of the foregoing, I have decided to refrain from participating in the Commission's consideration and action on respondents' Petition to Reopen Proceedings for the purpose of modifying the order to cease and desist.

plainly lends itself to more direct methods of proof, such as the expert-opinion testimony of persons familiar with the structure and functioning of the industry. While the parties to Commission proceedings have a considerable freedom to put on their cases in the manner they deem most effective, there is no absolute right to employ indirect, diffuse, repetitious, or protracted methods of proof when simpler and more expeditious ones are readily available. See *Great Lakes Airlines, Inc.* v. *Civil Aeronautics Board*, 291 F. 2d. 354, 362–63 (9th Cir.), *certiorari denied*, 368 U.S. 890.

We conclude that the regular processes of the Commission's Rules of Practice will be adequate to permit effective and expeditious litigation of all the relevant issues of this case and that it would not be in the public interest for the Commission to conduct a survey such as that proposed by respondent. Accordingly,

It is ordered, That respondent's motion for orders requiring the filing of special reports pursuant to Section 6(b) of the Federal Trade Commission Act be, and it hereby is, denied.

ASSOCIATED MERCHANDISING CORPORATION ET AL.

Docket 8651. Order, June 10, 1965

Order rejecting respondent's offer to negotiate a consent settlement and remanding the case to hearing examiner.

Order Rejecting Offer of Consent Settlement

This matter is before the Commission on the certification of the hearing examiner on May 18, 1965, of the motion of respondent Federated Department Stores, Inc., filed April 22, 1965, requesting that the Commission waive the provisions of § 2.4(d) of the Rules of Practice and proposing a consent order for the consideration of the Commission. The Commission waived § 2.4(d) of the Rules of Practice and carefully reviewed the offer of settlement and the statement of respondent in support thereof. The Commission has determined that the proposal of respondent Federated Department Stores, Inc., for a consent settlement should be rejected as inadequate. Accordingly,

It is ordered, That the proposed consent settlement of respondent Federated Department Stores, Inc., be, and it hereby is, rejected.

It is further ordered, That this matter be, and it hereby is, remanded to the hearing examiner for further proceedings in accordance with the Commission's Rules of Practice.

Commissioners Elman and Jones dissent. In their view, Federated's offer provides a reasonable basis for working out a settlement without protracted litigation on terms that would effectively prevent continua-

ORDER PROVIDING FOR REARGUMENT OF APPEALS ON REMAND

On June 7, 1965, the Supreme Court vacated the judgment of the Court of Appeals for the District of Columbia Circuit which had set aside the Commission's order to cease and desist entered in the above-captioned proceeding, and remanded the case to that court "with instructions to remand it immediately to the Federal Trade Commission for further proceedings, without the participation of Chairman Dixon, in light of *Atlantic Refining Co.* v. *Federal Trade Comm'n*, 381 U.S. 357 (1965)." Pursuant to the mandate of the Supreme Court, the Court of Appeals on June 16, 1965, remanded the case to the Commission.

In accordance with the directions of the Supreme Court and the Court of Appeals,

It is ordered, That:

(1) The Commission's decision and order of April 15, 1963 [62 F.T.C. 1172], in which Chairman Dixon participated, be, and it hereby is, vacated.

(2) The appeals from the hearing examiner's initial decision of September 24, 1962, are set down for oral argument on July 8, 1965, at 2:00 p.m., in Room 532 of the Federal Trade Commission Building, Washington, D.C., with 45 minutes allowed for each side. All questions of law and fact presented by the appeals will be considered by the Commission on the basis of the entire record. The Commission suggests that the oral argument will be most useful if counsel focus on the question whether the facts of record in the present case bring it within the Supreme Court's decision in the *Atlantic Refining Co.* case.

(3) Both sides may submit supplemental briefs with respect to the issues involved in the appeals, provided that such briefs are filed no later than August 9, 1965.

Commissioners Dixon and MacIntyre not participating.

THE B. F. GOODRICH COMPANY AND THE TEXAS COMPANY

Docket 6485. Order, June 21, 1965

Order denying respondent's motion to postpone oral reargument and the filing of briefs.

ORDER DENYING MOTION TO POSTPONE ORAL REARGUMENT AND FILING OF BRIEFS AND DISMISSING MOTION FOR LEAVE TO FILE BRIEF

By order of June 18, 1965, the Commission scheduled oral reargument in this matter for July 8, 1965, and directed that supplemental briefs may be filed by August 9, 1965. On June 18, 1965, counsel for

AMERICAN BRAKE SHOE COMPANY

Docket 8622. Order, June 17, 1965

Order denying respondent's request for reconsideration of Commission's earlier denial of motion for issuance of subpoenas.

ORDER DENYING MOTION FOR RECONSIDERATION

On June 7, 1965, respondent, purporting to act pursuant to Section 3.6 of the Commission's Rules of Practice for Adjudicative Proceedings, filed a "Motion for Reconsideration" of the Commission's order of June 2, 1965 [p. 1387 herein], denying respondent's motion for issuance of orders under Section 6(b) of the Federal Trade Commission Act. Although the Rules do not provide for the filing of such a request for reconsideration of an interlocutory matter certified by the examiner, the Commission has nonetheless given it full consideration.

Respondent contends that the June 2 order "cannot stand as written because either (1) it is premised on a mistaken view of respondent's contention as to the relevant product line and therefore does not fairly meet the issue posed by the motion; or (2) the order improperly holds that respondent is not entitled to prove affirmatively that the proper relevant market includes products other than those listed in the complaint."

The Commission has reviewed its June 2 order in light of respondent's present contentions, and concludes that it reflected an entirely correct understanding of respondent's position regarding the definition of a relevant market, as set forth in its answer to the complaint and in its statements during the prehearing conference. Furthermore, nothing contained in the June 2 order is fairly susceptible to the interpretation that respondent is to be prevented from trying to prove that the relevant market defined in the complaint is invalid and that the much broader product market it suggests "is the *only* market in which the impact of the merger can validly be tested." [1]

It is ordered, That respondent's motion for reconsideration be, and it hereby is, denied.

THE B. F. GOODRICH COMPANY AND THE TEXAS COMPANY

Docket 6485. Order, June 18, 1965

Order vacating an earlier order and setting time for reargument of the case.

[1] Respondent's motion of June 7, 1965, p. 3. (Emphasis in the original.)

one of the respondents filed a motion requesting that oral reargument be deferred pending the Supreme Court's disposition of petitions for rehearing in *Atlantic Refining Co.* v. *F.T.C.* [7 S. & D. 1238], and further requesting leave to file a brief. And in a telegram dated June 17, 1965, counsel "renew[ed] our motion to defer argument until after disposition of Atlantic-Goodyear petition for rehearing and until parties have reasonable time to brief matter prior to any argument that may take place."

The motion for leave to file brief is moot, in view of the Commission's order of June 18, 1965, providing for the filing of briefs. The requests for a postponement of oral reargument and filing of briefs must, we think, be denied. The complaint in this matter was issued on January 11, 1956 [62 F.T.C. 1172], more than nine years ago, and respondents continually urged that the case be completed expeditiously, and without unnecessary delay.[1] The Supreme Court directed that this case be remanded to the Commission "immediately" and that its own judgment "shall issue forthwith." In the circumstances, the public interest would not be served by further postponements. Should the Supreme Court grant the petitions for rehearing filed in the *Atlantic Refining Co.* case, there will be time enough for such further proceedings in the present case as may be appropriate in light of the Supreme Court's action. Finally, consideration of the merits of the appeals will be furthered by permitting briefs to be filed after oral reargument. Accordingly,

It is ordered, That the motion for postponement of oral reargument and filing of briefs be, and it hereby is, denied and that the motion for leave to file briefs be, and it hereby is, dismissed as moot.

Commissioners Dixon and MacIntyre not participating.

[1] At one point the respondents sought in federal district court to enjoin further Commission proceedings on the ground of undue delay.

DECISIONS AND ORDERS

TABLE OF COMMODITIES [1]

DECISIONS AND ORDERS

[1] Commodities involved in dismissing or vacating orders are indicated by *italicized* page reference.

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[1] Covering practices and matters involved in Commission orders. For index of commodities, *see* Table of Commodities. References to matters involved in vacating or dismissing orders are indicated by *italics*.

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