It is further ordered, That respondents Congress Sportswear Company, Inc., a corporation, and its officers, and Norman F. Grossman, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty that any textile fiber product is not misbranded or falsely invoiced under the provisions of the Textile Fiber Products Identification Act.

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

VIVIANO MACARONI COMPANY

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

Docket 8666. Complaint, Sept. 21, 1965—Decision, Feb. 19, 1968

Order requiring a Carnegie, Pa., manufacturer of macaroni and other food products to cease discriminating in prices, promotional allowances and services in sales to competing retailers who resell its products.

COMPLAINT*

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

COUNT I

PARAGRAPH 1. Respondent, Viviano Macaroni Company is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located on Noblestown Road, Collier Township, Pennsylvania. Mail addressed to respondent is directed

*Reported as amended by Hearing Examiner's order of Dec. 21, 1965, by changing the name of respondent from Vimco Macaroni Products Company to Viviano Macaroni Company.

through Post Office Box 546, United States Post Office, Carnegie, Pennsylvania.

PAR. 2. Respondent has been, and is now, engaged in the manufacture, sale and distribution of macaroni, macaroni products, egg noodles, prepared foods, and sauces. Respondent sells its said products to a large number of customers, located principally in the State of Ohio and in the Commonwealth of Pennsylvania, who purchase such products for use, consumption, or resale. Respondent's customers are, primarily, wholesale grocers and retail chain stores, but also include manufacturers, independent retail stores, restaurants, and institutions. Respondent's sales of its products are substantial, exceeding $4,000,000 in the year 1962.

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

PAR. 4. In the course and conduct of its business in commerce, respondent is now, and has been, in substantial competition with other corporations, individuals, partnerships, and firms, engaged in the manufacture, sale, and distribution of macaroni, macaroni products, egg noodles, prepared foods, and sauces.

Many of the purchasers of respondent's products of like grade and quality, and customers of some of said purchasers, are in substantial competition with each other in the resale and distribution of such products within the trading areas where said purchasers are located.

PAR. 5. In the course and conduct of its business in commerce, and particularly during and since 1963, respondent has been, and is now discriminating in price between different purchasers of its products by selling said products to some purchasers at higher and less favorable prices than those prices charged competing purchasers for products of like grade and quality.

For example, most of respondent's major customers are located within a trade area composed of eastern Ohio and western Pennsylvania. Respondent's largest customer, located within the above described market area, is the Youngstown-Pittsburgh Division of National Tea Company, a corporation of the State of Illinois, with its Youngstown-Pittsburgh Division offices located at 650 Meridian Road, Youngstown, Ohio. This division of National Tea Company is comprised of 114 individual retail food stores, doing business as Loblaw, Inc., and/or Loblaw Markets. During the year 1963, respondent

granted this division of National Tea Company freight allowances which were 45.5%, or approximately $9,000, in excess of the actual cost of freight transportation. As an introductory offer, respondent also gave this division of National Tea Company more than 6,600 cases of respondent's products, free of any cost, with an approximate value of $25,000. The aforesaid inflated freight allowance was also allowed on this free merchandise, creating a total introductory allowance having an approximate value of $26,300.

The excessive freight allowances and the free merchandise referred to above resulted, directly or indirectly, in a substantial discount from the prices at which respondent sold goods of like grade and quality to other purchasers competing in the resale and distribution of respondent's products with National Tea Company.

As a further example, in the trade area composed of eastern Ohio and western Pennsylvania, respondent sells its products to a majority of its retail and wholesale customers, including, *e.g.*, The Kroger Company, Giant Eagle Super Markets, Thorofare Markets, and Golden Dawn Foods, Inc., at prices corresponding to those prices published in respondent's price lists. Said prices were not offered or granted by respondent to other purchasers, who purchased respondent's products on a cash basis at prices averaging 2.5 percent to 13 percent above respondent's highest prevailing published list prices, and who compete with the said favored purchasers in the sale and distribution of respondent's products of like grade and quality.

PAR. 6. The effect of the discriminations in price made by respondent in the sale of its products, as hereinbefore set forth, has been or may be substantially to lessen competition in the line of commerce in which respondent is engaged, and in which said favored purchasers are engaged, or to injure, destroy or prevent competition with said respondent, or its purchasers who receive the benefits of such discriminations.

PAR. 7. The discriminations in price made by respondent in the sale of its products, as hereinbefore alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

COUNT II

PAR. 8. Paragraphs One through Four of Count I hereof are hereby incorporated by reference, and made a part of this Count, as fully, and with the same effect, as if quoted herein verbatim.

PAR. 9. In the course and conduct of its business in commerce, and particularly during and since 1962, respondent has paid or contracted for the payment of something of value to or for the benefit of some of

its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale, or sale of products sold to them by respondent, and such payments have not been made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

For example, respondent has offered and paid various payments and allowances to certain of its customers, which payments and allowances have not been offered, or paid, or otherwise made available to all of respondent's customers competing with the said favored customers. These payments or allowances included, but were not limited to: (1) free merchandise for store openings, anniversary sales, and other promotional purposes; (2) payments and allowances under "Cooperative Merchandising Agreements" for printed handbill, radio, television, or newspaper advertising of respondent's products; (3) payments or allowances for various periodic promotions of respondent's products; and (4) payments or allowances for radio or television advertising in excess of any payments or allowances which the customer might be entitled to under the aforesaid "Cooperative Merchandising Agreements."

PAR. 10. The acts and practices of respondent, as alleged herein, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

COUNT III

PAR. 11. Paragraphs One through Four of Count I hereof are hereby incorporated by reference, and made a part of this Count, as fully, and with the same effect, as if quoted herein verbatim.

PAR. 12. In the course and conduct of its business in commerce, and particularly during and since 1962, respondent has discriminated in favor of certain purchasers of its products, purchased for resale, by contracting to furnish, contributing to the furnishing of, or furnishing, to such favored purchasers, services or facilities connected with the handling, sale, or offering for sale of such products so purchased, while not according such services or facilities to all competing purchasers on proportionally equal terms.

For example, respondent has, directly or indirectly, through Merchant's Broadcasting System, a corporation located in Pittsburgh, Pennsylvania, furnished, or contributed to the furnishing of, broadcasting equipment, and taped background music and commercial announcements to certain retail grocery stores in the Greater Pittsburgh.

Pennsylvania, area. During the period November 5, 1962, to October 23, 1963, respondent paid a total of $18,540.91 for the Merchant's Broadcasting System service, approximately 95.5 percent of which expenditure was paid for the furnishing of the above detailed services to the individual grocery markets of four large chain grocery stores who are engaged in interstate commerce. Such services or facilities were not accorded to all competing purchasers on proportionally equal terms.

As a further example, respondent has, directly or indirectly, through Super Market Broadcasting Systems, Inc., a corporation located in Chicago, Illinois, furnished, or contributed to the furnishing of, broadcasting equipment, and taped background music and commercial announcements to the retail grocery customers of two of respondent's wholesale grocer customers, who transact business in both the Commonwealth of Pennsylvania, and the State of Ohio. In the years 1962 and 1963 respondent paid $3,056 and $3,309, respectively, for the above described service. Such services or facilities were not accorded to all competing purchasers on proportionally equal terms.

PAR. 13. The acts and practices of respondent, as alleged herein, are in violation of subsection (e) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Ernest G. Barnes, Mr. Thomas P. Athridge, Jr., Mr. Charles A. Price and *Mr. Hans C. Nolde* supporting the complaint.

Whitlock, Markey and Tait, Washington, D.C., by *Mr. Edward T. Tait* and *Mr. William D. Matthews* for respondent.

INITIAL DECISION BY ANDREW C. GOODHOPE, HEARING EXAMINER

AUGUST 31, 1966

The Federal Trade Commission issued its complaint against respondent on September 21, 1965, charging it with violations of the Clayton Act as amended by the Robinson-Patman Act. The charges were that respondent had violated subsections 2(a), 2(d) and 2(e) of the Clayton Act as amended in selling its products to certain of its customers. The respondent filed an answer in which it admitted certain allegations of the complaint and denied that it had violated any of the subsections of the Clayton Act as amended and alleged certain defenses discussed hereafter.

This matter is before the hearing examiner for final consideration on the complaint, answer, evidence and the proposed findings of fact and conclusions and memoranda and briefs filed by counsel for respondent and counsel supporting the complaint. Consideration has been given

to the proposed findings of fact and conclusions submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom and issues the following order:

FINDINGS OF FACT

1. The respondent, Viviano Macaroni Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania with its office and principal place of business located on Noblestown Road, Collier Township, Pennsylvania. Mail address of respondent is Post Office Box 546, United States Post Office, Carnegie, Pennsylvania. (Comp. and Ans. Pars. One.) [1]

2. Respondent has been, and is now, engaged in the manufacture, sale and distribution of macaroni products, including spaghetti of various thicknesses and cuts, egg noodles, prepared foods, and sauces. Respondent sells its said products to a large number of customers, located principally in the State of Ohio and in the Commonwealth of Pennsylvania, who purchase such products for use, consumption, or resale. Respondent's customers are, primarily, wholesale grocers and retail chain stores, but also include manufacturers, independent retail stores, restaurants, and institutions. Respondent's sales of its products are substantial, exceeding 4 million in the years 1962 and 1965, and exceeding 3 million in 1963 and 1964. (Comp. and Ans. Pars. Two—Tr. 85.) Approximately 70 percent of respondent's total sales are of three macaroni products—elbow macaroni, regular spaghetti, and thin spaghetti. (Tr. 85.) Macaroni products are semiperishable in nature and are an important and staple product in the grocery industry. Stocks of these products, because of their nature, are constantly required in retail grocery stores and because of their semiperishable nature comparatively small inventories are kept on hand, necessitating frequent orders. (Tr. 347–348, 1521, 1538.)

3. Respondent sells and causes its products to be transported from its manufacturing plant and principal place of business in the Commonwealth of Pennsylvania to purchasers located in other States of the United States.

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[1] In its answer, respondent admitted Paragraph One of the complaint, but asserted that the name of the respondent as it appeared in the complaint "Vimco Macaroni Products Company" no longer existed, but that the name had been changed to the present style. Counsel in support of the complaint moved that the complaint be amended to show this correction and an order to this effect was entered by the hearing examiner.

There has been, at all times mentioned herein, a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended. In its answer, respondent admitted that it was engaged in interstate commerce, but denied that any of the transactions alleged to be discriminatory in the complaint occurred in commerce or in the course of commerce. (Ans. Par. Three.) The question of commerce will be considered separately hereafter in connection with each of the three violations charged.

4. In the course and conduct of its business in commerce, respondent is now, and has been, in substantial competition with other corporations, individuals, partnerships, and firms, engaged in the manufacture, sale, and distribution of macaroni, macaroni products, egg noodles, prepared foods, and sauces.

Many of the purchasers of respondent's products of like grade and quality, and customers of some of said purchasers, are in substantial competition with each other in the resale and distribution of such products within the trading areas where said purchasers are located. (See Resp. Prop. Findings pp. 1–8.)

Respondent sells and distributes its products to a large number of customers located primarily throughout that area within a 150 mile radius surrounding respondent's manufacturing facilities located near Carnegie, Pennsylvania. In addition to western Pennsylvania, this trading area also includes eastern Ohio, northern West Virginia, and northwestern Maryland. (Tr. 86.) Respondent's customers involved in this proceeding consist primarily of wholesale food distributors, chain and independent retail grocers. (Tr. 86–88, Comp. and Ans. Par. Two.)

5. Since the year 1963, respondent has employed approximately fifteen salesmen who represent respondent by calling upon all wholesale food distributors, independent retail grocers, and the headquarters and individual stores of chain retail grocers located within each salesman's respective sales territory. This sales force constitutes respondent's primary means of distributing and selling its products, the individual salesmen being responsible for transacting sales, introducing new items, taking care of complaints and spoilage, and "* * * doing anything in their power to promote the sale of Vimco products. * * *" (Tr. 86–87.)

6. Respondent sells and delivers its products directly to wholesale food distributors, chain retail grocers, and certain independent retail grocers in minimum individual order quantities of twenty-five cases. (CX 2–3, 7–8.) Respondent also sells its products, usually in minimum individual order quantities of twenty-five cases, to wholesale food dis-

tributors, drop-shipping the products to the wholesaler's retailer customer. (Tr. 90.) Finally, respondent sells its products, in small quantities, directly to retail grocers, primarily independent retail grocers, who normally buy from a wholesaler on a cash basis through "off-the-car sales" by its salesmen. (Tr. 98–101.)

Respondent's Regular Prices

7. Respondent publishes and distributes price lists for its various products which lists give three different price brackets based upon different case volume purchase quantities. These three price brackets are calculated to pass on freight savings for larger purchases. (CX 1–3, 7–8, Tr. 94–96.) Respondent's normal credit terms are 2%, 10 days, net 30 days. Respondent also provides floor stock protection against the price declines for any stock in a warehouse at the time of the price reduction. Respondent also has regular cooperation advertising agreements, which it offers to all of the purchasers of its products that it considers to be its direct customers. In addition, respondent has periodic merchandising and promotion allowances, which are extended to all of its customers. (Tr. 103–105.) No charges of discriminatory practices are based upon the above described selling methods. The charges in the complaint are all based upon deviations from respondent's regular merchandising program.

Charges of Price Discrimination in Violation of Section 2(a)

8. During the year 1963, the National Tea Company owned and operated a chain of approximately 110 retail stores from a division headquarters located in Youngstown, Ohio. This group was operated as the Youngstown-Pittsburgh Division of National Tea by the All-American Stamp and Premium Corporation, a wholly owned subsidiary of National Tea. (Tr. 301–302.) The stores comprising this division were located in eastern Ohio and western Pennsylvania and operated under various trade names including "Loblaw, Big D markets and Loblaw Big D food markets." (CX 1349a–b.) Hereafter, in this decision this division of National Tea and its stores will all be collectively referred to as "Loblaw," since this was the trade name under which most of these stores operated in 1963. (CX 1349a–b.) Loblaw stores, pertinent to this decision, were located in: Akron, Ohio, 11 stores; Canton, Ohio, 5 stores; Cuyahoga Falls, Ohio, 5 stores; Youngstown, Ohio, 11 stores; Pittsburgh, Pennsylvania, 18 stores; Sharon, Pennsylvania, 2 stores. (CX 1349a–b.)

9. Prior to January 1963 respondent had been selling its products to individual Loblaw stores from its regular price list by making delivery directly to each Loblaw store which desired to purchase its products on a drop-shipment basis, with billing being made directly to the Youngstown Loblaw office and payment coming from this office. Respondent's products were not stocked in nor delivered from any Loblaw warehouse. (Tr. 124–128, CX 25–38.) In the late winter of 1962, subsequent to a reorganization and change in management in the Youngstown division of National Tea (Loblaw), respondent, by its principal officer, Mr. Samuel Viviano, entered negotiations directly with the new Loblaw management in an attempt to place its entire line in the Loblaw Youngstown warehouse for delivery by Loblaw to all Loblaw stores. (Tr. 128–129.) In January of 1963, these negotiations resulted in the following arrangement:

A. Respondent agreed to give Loblaw free goods in the amount equal to the first two orders placed by Loblaw for twenty-nine of the respondent's macaroni products. The result of this being that there could be a number of orders and invoices for various products but only the first two covering a particular product of respondent's would be credited with free goods. There was no limit placed upon either the size of the orders or the amount of free goods delivered, only that they should be equal. (Tr. 131–133, 1512, 1584–1585.) The record does not contain complete information as to the amount of free goods delivered, but during the three-month period beginning May 1963, when the free goods shipments began, Loblaw received, free, at least 6,600 free cases of respondent's products for a total dollar purchase value of $25,000. (CX 75–110.)

B. Respondent agreed to sell its products to Loblaw at its published 350-case price. (Tr. 129–130, 1587.)

C. Respondent agreed to permit Loblaw to pick up respondent's products at its manufacturing plant in Carnegie, Pennsylvania, in Loblaw trucks, and to give Loblaw a "pick-up" freight allowance of $1.69 per hundredweight applicable to all of respondent's goods invoiced to Loblaw. The $1.69 freight allowance was thereafter granted to Loblaw, not only on the products for which it paid but also on the free goods which Loblaw picked up in its own trucks. Respondent granted this freight allowance and Loblaw picked up respondent's products continuously from January to December, 1963. (Tr. 129–130, 135; CXs 40, 48, 50, 51, 61, 65, 67, 69, 71, 72, 74–102, 104–114, 117, 118, 1508–1530.)

D. Respondent agreed to extend its normal credit terms of 2%—10 days, to 2%—20 days, on all purchases by Loblaw. These terms were in effect from January to December 1963. (Tr. 129–131; CX 39.)

E. Respondent agreed to pay Loblaw all allowances which would be due under respondent's periodic merchandising offers by the issuance of a credit memorandum to Loblaw covering goods under one of respondent's merchandising offers. (Tr. 110, 1585–1587.) This resulted in Loblaw obtaining this money immediately without the necessity of submitting proof of performance of the required sales promotion or advertising services. Thus, Loblaw received this money without the usual delay between delivery of the products and the submission of proof of performance and payment of the promotional allowance. Loblaw received prepayments of this type amounting to $10,000 during the first seven months of 1963. (CXs 41, 49, 52, 54, 56, 58, 60, 62, 64, 66, 68, 70, 73, 103, 115, 119.)

Counsel in support of the complaint contend that parts A, C and D of this arrangement violated Section 2(a) of the Clayton Act, as amended.[2] (See counsel in support of the complaint, Prop. Findings, p. 157.)

Interstate Commerce

10. Respondent urges that neither the agreement described above nor any of the products covered by the agreement can be considered to have been made or shipped in the course of interstate commerce. (Resp. Prop. Findings, p. 18.) This contention by respondent must be rejected. The whole sense of the agreement was that respondent's products were to be sold to Loblaw, which had its headquarters in Youngstown, Ohio, and delivered by Loblaw, by whatever means it chose, to its stores located both in Pennsylvania and Ohio. While some of the products covered by the agreement may never have left the state of Pennsylvania, a substantial portion of them did. Certainly those that were carried by Loblaw back to the Youngstow, Ohio, warehouse and delivered to stores in Ohio and Pennsylvania from this point must be considered to have been in commerce.

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[2] Section 2(a) in pertinent part provides:

"That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce * * * and where the effect of such discrimination may be substantially to lessen competition * * * in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." (49 Stat. 1526; 15 U.S.C.A. Sec. 13.)

11. The record is replete with evidence that there were a substantial number of competitors of Loblaw purchasing respondent's products of like grade and quality, located both in the States of Pennsylvania and Ohio, who were in direct competition with Loblaw in the resale of respondent's products. Included among these customers who appeared and testified were independent retailers—Lazar Supermarkets of Youngstown, Ohio, (Tr. 689–691, 694, 706–707) and Fisher Foods of Canton, Ohio, Inc. (Tr. 1243–1250.) Neither of these customers were extended the same type of price concessions during 1963 as were extended to Loblaw, and both were in competition with Loblaw stores in Youngstown and Canton, Ohio. Chain store customers of respondent in competition with Loblaw appeared and testified. The Great Atlantic and Pacific Tea Company, Inc., purchased over $40,000 worth of respondent's products during 1963 at respondent's regular prices, and resold them in competition with Loblaw through 59 stores located in eastern Ohio and western Pennsylvania. (Tr. 310–315, CX 872b, 1103–1129; compare A & P's store list CX 1103 for Youngstown, Ohio, with Loblaw's store list 1349a–b for Youngstown, Ohio.) The Fred W. Albrecht Grocery Company, with 25 stores located in Akron and Cuyahoga Falls, Ohio, purchased respondent's products at respondent's regular prices during 1963 and competed with a number of Loblaw stores. (Tr. 1111–1112, compare CX 1620 and 1349a.) The Kroger Company, Inc., in 1963 purchased respondent's products at regular list prices and sold these products through supermarkets located in Pittsburgh, Pennsylvania, and Youngstown, Ohio. (Tr. 166–168, CX 1354–1384, 544, 872b.) A number of these Kroger stores competed directly with Loblaw stores in Pittsburgh, Pennsylvania, and Youngstown, Ohio. (Compare CX 1354 with 1349a.) Representatives of five wholesale food distributors appeared and testified. All of these wholesalers purchased respondent's products and sold them to independent retailers, including voluntary chain stores who were in competition with Loblaw retail stores in both Pennsylvania and Ohio. They all purchased at respondent's regular published prices. (Tr. 1078–1079, 1082–1083, CX 221–281, 872a–b; Tr. 336–345, CX 1141, 1169, 1174–1188; Tr. 1198–1213, CX 1624a–f, 408a–475, 872a; Tr. 384–401, CX 127–133, 138–155, 1349a–b, 645f–h.) Eleven independent retail grocers who purchase respondent's macaroni products from wholesalers of such products appeared and testified. These retailers were all located in Ohio, and testified that they competed with Loblaw stores. Each bought respondent's products at their regular wholesaler's prices. (Tr. 607–615, CX 806–844; Tr. 623–631, CX 286, 315, 343, 845a–856b;

Tr. 639–643, 658–660; CX 1349a; Tr. 673–680, CX 287; Tr. 710–717, CX 1292–1315; Tr. 721–731, CX 1189–1244; Tr. 1099–1102, CX 476–478; Tr. 1151–1158, CX 417–426; Tr. 1182–1191; Tr. 1230–1233, CX 410–416; Tr. 1274–1282, CX 427–475.)

12. With this wealth of evidence of interstate sales by respondent both to Loblaw and to competitors of Loblaw, it can only be held that the transactions charged to be discriminatory occurred in commerce, *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *Sun Cosmetic Shoppe* v. *Elizabeth Arden Sales Corp.*, 178 F. 2d 150 (C.A. 2 1949).

13. This evidence likewise forces the conclusion that respondent was selling products of like grade and quality to Loblaw and Loblaw's competitors continuously throughout the year 1963. While it's true that the record does not contain substantial evidence that competitors of Loblaw were handling the same identical products as were handled by a specific Loblaw store on a specific day, the record leaves no doubt that this was the case. It would be a practical impossibility at this date in 1966 to go back to records of either respondent in 1963 or customers of respondent who competed with Loblaw in 1963 to establish this point. As pointed out above respondent's largest selling products, which consisted of approximately 70% of respondent's total sales, elbow macaroni, regular spaghetti and thin spaghetti were regularly carried by all of the retail stores handling respondent's products. The testimony by respondent's official and an examination of the invoices of respondent to Loblaw in conjunction with the testimony and invoices in the record of shipments to Loblaw competitors leave no doubt that these best selling items were regularly handled at all times by all such customers.

Effect on Competition

14. The record in this matter establishes clearly that there is severe competition at all levels in the food industry and particularly in the macaroni industry (see for example respondent's proposed findings pages 3–8). This competition is particularly acute at the wholesale and retail levels. The record establishes that grocery products including macaroni are highly advertised at very competitive prices. The record establishes that the average net profit on sales of grocery items by retailers is approximately 2% of the total volume, and these figures are also true of the net profit on macaroni items. Furthermore, the testimony in the record makes it plain that cost of goods and competitive retail prices are the most important elements of competition at the retail level. (Tr. 277, 282–284, 348, 1084, 1187, 1233, 1246; CX 874–881, 1585–1587, 1621–1629.)

15. The discriminations which the respondent granted Loblaw during the year 1963 are substantial. While the record does not permit exact figures, Loblaw received somewhere between 10% and 12% discount on its 1963 purchases as a result of receiving respondent's free goods and freight allowances.[3] It is apparent that in an industry marked by such severe competition as exists in the macaroni industry a reduction in price such as given to Loblaw of necessity must be found to be injurious to competition. Both prior Commission and court proceedings require that under the circumstances of this matter it be found that respondent's price discriminations in favor of Loblaw had the effect on competition proscribed by the Clayton Act. *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948); *In the Matter of Foremost Dairies, Inc.*, F.T.C. Docket No. 7475 (decided May 23, 1963) [62 F.T.C. 1344], *aff'd* 348 F. 2d 674 (C.A. 5 1965); *In the Matter of William H. Rorer, Inc.*, F.T.C. Docket No. 8599 (decided May 9, 1966) [69 F.T.C. 667].

Respondent's Meeting Competition Defense

16. Respondent asserts that it granted the free goods, freight allowance and extended credit terms to Loblaw to meet competitive offers by four of its competitors, Gioia Macaroni Company, La Rosa and Sons, San Giorgio Macaroni Company and the Ideal Macaroni Company. Respondent argues that there was a great amount of wheeling and dealing on macaroni during the year 1962, and that respondent was forced into a position of meeting this severe competition or suffer the loss of a substantial amount of its business. At the last meeting with Mr. Dickson of Loblaw, Mr. Viviano was advised that other companies were bidding for Loblaw macaroni business, and after the deal was made Mr. Dickson advised that all the offers were close and that he could have done better with another company. (Tr. 1467, 1494, 1514–1515, 1588–1590.)

The record makes it apparent that Mr. Viviano was not aware of what any of the offers of his competitors were, only that he believed they were making Loblaw excellent offers of somewhat the same amount as his offer. Representatives of three of the competitors who did make Loblaw offers appeared and testified. These were representatives of Gioia, La Rosa, and San Giorgio. (Tr. 1633, 1651, 1668.) Ideal, apparently, never made an offer. The testimony of these witnesses and the written offers which they made show that there was no close simi-

[3] The extention of terms from respondent's usual 2%–10 days to 2%–20 days cannot be given a value to Loblaw.

larity in the offers of any of these competitors to the deal that Viviano finally granted Loblaw. (CX 1713–1719.)

17. Prior cases in which meeting competition defense have been treated make it apparent that the respondent has failed in establishing that its deal with Loblaw was made to meet the equally low price of a competitor. Respondent was merely reacting to a general competitive situation and not to any specific offer of a lower price or better terms of any specific competitor. In addition, respondent has failed to demonstrate that the offers which competitors did make were lawful offers. *In the Matter of National Dairy Products Corporation*, F.T.C. Docket No. 7018 (decided July 28, 1966) [70 F.T.C. 79]; *In the Matter of Tri-Valley Packing Association*, F.T.C. Docket No. 7225 and 7496 (decided July 28, 1966) [70 F.T.C. 223]; *In the Matter of Knoll Associates, Inc.*, F.T.C. Docket No. 8549 (decided August 2, 1966) [70 F.T.C. 311].

Respondent's "Off-the-Car" Sales

18. Respondent's salesmen, as part of their normal day to day activity, call upon retailers who are customers of wholesaler customers of respondent; the purpose of these calls are to assist the retailer sell merchandise and attempt to keep respondent's products on the retailers' shelves. Respondent does not consider these retailers to be its customers, but rather customers of the wholesaler. (Tr. 98, 173, 564–566, 569.) As a part of this effort, respondent's salesmen from time to time will carry a small supply of respondent's products in the back of their cars. If a retailer who is a customer of a wholesaler is out of stock of an item and desires to purchase from respondent's salesman, the salesman will sell to the retailer from stock which he is carrying. In making out the invoice, the salesman sends one copy of the invoice to the respondent and another to the wholesaler from whom the retailer normally purchases his supplies of respondent's products. (Tr. 99–100, CX 1338a–1343d.) Under respondent's policy, these sales are to be made at the same price at which the wholesaler would sell such products to the retailer. These sales are a very small part of respondent's business and are made only to fill in a retailer's stocks. No attempt is made by the respondent's salesmen to compete with their wholesaler in the particular area for such sales. These sales constitute an inconsequential portion of respondent's total business. (Tr. 596–597.)

The record does contain evidence that one of respondent's salesmen sold these products to various retail stores at varying prices. (CX 1340a–1343d.) However, these sales are of such a *de minimis* nature that no finding of substantial price discrimination or any meaningful effect upon competition can be based thereon. Consequently, the conten-

tion of counsel supporting the complaint that these sales by this one salesman of respondent violated § 2(a) of the Clayton Act as amended, is rejected.

Charges of Violation of Section 2(d)

19. In their proposed findings counsel in support of the complaint urges that the respondent has violated Section 2(d) in five different ways: (a) by its payments to State Food Stores, Moundsville, West Virginia, for participation in a radio program; (b) by its payments to the Fox Grocery Company, Belle Vernon, Pennsylvania, for participation in radio and television programs; (c) by its payments to By-Rite Markets, Inc., Wheeling, West Virginia, for participation in a radio program; (d) by prepaying all amounts of advertising allowances due under its regularly cooperative advertising agreements at the time of invoicing such products, rather than later after the submission of proof of performance, to six customers, including the prepayments to Loblaw discussed above; (e) by failing to give "off-the-car" customers respondent's regularly offered advertising allowance.

20. During the year 1963, respondent made payments to the State Food Stores in the amount of $10 per week for participation in a radio program sponsored by that retail chain. (Tr. 188–189, 1417, CX 495a.) State Food Stores were supplied by a wholesaler of respondent who had no part in the arrangement between respondent and State Food Stores. State Food Stores had a number of competitors at the retail level to whom no similar advertising payment or allowance was offered on any basis. (Tr. 188–189.) The competing stores were supplied respondent's macaroni products through two wholesalers, the Wheeling Wholesale Grocery Company, who supplied State Food Stores and Zarnits Grocery Company. Both of these wholesalers sold to retailers in competition with State Food Stores. (Tr. 828–831, 838, CX 1396b–j. Tr. 790–795, 819.)

Respondent contends that its payments to State Food Stores were made in good faith to meet the competition of the San Giorgio Macaroni Company. Respondent contends that during 1962, the State Food Stores began a radio program in Moundsville and were later advised by an official of the State Food Stores that San Giorgio was offering a lot of free goods and advertising money to State Food Stores if it would take on San Giorgio. (Tr. 1419.) Later, respondent's salesman was approached by an official of State Food Stores and advised that San Giorgio was willing to participate in the radio program if the respondent did not. (Tr. 191–192, 1419–1421.) When advised of this, respondent's principal official, Mr. Samuel Viviano agreed to this pro-

gram and participated for a period of about a year at $10 per week. (Tr. 190.) An official of the San Giorgio Company testified in rebuttal in this matter, but no questions were asked regarding San Giorgio's offer of payments to State Food Stores. Under the circumstances, the hearing examiner must conclude that San Giorgio had made a bona fide offer to participate in the radio program with State Food Stores and that the respondent in good faith made this offer and subsequent payments in order to maintain its position in the State Food Stores, meeting the competition of San Giorgio. The size of the payments were only $10 per week, which could reasonably lead respondent to believe that San Giorgio's offer to participate was an entirely lawful and proper offer.

21. The Fox Grocery Company is a wholesale grocer operating from 70 to 75 miles from Belle Vernon, Pennsylvania. Respondent has supplied Fox with a complete line of macaroni products for many years. During the relevant period 1963, Fox was carrying a competitive line of macaroni products, Procino & Rossi macaroni, and a small amount of Muellers macaroni. (Tr. 754–759.) During the period 1963 to 1965, respondent had made payments to the Fox Grocery Company for participation in television shows and radio programs, which feature products sold by the Foodland Stores. (Tr. 763–764.) Foodland Stores were a voluntary chain of independent supermarkets which were supplied their grocery products by Fox. (Tr. 760–761.) The arrangement between respondent and Fox and Fox's advertising agency was essentially for television advertising with the respondent paying $350 for each television spot during the year 1963, $250 in 1964 and $300 in 1965. During the three years respondent paid Fox in excess of $20,000 for participation in these television and radio programs. The television program consisted of a movie with opening and closing billboards and spot advertising interspersed during the course of the movie. Only one maraconi product could properly be advertised during the course of the program. Mr. Viviano candidly conceded that he did not make similar payments of offers to any of Fox's competitors. (Tr. 204.) Fox had competitors who were handling respondent's products of like grade and quality and who operated in the same areas as Fox, both in Pennsylvania and West Virginia. The Wheeling Wholesale Grocery purchased a complete line of respondent's products from 1962 to 1965. (Tr. 759, 844.) Wheeling Wholesale had a number of independent grocery retail customers in Wheeling, West Virginia who were in competition with Foodland Stores when reselling respondent's products. (Tr. 755, 758, 832; CX 1396–1397, 1534.) Zarnits Brothers Grocery Company also a wholesale grocer had customers in

Wheeling, West Virginia who competed with Foodland Stores. (Tr. 820–827; CX 1395.) Potter-McCune and Associated Grocers, both of whom are wholesale grocers in competition with Fox and with customers located in the same areas as Foodland Stores in selling respondent's products. None of these wholesalers were offered any type of like or similar advertising payments to those granted to Fox.

22. Respondent contends that the payments made to Fox Grocery Company were made to meet the competition of two competitors, La Primiatta Macaroni Company, and the Procino & Rossi Macaroni Company. Respondent was advised by an official of the Fox Grocery Company that both of these competitors of respondent had offered to participate in Fox's television and radio programs, (Tr. 759, 766 *et seq.*) and promptly thereafter respondent agreed to make the payments to Fox. Respondent's contention that these payments were made in good faith to meet like or similar payments of a competitor or competitors must be rejected. Fox had been a customer of respondent for many years, (CX 876) and at the time respondent's products were Fox's largest selling macaroni product by "5 to 1 over anything else." (Tr. 759–760.) It is clear to the examiner that the respondent knew or should have known that these payments of a substantial character over and above respondent's regular cooperative advertising payments were discriminatory. It should have been equally clear that for either of its competitors to make like or similar payments, in view of their weak position with Fox, would have been clearly unlawful. Consequently, the examiner finds that the respondent could not have made these payments in good faith to meet like or similar payments of these two competitors.

23. There can be no question but that both the sales and payments to the Fox Grocery Company were made in the course of commerce. While Fox's headquarters is located in Belle Vernon, Pennsylvania, the Foodland Stores are located in Wheeling, West Virginia, and the payments which respondent made to Fox were to benefit all such stores. Consequently, both the payments to Fox and sales to Fox for resale to Foodland must be considered to have been in commerce.

24. Commencing on April 1, 1963, and ending June 30, 1963, respondent paid By-Rite Markets, Inc., of Wheeling, West Virginia, $15 a week for radio advertising. The record shows that the total payments made to By-Rite were $195 (CX 500). At the time, By-Rite was owned by the Fox Grocery Company which acquired these seven By-Rite stores on May 3, 1962. The record, with regard to the relationship between By-Rite and Fox, is quite vague but apparently it was operat-

ing somewhat autonomously of Fox, although it did acquire all of its grocery products from Fox. Respondent contends that counsel in support of the complaint has failed to show that these payments were not or could not be considered to be a part of respondent's regular promotional advertising agreements which provided for radio advertising. The testimony of the witness, Kemper of Fox is, at best, vague (Tr. 762–764). The testimony of Mr. Viviano is contradictory (Tr. 196–197, 211, 1596–1598). The exhibit upon which counsel in support of the complaint rely, Comm. Exh. 500, is not conclusive. Consequently, the examiner finds that counsel in support of the complaint have failed to carry their burden of demonstrating that these payments by By-Rite violated Section 2(d) of the Clayton Act, as amended.

25. Counsel in support of the complaint contend that the prepayment by respondent of periodic merchandising payments to Loblaw and to five other of its customers, Charley Brothers, F. W. Albrecht Grocery Company, Betsy Ross Foods, Thorofare Markets and Reeves Parvin violated Section 2(d). (Tr. 110, 134, 1585–1587; CX 9, 13, 14, 16, 41, 49, 52, 54, 56, 58, 60, 62, 64, 66, 68, 70, 73, 103, 115, 119, 215, 216, 256, 265, 373–378, 381–389, 630, 642, 800–805.) The record demonstrates that these customers were required to submit proof of performance of the advertising or promotional activities but this was not required before payment was received. The allowances were given to these customers immediately by the issuance of a credit memorandum at the time the merchandise was invoiced and shipped. Other customers of respondent who competed in reselling similar products did not receive their payments until after they had supplied respondent with proof of performance of the advertising or promotional services. Respondent was apparently willing to extend this prepayment to any customer who desired the prepayment, particularly if the customer claimed that it was a hardship not to obtain the money immediately (Tr. 110).

In the examiner's opinion, these prepayments to these few customers were not discriminations of a sufficiently important nature to bottom a finding of violation of Section 2(d) of the Clayton Act. All that the record shows is that the respondent made these prepayments in six instances but had advised its sales force that such prepayments would be made to any customer who requested them. Any advantage which these customers might have enjoyed over their competitors as a result of these prepayments are, in the examiner's opinion, of such insignificant value as not to warrant a finding of violation.

26. Counsel in support of the complaint contend that respondent failed to offer customers to whom it made "off-the-car" sales, respond-

ent's regular cooperative advertising arrangement and thereby violated Section 2(d) of the Clayton Act, as amended. As pointed out above, these sales were so small as to be *de minimis* and the small amounts of any advertising allowances based on these minute sales would be inconsequential. In addition, respondent, as pointed out above, did not consider the retailers to whom these sales were made as its own customers, but customers of the wholesale grocer who had normally supplied their needs for respondent's products. In addition, the record is not clear as to whether the normal wholesale supplier would receive credit for these sales for advertising allowance purposes, but presumably he would have since he received a copy of the invoice. The contention of counsel in support of the complaint that respondent violated Section 2(d) of the Clayton Act, as amended, by failing to offer respondent's "off-the-car" customers its regular advertising allowance is rejected.

Charges of Violation of Section 2(e)

27. Counsel in support of the complaint contend that respondent has violated Section 2(e) of the Clayton Act, as amended, as a result of its arrangements providing instore background music to 12 of its customers. This background music included verbal advertisements of a number of each of these customers' suppliers products including those of the respondent. Other in-store promotional services were also to be furnished by the retailer. The respondent made payments to the broadcasting companies for supplying this music to the retail outlets and these payments are the basis for the charge of violation of Section 2(e).

28. Commencing in September 1962 and continuing through September 1963, the respondent paid the Merchants Broadcasting System (MBS) for transmitting a music program into approximately 200 retail stores of four supermarket chains: Loblaw, Kroger, Thorofare, Giant Eagle, and nine independent retail grocers located in the Pittsburgh, Pennsylvania, area (Tr. 929–930). The contract between respondent and MBS provided for a monthly rebate of 20% of all revenues paid by suppliers to go to the four chains (Tr. 928, *et seq.*; CX 1577 A–C, 1564 A–B, 1554 A–B, 1547–1584, *in camera*). However, no payments of this kind were ever made since costs of the services exceeded the amounts received by MBS. The broadcasts were over a closed FM circuit with range limited to the greater Pittsburgh area and none of the broadcasts went to any stores outside Pennsylvania (Tr. 954; CX 541–545). The broadcasts originated in Pittsburgh and the payments were made to MBS in Pittsburgh. Consequently, there

was no interstate commerce involved in this arrangement. In addition, MBS attempted to notify all retail stores by placing ads in two newspapers of the availability of the service and by mailings to all grocery stores listed in the Yellow Pages of the Pittsburgh telephone directory. Personal contacts were made with retail grocers in an attempt to sell the service to retailers in the Pittsburgh area (Tr. 955–956). Consequently the examiner finds that this service as a practical matter was available to all grocery retailers and wholesalers in the Pittsburgh area. The contention of counsel supporting the complaint that these payments violated Section 2(e) is rejected.

29. Supermarket Broadcasting System (SBS), with its headquarters in Chicago, Illinois, provides in-store background music interspersed with advertisements of products of various participating suppliers over loudspeaker systems in retail grocery stores. Miscellaneous merchandising services are also provided by the retailer to the participating suppliers. Respondent made payments toward the cost of the SBS program broadcasting into retail outlets of three of its wholesale grocery customers: Golden Dawn Foods, Inc., Sharon, Pennsylvania, September 1962 to July 1965: Reeves Parvin & Co., Huntington, Pennsylvania, July 1962 to February 1964; and Charley Brothers Company, Greensburg, Pennsylvania, during 1965. The services provided by SBS are basically the same for each of the wholesalers with minor differences not here pertinent.

30. Golden Dawn Foods, Inc., sells to approximately 130 retail grocery stores, the majority of which operate under the Golden Dawn trade name. Approximately 80 of these Golden Dawn stores receive the SBS in-store broadcasting service and are located both in the States of Pennsylvania and Ohio (CX 643–712). During the three year period September 1962 to July 1965 respondent paid SBS nearly $9,000 for the music and advertising services in the Golden Dawn stores at the rate of $390 for each four week period. Reeves Parvin & Company sells to approximately 40 IGA stores located in Pennsylvania and one store in Hancock, Maryland, of which 30 receive the SBS in-store broadcasting service. During the period July 1962 to February 1964 respondent paid SBS approximately $2400 for the broadcasting service in the Reeves Parvin and IGA stores at the rate of $150 for a four week period (CX 715–805). Charley Brothers Company sells to approximately 150 retail grocers located in Pennsylvania with one store located in Bellaire, Ohio (Tr. 462; CX 596–598). Charley Brothers sells to a group of stores which it sponsors and assists, all of whom use the trade name "Red and White." These stores purchase all of their grocery products from Charley Brothers and in addition Charley

Brothers sells to 100 contract stores who are independent and do not operate under the Red and White label. In 1965 respondent began paying SBS for broadcast services into the Charley Brothers' Red and White stores and continued these payments until July 1965 paying SBS in excess of $1,000 for such services at the rate of $278 for a four week period. As a part of the agreement with SBS respondent's products were advertised periodically over each of the retailers public address systems eight times a day and respondent received some additional merchandising and marketing services.

31. These three-way contracts between respondent, SBS and the wholesalers provided that SBS would pay each of the wholesalers a 50% rebate on all advertising net revenues paid to SBS by suppliers, including the respondent, where there were 15 or less such suppliers. The contract also provided that SBS would pay the wholesalers a rebate of 80% of the gross revenues received by SBS where there were more than 15 participating suppliers. As a result Golden Dawn was paid approximately $66,000 by SBS during the three-year period that respondent participated in the program. Only a small percentage of this total rebate to Golden Dawn, however, is attributable to respondent's payments to SBS. Reeves Parvin received rebates in excess of $5,000, a small percentage of which is attributable to respondent's payments to SBS. During the period April through July 1965, Charley Brothers received rebates totaling nearly $5,000, of which a small percentage is attributable to respondent's payments to SBS.

32. These wholesalers all handled respondent's products and in addition there were a number of other wholesalers competing with them who handled respondent's products of like grade and quality and who did not receive or were not offered like or similar services including the rebates. For example, the Tamarkin Company, a wholesaler located in Youngstown, Ohio, purchased products of like grade and quality to those sold by respondent to Golden Dawn and resold these products in competition with Golden Dawn in the Eastern portion of the State of Ohio (Tr. 357–361). A number of retailers to whom Tamarkin sold were in direct competition with Golden Dawn stores located in the State of Ohio. The Tamarkin Company was never advised of nor offered any like or similar services or facilities to those granted to Golden Dawn, Reeves Parvin or Charley Brothers.

33. These agreements and the payments made pursuant thereto and the products shipped by respondent to both favored and nonfavored wholesalers and retailers were made in the course of interstate commerce. SBS is an organization located in Chicago, Illinois. SBS billed the respondent from its Chicago office and respondent made payment

to SBS's Chicago office and SBS paid the rebates to the favored wholesalers from its Chicago office. One of the favored wholesalers, Golden Dawn, had a substantial interstate business operating both in the States of Pennsylvania and Ohio. Golden Dawn stores located in both States received the services and facilities and rebates for which respondent provided the money. Consequently, it is found that these agreements and the payments made pursuant thereto were made in the course of commerce.

Respondent contends that it entered these agreements with SBS in good faith to meet like or similar offers of its competitors. This contention must be rejected. The evidence in the record merely indicates that some of respondent's competitors participated in these programs in the past and might have participated in the SBS programs with these three wholesalers had respondent failed to do so. The evidence is very general in nature and it does not appear that the respondent was meeting any specific offer of any of its competitors to participate in these programs but was merely reacting to the general competitive condition in the trade. In addition it should have been patent that these agreements were illegal, particularly in view of the fact of the substantial rebates which the wholesalers received from SBS. Consequently, respondent has failed to demonstrate that it knew that the offers, if such they were, made by competitors were lawful. Consequently, it is found that respondent has failed to establish that these payments to SBS were made in good faith to meet the like offers of a competitor or of competitors.

CONCLUSIONS

1. Respondent Viviano Macaroni Company has violated Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, by granting a favored customer, Loblaw, discriminatory prices during the year 1963 in the form of free goods, freight allowances and extended credit terms as found above.

2. The effect of these discriminations in price in favor of Loblaw may be and have been substantially to lessen competition or to injure, destroy or prevent competition between Loblaw and its competitors both wholesale and retail and retailer customers of wholesalers.

3. The discriminations in price granted to Loblaw were in the course of commerce, as "commerce" is defined in the Clayton Act, as amended.

4. Respondent has failed to prove that the discriminatory prices granted to Loblaw were made in good faith to meet an equally low price of a competitor.

5. The evidence in the record does not permit a conclusion that the respondent violated Section 2(a) of the Clayton Act, as amended, in making its "off-the-car" sales as found above.

6. The payments made to State Food Stores do not violate Section 2(d) of the Clayton Act, as amended, since the respondent has established that these payments were made in good faith to meet the payments for services or facilities offered by a competitor.

7. The payments made to the Fox Grocery Company for radio and television advertising constitute a violation of Section 2(d) of the Clayton Act, as amended, since they were not made available on proportionally equal terms to all customers of respondent competing with the Fox Grocery Company in the resale of respondent's products of like grade and quality.

8. The payments of respondent to the Fox Grocery Company and the sale of respondent's products to Fox and to Fox's competitors were made in the course of commerce as "commerce" is defined in the Clayton Act, as amended.

9. The record will not support a finding that the payments made to By-Rite Markets, Inc., constitute a violation of Section 2(d) of the Clayton Act, as amended.

10. The record will not support a conclusion that the prepayment of advertising allowances to Loblaw and five other of its customers constitute violations of Section 2(d) of the Clayton Act, as amended.

11. The record will not support a conclusion that respondent's failure to offer its regular advertising and promotional agreements and contracts to its "off-the-car" customers constitutes a violation of Section 2(d) of the Clayton Act, as amended, because of their *de minimis* nature and the fact that these customers were not considered by respondent to be its customers but rather customers of its wholesalers.

12. The payments made by respondent to Merchants Broadcasting System for supplying the retail outlets of certain customers of respondents with in-store background music containing advertisements of respondent's products and the supplying by retailers of other promotional activities cannot constitute a violation of Section 2(e) of the Clayton Act, as amended, since neither the agreement nor the payments made pursuant thereto nor the shipment of any products to the stores receiving the background music can be considered to have been made in the course of commerce, as "commerce" is described in the Clayton Act, as amended.

13. The payments made by respondent to the Supermarket Broadcasting System for providing background music in the retail stores supplied by certain of respondent's wholesale customers constitute

violations of Section 2(e) of the Clayton Act, as amended, since they were made in the course of commerce, as "commerce" is defined in the Clayton Act, as amended, and were not accorded to all customers competing with the favored customers on proportionally equal terms.

ORDER TO CEASE AND DESIST

It is ordered, That respondent Viviano Macaroni Company, a corporation, and its officers, representatives, agents and employees, directly, indirectly, or through any corporate or other device, in or in connection with the sale of its macaroni products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

1. Discriminating, directly, or indirectly, in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net price charged any other purchaser who competes in the resale and distribution of respondent's products with the purchaser, or with customers of the purchaser, paying the higher price.

2. Paying or contracting for the payment of anything of value to or for the benefit of any customer of respondent as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the offering for sale, sale or distribution of 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.

3. Furnishing, contracting to furnish, or contributing to the furnishing of services or facilities in connection with the handling, processing, sale or offering for sale of respondent's products to any purchaser of such products bought for resale, when such services or facilities are not accorded on proportionally equal terms to all other purchasers who resell such products in competition with any purchaser who receives such services or facilities.

OPINION OF THE COMMISSION

FEBRUARY 19, 1968

BY DIXON, *Commissioner:*

This matter is before the Commission on cross-appeals from the hearing examiner's initial decision. The complaint, in three counts, charges respondent, a corporation engaged in the manufacture and sale of macaroni products, with violating Sections 2(a) (Count I), 2(d) (Count II), and 2(e) (Count III) of the Clayton Act, as amended.

The hearing examiner found that the evidence sustained certain of the charges under each count and his proposed order prohibits violations of each of the three sections of the Clayton Act. Respondent has appealed from the examiner's findings of a violation under each of the three counts and complaint counsel's appeal is directed at the examiner's ruling that certain of the charges under Counts II and III have not been sustained. We will first consider respondent's appeal under each separate count.

COUNT I

The price discrimination charge under this count is based on respondent's dealings with a wholly owned subsidiary of the National Tea Company, the All-American Stamp and Premium Corporation, which, in 1963, operated a group of about 110 retail stores with division headquarters in Youngstown, Ohio. Most of these stores, which were located in eastern Ohio and western Pennsylvania, were operated under the name Loblaw and the group will hereinafter be referred to by that name.

Prior to 1963, respondent had been selling certain items in its line of macaroni products to about fifty of these Loblaw stores located in western Pennsylvania. Sales were made at respondent's regular list prices and the goods were drop shipped to the individual stores. Billing for each shipment was sent to the Loblaw divisional office in Youngstown and payment was received from that office.

National Tea acquired the stock of the All-American Stamp and Premium Corporation in July 1962. As a result of this change in management, respondent entered into negotiations with Loblaw in an attempt to place its entire line of macaroni products in Loblaw's Youngstown warehouse. These negotiations took place at two meetings in January 1963 between respondent's principal officer, Mr. Samuel Viviano, and representatives of Loblaw.

The negotiations resulted in a package deal between respondent and Loblaw, the terms of which are not disputed. As found by the hearing examiner, respondent agreed:

(1) To give Loblaw free goods in the amount equal to the first two orders placed by Loblaw for twenty-nine of respondent's macaroni products. This one-free-with-one offer on two orders was not limited as to the size of the orders that could be placed;

(2) To sell its products to Loblaw at respondent's 350-case price regardless of the actual quantity purchased;

(3) To grant Loblaw a freight allowance of $1.69 per hundredweight for respondent's products which Loblaw was permitted to pick

up in its own trucks at respondent's plant in Carnegie, Pennsylvania, and transport to Loblaw's Youngstown warehouse. This freight allowance was granted on the free goods as well as the products paid for by Loblaw:

(4) To extend its normal credit terms of 2%–10 days to 2%–20 days on all purchases by Loblaw.

Counsel supporting the complaint relied on these four provisions in the agreement in support of the price discrimination charge.[1] However, in sustaining this charge, the hearing examiner placed no reliance upon the provisions for sales to Loblaw at respondent's 350-case price. Complaint counsel have not raised this issue in their appeal.

It is not disputed that, as found by the hearing examiner, respondent granted Loblaw a freight allowance in the amount of $1.69 per hundredweight for at least the period from January to December 1963 (CX 40, 48, 50, 51, 61, 65, 67, 69, 71, 72, 74–102, 104–114, 117, 118, 1508–1530). Competitors of Loblaw, who were respondent's customers, testified that they did not receive, and were not offered, a freight allowance by respondent. Mr. Viviano testified unequivocally that respondent did not offer the $1.69 freight rate to all customers (Tr. 135). Additionally, the prices quoted on respondent's published price lists were delivered prices and there is no indication on these lists that respondent granted a freight allowance in any amount (CX 1, 2, 3).

Despite these undisputed facts, respondent's first argument on its appeal is that there is no substantial evidence that the $1.69 freight allowance to Loblaw was discriminatory. It is respondent's contention that the evidence establishes that this freight allowance was available to all customers who desired to pick up goods at the Viviano plant. The only evidence relied upon by respondent in support of this argument is the testimony of Mr. Viviano that his company used "the 5,000 pound rate as a freight allowance" for any customer who wanted to pick up the goods. However, Mr. Viviano's statement that this was "company policy" is considerably weakened by the fact that respondent's published price lists specifically state that freight is prepaid, and by the testimony of customers that they had never been offered a freight allowance. Aside from this, however, the record establishes that the 5,000 pound rate from respondent's plant in Carnegie to Loblaw's warehouse in Youngstown was $.94 (CX 1640a). Thus, giving full credence to the testimony of Mr. Viviano, the $1.69 rate granted to Loblaw was dis-

[1] The agreement contained one other provision under which respondent agreed to pay its regular promotional payments to Loblaw in advance of performance of the promotional service. This practice is charged as a violation of Section 2(d) of the Clayton Act and will be more fully discussed in considering the appeal of complaint counsel.

criminatory. Respondent's further statement that where a customer bought smaller quantities the freight rate would increase accordingly, is literally true. However, respondent does not contend that it ever granted such increased rates and the evidence establishes that it did not. Mr. Viviano's testimony is that the 5,000 pound rate was granted regardless of the amount of the shipment and regardless of the location of the customer.

On this record, we find that the $1.69 per hundredweight freight allowance granted by respondent to Loblaw was discriminatory, and respondent's argument to the contrary is rejected.

Respondent's second argument is that its free goods offer to Loblaw was not discriminatory. The record in this regard discloses that for the three-month period beginning in May 1963, Loblaw received at least 6,600 free cases of respondent's products (CX 75–110). The record further establishes that during this period, customers of respondent who competed with Loblaw, did not receive and were not offered free goods by respondent.[2]

The evidence relied upon by respondent is the testimony of Mr. Viviano that for a period of from six to nine months, it was respondent's policy to make an introductory offer of one-free-with-one on two orders to potential customers. Contrary to respondent's argument, however, this testimony further establishes the discriminatory nature of the offer. Obviously, if this offer was available only to *potential* customers, a price discrimination was effected between Loblaw and respondent's established customers competing with Loblaw in the sale of respondent's products. This, of course, is aside from the question whether the discrimination had the required adverse effect on competion, which is another issue raised in respondent's appeal.

Additionally, respondent's argument on this issue ignores two critical factors. First, Loblaw was not truly a potential customer since it is undisputed that prior to the offer, respondent had been selling its products to about fifty stores in the Loblaw chain. Second, respondent would have us view the one-free-with-one offer as a separate introductory offer. This is obviously not the case with respect to Loblaw. Respondent's free goods offer to that customer was actually a part of a package deal, combined with other discriminatory terms having no time limitation, which must be considered as a continuing price discrimination.

We hold, on the foregoing facts, that respondent's free goods offer to Loblaw was discriminatory, and respondents argument to the contrary is also rejected.

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[2] Tr. 393, 646, 685, 695, 1122, 1216, 1260.

As previously stated, Loblaw owned about 110 retail stores located in western Pennsylvania and eastern Ohio. Representatives of other retail grocery stores, which were located in the same cities and within a short distance of the Loblaw stores, and which did not receive free goods, a freight allowance or extended cash discount terms from respondent, testified in support of the complaint. It is respondent's contention that the evidence does not support the examiner's finding that particular Viviano products were sold contemporaneously by any specific Loblaw stores and their competitors. Respondent relies on testimony of former Loblaw officials that at the time of the Loblaw-Viviano transaction, the Loblaw warehouse was carrying macaroni and noodle products of several of respondent's competitors and that all of the products stocked in the warehouse were not necessarily for sale in all Loblaw stores because the individual store managers usually exercised the prerogative of determining whose products and which items he carried in his store.

The facts disclose that respondent's sales to Loblaw increased from about $32,150 in 1962 when it serviced about fifty Loblaw stores in Pittsburgh with nine items, to about $293,800 in 1963 when it placed twenty-nine items in the Loblaw warehouse. By comparison, respondent's sales to the largest wholesale grocery company in Youngstown, the Tamarkin Company, totaled about $135,000 in 1963. This wholesaler sold to about 150 retailer accounts in Youngstown and respondent's products were by far its leading macaroni line.

In addition to the substantial volume of sales by respondent to Loblaw, the evidence discloses that respondent's products were the number two macaroni line in the Loblaw trading area and in the Loblaw stores. Also, complaint counsel introduced into evidence representative Loblaw newspaper advertisements, offering Viviano products, which were published in 1963 in various cities in which nonfavored customers were located. One of these advertisements (CX 1631), published on May 1, 1963, bears the address of nineteen Loblaw stores in the Youngstown trading area.

In further considering respondent's argument, it is to be noted that a former Loblaw official testified that, after the agreement with Viviano was entered into, shipment of respondent's products was delayed in order that the line of macaroni products which Loblaw had in its Youngstown area stores at that time might be replaced. Obviously, therefore, the prerogative of the individual store managers in deciding which brand of macaroni to carry was severely limited.

In these circumstances it would be wholly unrealistic to conclude, as respondent contends, that individual Loblaw stores were not shown to have competed with nonfavored retail grocers in the sale of Viviano products. As held by the Court of Appeals for the Ninth Circuit in the *Tri-Valley* case,[3] evidence tracing particular products to the shelves of two competing customers is not necessary.

Thus, the facts of record in this case fully support the examiner's findings that respondent's products were sold contemporaneously by the favored Loblaw stores and their nonfavored competitors.[4]

We next consider respondent's argument that the price discriminations resulting from its deal with Loblaw did not have the necessary potential to adversely affect competition within the meaning of Section 2(a). In substance, respondent refers to the hearing examiner's finding that Loblaw received somewhere between 10% and 12% discount on its 1963 purchase of Viviano products and contends that the examiner erred in concluding that the benefits received by Loblaw were of a continuing nature. Respondent says, for example, that the Viviano offer was "introductory," and "nonrecurrent," and constituted a "single transaction."

The Commission notes in this connection that there is no evidence that the combination offer of free goods, freight allowance and extended credit terms was made to introduce respondent's products into the store of any other potential purchaser. It was "introductory" to Loblaw only in the sense that it induced that customer to substantially increase its purchases from respondent for at least a year at a price lower than its competitors paid for the same goods. While the offer and acceptance may constitute a "single transaction," there was a continuing price discrimination on every shipment of Viviano goods to Loblaw from January 1963 until some time in 1964.

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[3] *Tri-Valley Packing Ass'n* v. *Federal Trade Commission*, 329 F. 2d 694 (9th Cir. 1964). The court held that where it is shown that the customers are operating on a particular functional level, such as retailing, it is only necessary to establish that:

"* * * one [customer] has outlets in such geographical proximity to those of the other as to establish that the two customers are in general competition, and that the two customers purchased goods of the same grade and quality from the seller within approximately the same period of time. Actual competition in the sale of the seller's goods may then be inferred even though one or both of the customers have other outlets which are not in geographical proximity to outlets of the other customer."

[4] It is to be further noted that in our decision *In the Matter of Sunbeam Corporation*, Docket No. 7409 (1965) [67 F.T.C. 20], involving discriminatory promotional payments, we held that where complaint counsel has shown that some of the favored and disfavored customers are located in the same local trade area, the burden shifts to respondent to produce evidence that such customers were not competing in the distribution of the products. We think the same rule applies in a matter involving alleged discriminatory pricing, and respondent has not met that burden in this case.

While arguing that the benefits to Loblaw from the combination offer were not of a continuing nature, respondent would also view the free goods offer as separate and apart from the freight allowance and extension of credit terms. Respondent's contention is that, since the great majority of the free goods (86%) were shipped in the period from May 6 to June 11, 1963, there is no likelihood of injury to competing purchasers.

In considering the benefits accruing to Loblow, the free goods offer cannot be so readily isolated from the freight allowance and extension of credit terms. That Loblaw itself was concerned with the benefits of the combination offer is shown by the fact that it refused to accept the free offer and a substantially lower freight allowance when first offered by respondent. Moreover, the interrelationship between the terms of the offer is evidenced by the fact that the discriminatory freight allowance, totaling about $2,200, was granted on the free goods shipments.

Even assuming, however, that the terms of the agreement can be considered separately, we believe that the discrimination resulting from the free goods offer alone could easily have a seriously adverse competitive effect.

The undisputed facts are that the free offer consisted of granting one case free with each case purchased on two unlimited orders covering twenty-nine of respondent's products. Loblaw received at least 6,601 free cases, having a total dollar value of $25,288. Since Loblaw's purchases of Viviano products for the year 1963 totaled about $293,800, this constitutes a discount of over 8% on Loblaw's yearly purchases.

These facts must be considered in light of the competitive situation existing in the retail sale of food products in market areas in which respondent's products were sold. The examiner, in considering this question, found that there is severe competition at all levels in the food industry and particularly in the macaroni industry. This finding is not disputed and is fully supported by the record. Representatives of retail grocery stores and wholesalers testified that the cost of goods and retail prices determine their ability to compete. They further testified that they find it necessary to take advantage of the 2% cash discount offered by suppliers and that these discounts are a vital factor in their profit and loss figures. Documentary evidence establishes the extremely low profit margins in the retail grocery industry.

The Supreme Court has stated that " * * * § 2(a) does not require a finding that the discriminations in price have in fact had an ad-

verse effect on competition. The statute is designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." [5]

The court applied this test in the *Edelmann* case [6] where the market conditions were substantially identical with those established in this record. There, as here, purchasers of respondent's products sold in a market where competition was keen; these purchasers operated on small profit margins; and differentials of small amounts were important in the trade. In view of these market conditions, the court sustained the Commission's findings that the competitive opportunities of the less favored purchasers were injured when they had to pay substantially more for respondent's products than their competitors had to pay.

There is testimony in this record that a difference of a few pennies a box in the retail price of macaroni is sufficient to gain a sale for the grocer with the lower price. The evidence also establishes that as a result of receiving the free goods, Loblaw reduced prices and ran special displays and advertising on respondent's products. Thus, the price discrimination resulting from the free goods gave this favored customer a very substantial initial competitive advantage which it was able to maintain by virtue of the other two aspects of the package deal, the discriminatory freight allowance and the discriminatory extension of credit terms.

This brings us to respondent's further argument that the freight allowance merely reflected its savings from Loblaw's assumption of delivery costs. It is respondent's contention that the $1.69 rate was the official less-than-truckload rate established by the Interstate Commerce Commission and state regulatory tariff schedules and reflects the exact freight rate respondent paid in drop shipping the individual Loblaw-Pittsburgh stores prior to the January 1963 transaction.

In the first place, the $1.69 rate was the 1963 common carrier rate for less-than-truckload shipments from Carnegie to Youngstown. Prior to 1963, respondent shipped only to Loblaw's Pittsburgh stores which were near its Carnegie plant. More importantly, Mr. Viviano testified that respondent used its own trucks in making deliveries in Pittsburgh and Youngstown. Also, at least during 1963, Loblaw used its own trucks which had made Pittsburgh deliveries, to pick up products at the Viviano plant. Under the circumstances, common carrier rates have no relationship to the actual costs that were involved, and this record is devoid of any evidence as to actual delivery

[5] *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726 (1945).
[6] *E. Edelmann & Co.* v. *Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956).

costs, either as to respondent or Loblaw, which would support respondent's argument that the $1.69 rate reflected its savings. Moreover, as we have previously stated, respondent's price lists set forth three categories of delivered prices for each item, intended to reflect the differing costs of freight between each weight category on drop shipments. An example of respondent's calculated freight savings on one such price list, effective March 14, 1963, shows a difference in price on respondent's 20–1 pound cartons of Naples type products of just three cents between each of the price categories. Under these circumstances, respondent's argument that the $1.69 per hundred freight allowance merely reflected its savings as a result of the Loblaw transaction is rejected.

It must be here noted that, while the hearing examiner concluded that the extension of credit from 2%–10 days to 2%–20 days granted by respondent to Loblaw as part of the package deal was discriminatory, he did not make a specific finding on this point nor did he discuss the evidence relating thereto.

Respondent does not take issue with the hearing examiner's conclusion which is fully supported by the facts of record. Mr. Viviano testified that 2%–10 days were respondent's normal credit terms and these terms are set forth on respondent's price lists which were in effect at that time (CX 1, 2, 3). Additionally, customers competing with Loblaw stores in the sale of respondent's products testified that they were never offered credit terms of 2%—20 days. We find, therefore, that by granting Loblaw extended credit terms, respondent discriminated between competing customers.

The evidence which the examiner failed to discuss deals with the adverse competitive effect of this aspect of the discriminatory package deal. Thus, one of respondent's large customers who was not offered the extended credit terms testified that "In 20 days, the chances are that the merchandise we would have bought would have been sold by that time, and in most cases the moneys would have been collected for it and, in effect, we would have been operating on Vimco's money" (Tr. 346–347). He further stated that his company borrows short term money to enable it to meet discount terms of its suppliers and that "If we had an extra ten days, that would give us a half million dollars of extra capital in our business" (Tr. 347). Several other nonfavored customers testified that an extension of credit to 2%—20 days would be significant and a definite advantage for the reason that this would enable them to sell the products before they have to pay for them, thus giving them more cash to use in other ways (Tr. 314, 1094, 1118, 1208).

Considering this testimony in light of the intensively competitive situation existing in the retail food industry, we find that respondent's discriminatory extension of credit terms to Loblaw, even considered separate and apart from the other discriminatory price reductions in its package deal, may have the effect of substantially lessening competition.

As a final argument on the issue of competitive injury, respondent states that a comparison of Loblaw's competitive state with the various retailers called as injury witnesses in this proceeding rebutted any inference of possible adverse effect on competition. The premise for this argument, that Loblaw was losing money before, during and after 1963, does not find support in this record. The only evidence on this point is the testimony of the Loblaw Youngstown division manager, Mr. Malt, who did not take that position until *March 1964*. Although asked several times by complaint counsel whether the division was profitable when he arrived there, Mr. Malt would only reply that "I wish that it were." Upon further questioning by the hearing examiner, Mr. Malt indicated that he considered such information to be a trade secret. Clearly, this witness' testimony is of no value in establishing the financial condition of Loblaw in 1963. Additionally, during the period of the price discrimination, Loblaw was a wholly owned subsidiary of the National Tea Company which, the record does show, enjoyed a profit in 1963. There is no evidence as to the organization and internal operation of the National Tea Company which would require that the competitive state of its Loblaw subsidiary be determined separate and apart from the overall operation of the company.

After fully considering the arguments presented by respondent on this issue, the Commission finds that the evidence sustains the examiner's conclusion that the effect of respondent's price discrimination may be substantially to lessen competition between Loblaw and its nonfavored competitors.

We next consider respondent's argument that the hearing examiner erred in rejecting its affirmative defense under Section 2(b) of the Clayton Act by finding that respondent had failed to establish that its lower prices to Loblaw were made in good faith to meet a competitor's equally low price. We will consider respondent's argument under the test laid down by the Supreme Court in the *Staley* case [7] wherein it was held that the statute requires the seller "to show the existence of facts which would lead a reasonable and prudent person

[7] *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945).

to believe that the granting of a lower price would in fact meet the equally low price of a competitor."

The facts relied upon by respondent are primarily the thirty-five year's experience of Mr. Viviano in the macaroni business, and the testimony of two former employees of Loblaw.

As previously mentioned, the agreement between Loblaw and respondent, which included the free goods, freight allowance and extended credit terms, was reached as a result of two meetings between these parties in January 1963. The first meeting was attended by Mr. Viviano and by Mr. John Dickson, the assistant sales manager of Loblaw's Youngstown-Pittsburgh Division. Mr. Viviano and Mr. Dickson were also present at the second meeting, as well as Mr. Dickson's superior, Mr. Charles Marcey.

These meetings were prompted by the fact that after the change of ownership of Loblaw in July 1962, Loblaw was approached by a number of potential macaroni suppliers who urged Loblaw to take on their products. Mr. Viviano testified that he "figured" these competitors were LaRosa and Sons, Procino & Rossi, San Giorgio, Gioia Macaroni Co., and Ideal Macaroni Co. Thus, respondent contends that it knew the specific identity of its competitors for the reason that the record shows that the first three of these companies made offers to Loblaw, and these offers are a matter of record.

In support of this contention, respondent relies on the testimony of Mr. Dickson and Mr. Marcey, neither of whom was still employed by Loblaw at the time of his testimony, and upon two physical exhibits. Respondent does not contend that these persons identified the competitors and it is clear from this record that neither of these individuals mentioned the names of any of respondent's competitors in their meetings with Mr. Viviano. In fact, neither could remember whether he had even told Mr. Viviano that respondent was talking with other macaroni companies. Instead, respondent's argument is that, from Mr. Viviano's experience in the market, he knew which competitors were likely to make offers to Loblaw, and the testimony of Dickson and Marcey that they had received offers from LaRosa, Procino & Rossi and San Giorgio prior to their meetings with Mr. Viviano simply confirmed his belief. However, this testimony can be given little weight. In rebuttal, complaint counsel adduced testimony from the representatives of each of these companies who would have the authority to make such offers. The San Giorgio representative testified unequivocally that his company did not make an offer to Loblaw. Although Procino & Rossi made an offer, it was not submitted until after the date of the second meeting with Loblaw, as established by the testimony of

Mr. Viviano and Mr. Marcey. LaRosa did make an offer prior to respondent's negotiations with Loblaw. However, the LaRosa representative testified that he quoted only the regular prices on LaRosa's secondary line out of courtesy to Mr. Dickson, who had requested an offer, since his company was not ready to enter the Youngstown market.

The testimony of the former Loblaw officials is further discredited by the fact that contrary to their assertions that Loblaw had not received written offers, the offers made by LaRosa (for regular prices only) and Procino & Rossi (made after the second Loblaw-Viviano meeting) were submitted to Loblaw in writing and are a matter of record in this proceeding (CX 1714, 1718).

While we do not hold that it is necessary for respondent to specifically identify its competitors to establish a Section 2(b) defense, we do find that respondent's reliance upon its alleged knowledge of the specific identity of its competitors who made offers to Loblaw, as evidence of its good faith in granting a discriminatory price, is not supported on this record.

We turn next to the question of whether respondent has shown sufficient facts to lead a reasonable person to believe that its lower price was responsive to the lower price of *any* competitor who may have been negotiating with Loblaw for its Youngstown macaroni business.

In the *Staley* case, *supra*, the facts as stipulated were that the discriminations were made in response to verbal information from buyers and salesmen to the effect that one or more competitors had granted or offered to grant like discriminations. Moreover, it was stipulated that Staley granted price discriminations on the belief that such reports were true. However, the court referred to the lack of diligence on the part of Staley to verify the reports and stated that "The good faith of the discrimination must be shown in the face of the fact that the seller is aware that his discrimination is unlawful, unless good faith is shown, *and in circumstances which are peculiarly favorable to price discrimination abuses*" (emphasis added). In the case before us, we have the prime example of such favorable circumstances, a large chain store organization negotiating with suppliers to obtain a lower price for a staple food product.

The facts relied upon by respondent are not as strong as those stipulated in the *Staley* case. There is no evidence, nor does respondent contend, that it had been informed as to the offers made by its competitors. Mr. Viviano, in answer to a question from respondent's counsel, specifically testified that he didn't know how respondent's offer compared

with those of his competitors. More importantly, the evidence does not support a finding that respondent made a diligent effort to investigate or verify any possible competitive offers. We do have the self-serving testimony of Mr. Viviano that he twice asked Mr. Dickson the nature of competitive offers, which information was not given him. However, Mr. Dickson failed to support this testimony, stating first that Mr. Viviano had *not* asked and then, later, only that he "may have asked." There is no evidence that Mr. Marcey was asked, nor is there any evidence that respondent made any other attempt to learn the nature of any competitor's offer.

Respondent places reliance upon the testimony of Mr. Dickson that he told Mr. Viviano that "we had offers equally as good as his." However, this testimony can be given little weight. First, such a statement could be made only *after* respondent had made an offer and in no way reflects that respondent was responding to a competitor's offer. Second, Mr. Dickson's testimony was refuted by his superior, Mr. Marcey, who was present at the second meeting when the discriminatory freight allowance was added to the deal. In answer to the question as to the conversation with Mr. Viviano, Mr. Marcey stated:

> It wasn't a matter of telling him anything. It was a matter of discussing a proposal, not saying to him that we have anything because we didn't do business that way. I am sure that we did not say to him "We have a deal better than yours or equal to yours," or anything like that, or we didn't tell him what the other deals were because it was against the policy of the company to do business that way. (Tr. 1514.)

The most that can be said for respondent's Section 2(b) defense is that it had general knowledge, known in the trade, that Loblaw was interested in obtaining a macaroni supplier for its Youngstown ware house. This was obviously not a situation, which often prevails, where a supplier has to react immediately to information received from a buyer or a salesman in order to retain the business of a customer. Instead, the facts show that this price discrimination was the result of negotiations over a course of time between a chain store buyer and a supplier whose product had consumer preference and ranked second in sales in the trade area. It was simply a situation of a large buyer attempting to get the best price it could from a seller who was willing to grant price concessions to obtain the business. As we have stated in the *Knoll* case[8] "* * * if it appears from the evidence and he [the supplier] would have sold to favored purchasers at the lower discriminatory price regardless of the price at which his rival sold, it cannot be said that he was metting a competitor's price in good faith

[8] *In the Matter of Knoll Associates, Inc.*, Docket No. 8549 (1966) [70 F.T.C. 311].

even though it can later be established that his competitor was also selling at the lower price."

We conclude that respondent has failed in its burden of establishing that its discriminatory price was granted to meet the equally low price of a competitor.

Respondent's appeal from the hearing examiner's finding that the respondent has violated Section 2(a) of the Clayton Act in its dealings with Loblaw is denied.

COUNT II

Respondent has appealed from the hearing examiner's ruling that its promotional payments to Fox Grocery Company violated Section 2(d) of the Clayton Act.

The facts concerning the payments to Fox are not disputed. Fox, a wholesale grocery company, has its headquarters and warehouse in Belle Vernon, Pennsylvania, and serves over two hundred retail grocer accounts located in four States. It has carried the complete line of respondent's macaroni products for fifteen to twenty years.

Beginning in January 1963, respondent paid Fox varying amounts for spot announcements on television and radio programs sponsored by Fox and featuring products sold by Foodland Stores, a voluntary chain of supermarkets supplied by Fox. Respondent's participation on these programs began when the programs were initiated and was maintained on a continuous basis through the date of the hearings in March 1966. During the first three years (1963–1965) respondent paid Fox in excess of $20,000 for these spot announcements. Fox's purchases from respondent during this period totaled $579,577. Fox also carried macaroni products of two other suppliers, Procino & Rossi and Muellers, but respondent's products outsold the other brands by 5 to 1.

Respondent had other wholesale grocery purchasers who competed with Fox and whose customers competed with Foodland markets in West Virginia, Maryland, Ohio and Pennsylvania. Respondent concedes that it did not make like or similar promotional payments available to these competitors.

Respondent's first argument under this count is that the requisite jurisdiction was lacking in its transactions with Fox. It contends that the payments were made to Fox in Pennsylvania, respondent's products were shipped to Fox's Pennsylvania warehouse, and the participating radio and TV stations paid by Fox are located in Pennsylvania. Accordingly, it is respondent's argument that the promotional

payments were not made in the course of interstate commerce, as required by the statute.[9]

It is established in this record that respondent is engaged in interstate commerce and that Fox is engaged in interstate commerce. Foodland Stores is a voluntary chain, purchasing all of its supplies from Fox, as distinguished from Contract stores which are independent stores which buy from Fox only if they so desire (Tr. 760). There are Foodland markets located in states other than Pennsylvania, which are served by Fox and, during the period of the discriminatory promotional payments, seven of these stores located in Wheeling, West Virginia, were wholly owned by Fox. The contract between respondent and Fox provided that the Foodland markets would stock the products featured on the spot commercials (CX 1537). The television station carrying these commercials televises into the three out-of-state areas in which the Foodland markets are located (CX 494e). Additionally, contrary to respondent's contention, the testimony of the Fox representative establishes that a Wheeling, West Virginia, radio station was employed to broadcast the Fox sponsored Foodland commercials paid for by respondent (Tr. 776).

In the *Shreveport* case,[10] the court stated:

> * * * we have a manufacturer engaged in interstate commerce making an allowance to two food chain customers who are also engaged in interstate commerce in connection with products sold only in intrastate competition, but with the allowance being made or used in interstate commerce. This, we think, meets the test of the statute that the allowance payments be made in the course of the commerce that Petitioner was engaged in at the time.

The court further stated that: "We do not read the statute to qualify payment in the 'course of * * * commerce,' once that appears, by a further requirement that the payment be in connection with goods sold in interstate commerce, resold in interstate commerce, or that competition between competing customers be in interstate commerce where there is ample nexus to interstate commerce in the whole transaction as here."

On the facts of this case, the court's holding in the *Shreveport* case fully disposes of respondent's jurisdictional argument. Accordingly, we find that respondent's discriminatory promotional payments to

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[9] Section 2(d) provides, in part, that:

"It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce * * *."

[10] *Shreveport Macaroni Mfg. Co. v. Federal Trade Commission*, 321 F. 2d 404 (5th Cir. 1963), *cert. denied*, 375 U.S. 971.

Fox were in the course of commerce, and respondent's argument on this issue is rejected.

Other than the commerce issue, there is no contention by respondent that the facts concerning its payments to Fox do not establish a *prima facie* violation of Section 2(d). However, respondent argues that its payments to Fox were made to meet the specific competitive offers of two other macaroni suppliers, Procino & Rossi and La Premiata Macaroni Company, and were therefore justified under Section 2(b).

Procino & Rossi products were in the Fox warehouse at the time Fox initiated the radio-TV show. La Premiata was not a supplier of Fox at that time. The hearing examiner, relying on the evidence that Fox has been a customer of respondent for a number of years, that respondent's products were Fox's largest selling macaroni product by 5 to 1 over any other competitor's, and that respondent's payments for the radio-TV show were over and above its regular cooperative advertising payments, held that it should have been clear to respondent that "for either of its competitors to make like or similar payments, in view of their weak position with Fox, would have been clearly unlawful."

We do not find it necessary to rule on this holding by the examiner since, in our opinion, respondent's Section 2(b) defense fails for other reasons.

It is respondent's position that this is the "classic situation" for the application of that defense for the reason that the competitors were identified and the amounts of their offers were known.

In the first place, it is not clearly established that respondent knew the identity of the competitors since Mr. Viviano testified only that he "suspected the other macaroni company was one of these three: Gioia, P & R and San Giorgio." Be that as it may, we do not think the evidence supports respondent's contention that it knew the amount of any competitor's offer.

Respondent's support for this argument is the testimony of Mr. Kemper, Fox vice president, that the prices charged for advertising on the Fox program was the same for all macaroni manufacturers. Thus, it is respondent's position that the amount which it paid to Fox is the amount which competitors would have offered in order to participate on the program. Aside from the fact that there is no indication that any such information was conveyed to respondent, Mr. Kemper's further testimony on this subject must be considered. He specifically testified that all participants on the TV program did not take the same number of spots, stating that "They could not, because

we would not sell their products sufficiently for them to afford it" (Tr. 785). He further testified that some suppliers took "one or two spots, three spots" and participated intermittently on an "in-and-out basis" (Tr. 771).

In our view, the testimony relied upon by respondent could only mean that suppliers were all charged the same amount per spot announcement, and not that all suppliers would pay the same overall amount.

It is, of course, well settled that a supplier claiming the Section 2(b) defense does not have to establish the exact amount of a competitor's offer. However, under *Staley, supra*, the supplier does have the burden of taking steps to investigate competitive offers and thus to learn the existence of facts which would lead a reasonable and prudent person to believe that the granting of promotional payments would do no more than meet the payments of a competitor. We recognize that we are here dealing with a Section 2(b) defense to a violation under Section 2(d) whereas the *Staley* case involved Section 2(a). However, it has been judicially recognized that the Section 2(b) principles announced in the *Staley* decision also apply in a Section 2(d) case. *Exquisite Form Brassiere, Inc.* v. *Federal Trade Commission*, 360 F. 2d 492 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 959 (1966).

In this case, we have only the vague and general testimony of the Fox representative that he told respondent that competitors "would support the program" and that he "laid the cards on the table." Respondent's representative testified only that he was told that if he didn't take the radio-TV deal, "another macaroni company was going on." Respondent knew that its payments to Fox were over and above its regular cooperative promotional payments and that its products far outsold any other macaroni products in the Fox warehouse. Also, as testified to by Mr. Kemper, there were no other TV programs like this one in the market. Despite these facts, there is no evidence that respondent made any effort to learn the nature of any competitive offers. Clearly, this record establishes an "entire lack of a showing of diligence on the part of respondents to verify the reports" of competitive offers.[11]

We think respondent's good faith defense fails for one additional reason. Its payments to Fox began in January 1963 and continued for at least three years. The contract with Fox was renewed annually. Complaint counsel established by the testimony of the Fox representative that no other macaroni supplier "has attempted to get on

[11] *Federal Trade Commission* v. *A. E. Staley Mfg. Co., supra.*

the program" since it was initiated and that "we have not solicited anybody" (Tr. 786). In view of this testimony, we think there was a burden upon respondent to show facts which would lead it to believe that a continuation of the discriminatory payments was necessary. Respondent made no attempt to do so and its failure evidences a lack of good faith as required by Section 2(b).

On this record, we hold that respondent has failed to sustain the burden imposed upon it by Section 2(b) in its promotional payments to Fox. Accordingly, its appeal on this issue is denied.

COUNT III

The order issued by the hearing examiner under this count arises from payments made by respondent to Supermarket Broadcasting System (SBS). The facts concerning these payments are not in dispute.

As found by the examiner, SBS, which is located in Chicago, Illinois, provides in-store background music interspersed with advertisements of products of various participating suppliers over loudspeaker systems in retail grocery stores. Respondent made payments toward the cost of the SBS program broadcast into retail outlets of three of its wholesale grocery customers, as follows:

Golden Dawn Foods, Inc., Sharon, Pennsylvania, September 1962 to July 1965, $9,000.

Reeves Parvin & Co., Huntington, Pennsylvania, July 1962 to February 1964, $2,400.

Charley Brothers Company, Greensburg, Pennsylvania, 1965, $1,000.

The agreement between respondent and SBS provided that respondent's products would be advertised over each of the retailer's public address systems eight times a day. The contract between SBS and the wholesaler provided that SBS would pay each of the wholesalers a 50 percent rebate on all advertising net revenues paid to SBS by suppliers.

The examiner found that respondent had other wholesale customers who competed with the three wholesalers receiving the SBS services and that the other wholesale customers did not receive and were not offered like or similar services. He further found that retail customers of the favored wholesalers competed with retail customers of nonfavored wholesalers. He held that the discriminatory services furnished by respondent through SBS violated Section 2(e) of the Clayton Act, and he rejected respondent's Section 2(b) defense.

Respondent does not contest the examiner's finding of illegality. Its position is that the circumstances are such that it is not in the public interest to issue an order. The alleged circumstances are that respondent was not aware of the rebate by SBS to wholesalers, that SBS advised respondent that the program was offered and available to all food outlets in respondent's trade area, and that SBS further advised that the program was completely legal.

With reference to the rebate, the evidence shows that the practice was for respondent's representative to meet with representatives of the favored wholesalers and SBS to discuss the program prior to respondent's participation. Moreover, the Golden Dawn representative indicated that respondent's representative was aware of the terms of the contract between SBS and the wholesaler (Tr. 444). This contract specifically provides for a rebate from the advertising revenue to be paid to the wholesaler (CX 645c). Under the circumstances, little weight can be given to respondent's testimony that it was unaware of the rebate. In any event, the legality of the plan does not depend upon the rebate provision and respondent's alleged lack of knowledge is of no consequence. As found by the examiner, the violation results from the fact that respondent furnished services through SBS to three customers upon terms not accorded to competing purchasers on proportionally equal terms.

Respondent cites the testimony of the SBS representative (Tr. 1045–1046) in support of its statement that SBS advised it that the program was available to all food outlets. Quite plainly, the SBS representative did not so testify. His comments, relied upon by respondent, relate only to the question of whether the program could be used by small grocery stores. Additionally, the contract between respondent and SBS does not support respondent's position. In the contracts initially entered into between these parties, SBS warranted that "the use of its system is available to any appropriate food trade group." Aside from the fact that SBS apparently determined which group was "appropriate," it is clear that respondent had customers which were not members of a food trade group and were therefore precluded from participation.

Section 2(e) imposes upon a supplier furnishing a service or facility to a customer the burden of assuring that such service or facility is accorded to all purchasers on proportionally equal terms. Here, respondent made no attempt to assume that burden. In the first place, respondent did not even furnish SBS, upon whose representations it allegedly relied, a list of its customers. The testimony of Mr. Viviano establishes that respondent was well aware that the SBS in-store pro-

gram was being used by only a few of its customers and not by their competitors who were likewise respondent's customers. Additionally, Mr. Viviano testified that although he knew that SBS had records showing to whom the programs were offered, and was advised that he could see these records, he made no attempt to do so.

The nonfavored customers in this case were respondent's and not SBS' customers. There is no authority for respondent's attempted delegation of its burden to SBS and, under the facts of this case, its reliance thereon, rather than militating against an order, establishes the need for a prohibition against future violations.

We find no substance in respondent's further contention that it was informed by SBS officials that the program was legal. The testimony of the wholesalers who were present at the meetings with all three parties, does not support this contention. Moreover, we fail to see how such information, if given, could carry any weight. SBS was attempting to obtain suppliers to participate in its program, which was its sole business operation, and it is certainly to be expected that it would represent the program as being legal. Despite the obvious self-serving nature of any representations by SBS, respondent made no attempt to verify the lawfulness of its payments to SBS, well knowing that other competing customers were not being accorded equal treatment. Moreover, it is to be noted that the lawfulness of the SBS program is not really in issue. It is respondent's discriminatory participation in the program which was found by the examiner to be illegal.

Under the foregoing circumstances, we think a prohibition in the order against the future use of such illegal practices is required in the public interest and we, therefore, deny respondent's appeal on this count.

PROCEDURAL ISSUE

Just prior to the first hearing in this case, respondent filed an application for inspection and copying of documents in the possession of the Commission pertaining to all witnesses whom respondent had been notified would be called as witnesses by complaint counsel. Certain of the documents requested were letters written to the Commission by such persons and copies of letters sent to them by the Commission, and all written statements given by them. At the first hearing, agreement was reached as to these documents and they were made available to respondent's counsel.

In addition, respondent's application requested "All memoranda of meetings, interviews and/or telephone conversations made by Commission personnel" with all prospective Commission witnesses. The ex-

aminer certified this portion of the application to the Commission which, by order and accompanying opinion issued on March 9, 1966, denied the request.

Respondent now requests that we reconsider our denial in the light of our decision in *Inter-State Builders, Inc.*, Docket No. 8624, April 22, 1966 [69 F.T.C. 1152]. Also, respondent contends that our previous ruling was erroneous under the *Jencks* rule.[12]

In the *Inter-State Builders* decision, after reviewing at length the requirements of the *Jencks* rule, we remanded the case to the hearing examiner with directions that he examine interview reports prepared by Commission investigators of interviews with witnesses who had testified in the proceeding to determine whether or not such reports were required under the *Jencks* rule to be made available to the respondents for the purpose of cross-examining and impeaching such witnesses. We held that the *Jencks* rule required that any written statements prepared or approved by a witness relating to the subject matter of such witness' testimony together with any written statement which represented a substantially verbatim transcription of any oral statements given to a Commission investigator by such witness must, under the circumstances of that case, be made available to respondents' counsel.

In reaching our decision in the *Inter-State Builders* case, we pointed out certain requirements that must be met in order for the *Jencks* rule to apply in an administrative proceeding. Insofar as this present proceeding is concerned, we concluded that Jencks statements may not be demanded until after the witness in question has testified on direct examination. The reason for this requirement, as we pointed out, is that in some instances the witness might not ultimately be called upon to testify and in other instances a witness' testimony might be unrelated to prior statements which he made. Second, we held that under court decisions, respondent's counsel must make some showing that a statement has been made to the government or that a report of an interview with the witness has been prepared by a government agent.

In our decision of March 9, 1966 [69 F.T.C. 1104, 1106], denying respondent's prehearing request for witness interview reports in the present case, we expressly stated that:

> If there is any question whether or not the report is a statement within the scope of Section 2(e) of the statute (Jencks Act), the examiner may inspect the document and make a determination. But that would not occur until after the witness takes the stand.

[12] *Jencks* v. *United States*, 353 U.S. 657 (1957). The rule laid down in that decision was codified in statutory form in what is known as the Jencks Act, 18 U.S.C. 3500.

Nowhere throughout this entire proceeding did respondent's counsel make any request of the examiner to inspect any document for such purpose. Nor does respondent even contend that such request was made. Moreover, respondent's counsel did not ask or otherwise make any attempt to show that a report of an interview with any witness who testified on behalf of complaint counsel had been prepared by a government agent. Given an opportunity to do so, respondent made no attempt to comply with the provision in our decision for invoking the *Jencks* rule, which provision is entirely consistent with our holding in *Inter-State Builders*.[13] Accordingly, respondent's request that we reconsider on March 9, 1966, ruling in the light of the *Inter-State Builders* decision and the *Jencks* rule, must be rejected.

In this same connection, respondent contends that the examiner was inconsistent and erred in requiring its counsel to produce a memorandum prepared by one of respondent's counsel of his interview with a defense witness, Mr. Dickson.

We find no substance in this argument. As previously stated, respondent's counsel agreed on the record to accept complaint counsel's proposal to turn over to the hearing examiner all letters and written statements sent to the Commission by complaint counsel's witnesses, and all letters sent by the Commission to those witnesses. Such documents were, in fact, produced. Complaint counsel requested similar documents that respondent may have received from its witnesses. One such document produced by respondent was a copy of a letter it had received from one of its witnesses, Mr. Dickson. This letter disclosed that respondent's counsel had forwarded to Mr. Dickson a memorandum of an interview he had had with that witness for that witness' comment. The record shows that, in his letter, Mr. Dickson stated that the memorandum was substantially correct except for certain corrections he was making. Complaint counsel argued that the memorandum thereby became an adopted statement of the witness and that they should have it for the purpose of cross-examination. The examiner so ordered.

Respondent does not dispute the facts. Nor does it argue that the witness Dickson did not adopt or approve the interview report. Moreover, there is no contention by respondent that complaint counsel had in their possession any witness interview reports which had even been

[13] The court has stated with reference to a Jencks Act statement that "* * * the defendant must plainly tender to the Court the question of the producibility of the document at a time when it is possible for the Court to order it produced, or to make an appropriate inquiry. If he fails to do so he may not assert, on appeal, that failure to order production or to undertake further inquiry was error." *Ogden* v. *United States*, 303 F. 2d 724, 733 (9th Cir. 1962).

seen by a witness. Respondent simply asserts that the examiner was inconsistent and erred in requiring it to produce the Dickson interview report while complaint counsel was not required to produce any witness interview reports they may have had in their possession.

Clearly, there was no inconsistency in the examiner's rulings. The obvious reason for the difference in his rulings is the undisputed fact that respondent's witness approved and adopted his interview report.[14] That such reports may be required to be produced for cross-examination purposes is well settled.[15] *Campbell* v. *United States*, *supra*; *United States* v. *Lamma*, 349 F. 2d 338 (2d Cir. 1965).

Although we find that, contrary to respondent's argument, the examiner was consistent in his ruling on this issue, we note that the examiner required the production of the Dickson interview report prior to the testimony of that witness. In this respect, he was in error. Cases decided prior to the examiner's ruling on this point have held that "Jencks statements" need not be produced until after a witness has testified on direct examination.[16] However, at the time of the examiner's ruling, respondent's counsel did not object on the grounds that production at that time was premature nor did they take an interlocutory appeal from the examiner's ruling.

The record discloses that Mr. Dickson took the stand immediately after the examiner's ruling. We have reviewed the testimony of Mr. Dickson on direct examination and we find that it expressly relates to the statements made in the report of the interview in question. Obviously, therefore, complaint counsel would have been entitled to the report for cross-examination purposes after the witness' direct testimony. Respondent does not contend nor has it shown that it was prejudiced or in any way put at a disadvantage as a result of the premature production of the report. Under the foregoing circumstances, we find that respondent was not deprived of a fair hearing as a result of the examiner's action and, accordingly, respondent's appeal on this issue is denied.

COMPLAINT COUNSEL'S APPEAL

Count II

Complaint counsel have appealed from the examiner's rulings dismissing certain of the charges under this Section 2(d) count.

[14] *Campbell* v. *United States*, 373 U.S. 487 (1963). The fact that the witness did not sign the report is immaterial. *Bergman* v. *United States*, 253 F. 2d 933 (6th Cir. 1958).

[15] In our decision in the *Inter-State Builders* case, we expressly held that any written statement approved by a witness relating to the subject matter of his testimony must be made available to respondent's counsel.

[16] *N.L.R.B.* v. *Vapor Blast Co.*, 287 F. 2d 402 (7th Cir. 1961); *N.L.R.B.* v. *Chambers Mfg. Corp.*, 278 F. 2d 715 (5th Cir. 1960).

The examiner found that in 1963 respondent made payments to State Food Stores, a chain of retail grocery stores in West Virginia, in the amount of $10 per week for participation in a radio program sponsored by that customer. He further found that similar payments were not offered to that customer's competitors on any basis, thus establishing a *prima facie* violation of Section 2(d). However, he found that a competitor of respondent, San Giorgio, had made a bona fide offer to participate on the radio program and that respondent's offer was made in good faith to meet this competitor's offer. Accordingly, he found that respondent's payments were justified under Section 2(b).

The facts, as found by the examiner, establish that respondent's offer to State Food Stores was made in response to verbal information received from respondent's salesman, Mr. High, that San Giorgio had offered to participate on the radio program. This is the same factual situation as that stipulated in *Staley*, *supra*. As we have previously stated, the doctrine of *Staley* applies in a meeting competition defense to a Section 2(d) charge. Thus, the Supreme Court in that case held that there is a burden upon a supplier under these facts, to take steps to verify the existence of the lower offer of a competitor. Respondent concededly made no attempt to verify its salesman's report and, under the circumstances of this case, we think its failure to do so evidences a lack of good faith.

Respondent bases its defense on the testimony of Mr. Viviano and its salesman, Mr. High. Mr. Viviano testified he was contacted by Mr. High with respect to the radio program and was told that "a competitor was going on and we were going out if we didn't go" (tr. 192). He further testified that he was told by Mr. High that the competitor was San Giorgio and that it had offered State Food Stores $10 a week to go on the program. Additionally, he stated that, at this time, San Giorgio was selling to Wheeling Wholesale Grocery, the wholesale supplier of State Food Stores.

Mr. High testified concerning two conversations he had with officials of State Food Stores. The first occurred in a State Food market and was prompted by the fact that he noticed some San Giorgio macaroni on the shelf. Upon asking why, he was advised by Mr. Cassius, general manager of State Food Stores, who was accompanied by the president of the company, that these were samples given to them by San Giorgio, that San Giorgio was offering them "some free goods and a lot of advertising money if we take them in" and that "we don't think we need both San Giorgio and Vimco." Mr. High further testified that about a month or two later, he was approached on the

street by Mr. Cassius who explained to him that several suppliers were going together on a radio program with them, that they "were giving a very low cost per spot announcement," and that "he wanted me to contact my office or the company and see if we couldn't participate." This was the entire extent of that conversation. It was allegedly on the basis of these two conversations that he told Mr. Viviano that San Giorgio had offered to participate on the program, that it had offered $10 per week, and that if respondent did not participate, it would lose the business. There can be no doubt from this record that, contrary to respondent's argument, no such information was conveyed to Mr. High by a State Food Stores' representative. At best, his report to respondent was merely a guess, resulting from his first conversation with Mr. Cassius. And that conversation was not initiated by the customer but by the salesman.

The facts establish that, contrary to respondent's assertion, the wholesale supplier of State Food Stores did not carry the competitor's product at the time the payments were initiated (tr. 1442, 834). Moreover, respondent's products were this customer's main macaroni line (tr. 1440) and the recipient of the discriminatory payments was one of the biggest customers of the salesman upon whose report respondent relied (tr. 1439). Despite these facts, respondent would have us believe that it would have lost this account if it had not acted on this salesman's report and made a payment of just $10 a week as a promotional allowance for this customer's radio program.

The *Staley* decision imposes upon a supplier claiming the "good faith" defense, the burden of showing that it used due diligence in verifying the competitive necessity for a discriminatory price. Above anything else, the facts of this case clearly establish that respondent should have used some degree of care in determining the validity of its salesman's report. This it failed to do. We must conclude, therefore, that respondent has not shown justification for its discriminatory payments to State Food Stores, and its defense that it acted in good faith to meet a competitor's offer must be rejected.

One further comment is required. Respondent also relies on the testimony of its representatives, Mr. Viviano and Mr. High, concerning alleged competitive inroads made on respondent's customers for several years in this market by competitors, including San Giorgio. Respondent offered no documentary or other evidence in support of its statements. However, assuming the validity of this general testimony, it does not establish that any competitor made an offer of a promotional allowance to State Food Stores which necessitated respondent's payments.

We hold that the hearing examiner erred in sustaining respondent's Section 2(b) defense and, accordingly, we grant complaint counsel's appeal on this charge.

Complaint counsel have also appealed from the examiner's ruling that certain payments made by respondent to a retail grocery chain, By-Rite Markets, Inc., did not violate Section 2(d).

An exhibit introduced by complaint counsel (CX 500) discloses that, for the period April 1, 1963, to July 1, 1963, respondent paid By-Rite Markets a total of $195 for radio advertising. In substance, complaint counsel contend that the testimony of Mr. Viviano establishes that these payments were not made available to respondent's customers competing with By-Rite Markets.

We have reviewed the testimony of Mr. Viviano on this point and we agree with the examiner. Contrary to complaint counsel's contention, it cannot be found from Mr. Viviano's testimony that respondent's payments to By-Rite Markets were other than a part of its regular cooperative merchandising agreement, offered to all customers. Since this is the evidence relied upon by complaint counsel, we find with the examiner that they have failed in their burden of proving that respondent's payments to By-Rite Markets were discriminatory. Accordingly, complaint counsel's appeal on this issue is denied.

One additional issue has been raised by complaint counsel in their appeal under Count II. They contend that the examiner erred in finding that the evidence does not support the charge that the discriminatory prepayment of advertising allowances by respondent violated Section 2(d).

The evidence establishes that respondent granted prepayment of its periodic advertising allowances to six of its largest retail chain and wholesale accounts, including Loblaw. The allowances were given to these customers by the issuance of a credit memorandum at the time the merchandise was invoiced and shipped. Respondent had other customers, competing with the six favored purchasers, who did not receive payment until after they had supplied respondent with proof of performance of the promotional service. This normally involved a delay of about 60 days. The record discloses that the dollar value of the allowances prepaid to three customers in the first eight months of 1963 were: Loblaw—$11,875; Charley Brothers—$2,448; and Thorofare Markets—$4,232.

The examiner states that respondent was "apparently willing" to extend prepayment to any customer who desired prepayment, particularly if the customer claimed that it was a hardship not to obtain the money immediately. The only record support for this statement is the

testimony of Mr. Viviano that respondent advised its sales force that such prepayments would be made to any customer who claimed a hardship. However, even this testimony is considerably weakened by the testimony of one of respondent's salesmen that "We don't pay anybody before they have performed the performance, sir." In any event, this record does not support a finding that prepayment was made "available" to all competing customers within the meaning of Section 2(d), if that is what the examiner intended. Obviously, a customer must know of the existence of a promotional offer before it is available to him. *Vanity Fair Paper Mills, Inc.* v. *Federal Trade Commission*, 311 F. 2d 480 (2d Cir. 1962). Respondent's alleged policy places the burden on a customer to request equal treatment before prepayment would be allowed. Moreover, respondent produced no evidence that any salesman ever carried out its alleged instructions. This failure itself supports an inference that the information was not generally passed on. *Vanity Fair Paper Mills, Inc., supra.* Finally, the testimony of several of respondent's customers that they were never offered prepayment of promotional allowance by respondent establishes that such prepayment was not made available as required by Section 2(d).

In dismissing this charge, the examiner has held that the prepayments were not discriminations of a sufficiently important nature to bottom a finding of violation of Section 2(d). We disagree. The evidence in this case goes beyond the requirements of Section 2(d) and affirmatively establishes the need for an order prohibiting this discriminatory practice.

A representative of a wholesale grocery company, who stated that respondent was one of its two largest macaroni suppliers, testified as follows concerning advance payment of respondent's promotional allowance to his company:

Q. Had it been offered payment at the time of ordering rather than at the time of proof of performance, would that have been of significance to you?

A. Yes, sir.

Q. Why?

A. Because it prevents us spending our money. [Tr. 1213.]

The significance of this testimony is emphasized by the previously discussed testimony of another wholesale customer of respondent concerning cash discounts. This customer first testified that if it were not for cash discounts, his company would not make a profit. In testifying concerning the advantage of a 2 percent cash discount in twenty days rather than ten days, this customer stated that the additional ten days would be significant for the reason that the goods would probably have been sold within that time and that the company would have been

operating on respondent's money. He further testified that his company regularly borrows short term money for from 30 to 60 days to meet discount terms.

The testimony of respondent's representative, Mr. Viviano, discloses the importance of prepayment of the promotional allowance. In answer to the question whether some customers received their payment immediately, he stated that:

> There were some customers who said "Why tie up our money for 60 days?" They said, "You are tying up a considerable amount of cash, so send us a credit memorandum with your invoice. . . ."

As we have found under Count I, profit margins are very low in the grocery business, and available cash is extremely important (tr. 314, 347, 1094, 1118, 1208). One of respondent's customers has stated that his grocery operation is "a penny business," while another testified that "to stay in the competitive race" you have to take full advantage of all cash discounts, special promotions and advertising allowances offered by suppliers.

Viewed in the context of the competitive situation prevailing in the grocery business, we find that the examiner erred in concluding that respondent's discriminatory prepayment of promotional allowances is not of a sufficiently important nature to warrant a finding of a violation of Section 2(d).

We hold that respondent has violated Section 2(d) by prepaying advertising allowances to certain customers and not according such prepayments to competing customers on proportionally equal terms. Therefore, complaint counsel's appeal on this issue is granted.

Count III

The practice placed in issue by complaint counsel under the Section 2(e) count is similar to the SBS broadcasting service discussed under respondent's appeal.

As found by the examiner, respondent made payments to Merchants Broadcasting System (MBS) for providing in-store background music, interspersed with advertisements of respondent's products and those of other participating suppliers, to the retail stores of four supermarket chains and five independent grocers located in Pittsburgh, Pennsylvania. The payments began in September 1962 and continued through September 1963. Respondent paid a total of about $18,500 for the MBS service, of which $17,670 was paid for the benefit of the four chains: Loblaw, Kroger, Thorofare and Giant Eagle. Respondent's contract with MBS provided that a rebate of 20 percent of all revenue

paid by suppliers, after deduction of certain costs, would go to the four chains. These payments were never made since the cost of the program exceeded the amount of the rebate. During the period of the payments for the MBS services to these customers, respondent had other customers competing with the favored customers who were not accorded similar services.

The examiner found, and it is not disputed, that the broadcasts which originated in Pittsburgh, did not go to any stores outside Pittsburgh, and that respondent, located a short distance from Pittsburgh, made payments to MBS in Pittsburgh. On this basis, he held that there was no interstate commerce involved in the arrangements.[17] We do not agree.

Respondent's sales of macaroni products to two of the favored chain store customers were in interstate commerce. Loblaw's warehouse was in Youngstown, Ohio, and respondent's products were shipped to that warehouse for redistribution to Loblaw's retail stores in Ohio and Pennsylvania. Respondent invoiced its products to Loblaw's Youngstown office and was paid by that office. Also, the record shows that respondent's sales to Kroger were made in Ohio and that the goods were shipped to Kroger's warehouse in Solon, Ohio (CX 1356–1371).

We do not think the fact that the payment for a promotional service was made to a third party within the state or that the service itself was rendered intrastate is determinative of the question whether the service was furnished in the course of interstate commerce. Here, the basic sales to two customers were in commerce. The services paid for by respondent were furnished in connection with such interstate sales. In our opinion, this satisfies the commerce requirements of Section 2(e).[18]

Additionally, the benefits resulting from these promotional payments by respondent, an interstate business, accrued to the treasuries of three interstate companies. Such payments thus profited these companies not only in their local Pittsburgh stores but in their entire in-

[17] Section 2(e) does not contain the language "engaged in commerce" or "in the course of such commerce," as found in Section 2(d). However, these limitations have been supplied in Section 2(e) by judicial interpretation. *Elizabeth Arden, Inc.* v. *Federal Trade Commission*, 156 F. 2d 132 (2d Cir. 1946).

[18] Rowe comments that: "Fundamentally, a promotional payment becomes amenable to Sections 2(d) and 2(e) by virtue of its 'connection' with a sales transaction which is governed by the Robinson-Patman Act. Accordingly, the jurisdictional status of a promotional arrangement is derivate from the sale to which it is appended, apart from any special requirements of Sections 2(d) and 2(e)." *Price Discrimination Under the Robinson-Patman Act*, at 393.

terstate operations. The court in the *Shreveport* case, *supra*, has stated that:

> The purpose of the Act was to protect small merchants from discriminatory practices at the hands of manufacturers or suppliers favoring large purchasers. The discrimination here was in the course of interstate commerce. It ran from one engaged in interstate commerce to others engaged in interstate commerce. It favored interstate chain operators in their whole business including their intrastate competition with grocerymen in Louisiana in the sale of Petitioner's products who were not offered allowances on proportionally equal terms.

For the foregoing reasons, we hold that the examiner erred in ruling that there was no interstate commerce involved in the discriminatory services furnished by respondent through MBS.

As a second grounds for dismissing this charge, the examiner found that the MBS service as a practical matter was available to all grocery retailers and wholesalers in the Pittsburgh area. This finding is based principally on the testimony of the MBS representative that the company attempted to notify all retail stores by placing ads in two newspapers of the availability of the service, and by mailings to all grocery stores listed in the Yellow Pages of the Pittsburgh telephone directory. Also, he testified that personal contacts were made with retail grocers in an attempt to sell the services to retailers in the Pittsburgh area.

The contract between respondent and MBS provides that:

> The company (MBS) hereby represents that participation on this program has been offered on proportionately equal terms to all retail grocery, drug, and similar outlets in the area covered by this agreement.

The testimony of the MBS representative, relied upon by the examiner, relates to the methods used by MBS to comply with this provision in the contract.

Under Section 2(e), a supplier has the legal responsibility of according promotional services to all competing purchasers on proportionally equal terms. In our opinion, this record establishes that respondent did not meet that responsibility. In the first place, it is conceded that respondent itself made no attempt to inform its customers of the service provided through MBS. The testimony of its representative establishes that respondent was aware that the four chains and five independent grocers were the only customers receiving the service. Respondent did not furnish MBS with the names of its customers nor did it attempt to learn the methods MBS might employ to comply with the provision in its contract. Respondent made no inquiry among its customers as to whether they had been offered the MBS service.

Moreover, despite a provision in its contract with MBS that MBS would make available the names of the outlets to whom the service had been offered, respondent made no attempt to determine whether these names included its competing customers in the Pittsburgh area.

Representatives of respondent's customers who competed with the favored customers testified that they had never been informed of the availability of the MBS service.[19]

We do not hold that respondent can delegate its responsibility under Section 2(e), as contended by respondent. However, even assuming that such delegation is permissible, we conclude that under the facts of this case, respondent's reliance on the representation in its contract with MBS falls far short of the duty imposed upon it of according equal treatment to all competing customers.

Respondent's attempt to delegate its duty under Section 2(e) must be rejected for yet another reason. The contract provision represents only that the MBS program was offered to all retailers in the area. In our opinion, this type of in-store broadcast is not actually "accorded" to customers within the meaning of Section 2(e) until they are fully advised as to the identity of the participating suppliers. We have no doubt that a customer would be greatly influenced in his decision whether or not to accept the service by the type of products to be advertised and the business reputation of the suppliers. Such notification is not provided for in the MBS contract and the evidence discloses that customers were not so informed. Certainly, a service is not accorded to a customer when substantive information is not made known.

Aside from the failure to name participating suppliers, we find that the three methods of notification allegedly used by MBS, and relied upon by the examiner, were defective.

A copy of the later of the two MBS newspaper ads, which was published a year before respondent's participation in the program, is in the record (CX 573). It sets forth certain charges which must be paid by a retailer for installation of a sound system in his store. However, the evidence discloses that the chains which participated in the program never actually paid these charges. This difference between the advertised offer and the service actually provided would be of vital importance to a prospective customer.

Respondent did not produce a copy of the direct mailing allegedly made to all retailers in the Pittsburgh area. However, the MBS representative testified that this mailing, which was undertaken only one time, was similar to the newspaper ad, using the same guidelines. Thus,

[19] Tr. 1016, 1021 ; 1002, 1010 ; 1066 ; 991, 995 ; 914.

retailers who may have received the mailing were not properly informed as to the terms of the offer.

Finally, the testimony as to personal solicitation is general and vague, leaving open the important question of the method used by MBS to select retailers to be directly solicited. No reliance can be placed on this testimony since it is clear that all retailers in the Pittsburgh area were not personally contacted by MBS, and MBS did not know who respondent's customers were in that area.

On the facts in this record, we find that respondent did not accord the MBS service to all of its customers in the Pittsburgh area on proportionally equal terms as required by Section 2(e). Accordingly, complaint counsel's appeal on this issue is granted.

SCOPE OF THE ORDER

As a final issue, complaint counsel contend that the hearing examiner's order should be amended. Specificially, they would include a definition of net price in the prohibition against further price discriminations, and would add two provisions to the order.

We agree with complaint counsel that a definition of net price is required in the prohibition against future price discriminations. The illegal discriminations upon which this prohibition is based were granted by respondent by means of free goods, freight allowances and extended credit terms. Thus, the discriminations were not the result of an established discount schedule but were granted as the result of direct negotiations between respondent and a large chain store purchaser which was attempting to obtain the lowest possible net price in a form acceptable to this supplier. That respondent was willing to accede to discriminations in the forms granted compels the conclusion that, to be effective, an order against future price discriminations must extend to other means by which a reduction in price may be accomplished. We will include a definition of net price in our order for that purpose.

The first provision that complaint counsel would add to the order would require respondent to notify all competing customers concerning the terms, details, and availability of any special prices, cash discount terms, or advertising allowance programs extended to any customer.

We recognize, of course, that the addition of such a provision to an order must be warranted by the facts of the particular case. In this proceeding, respondent has been found to have engaged in practices which violate Sections 2(a), 2(d) and 2(e) of the Clayton Act. For

the most part, these violations resulted from specially negotiated deals between respondent and the favored customer. The discriminations were in several different forms and, being directly negotiated, would likely be known only to the customer who reaped the benefits. Moreover, these discriminations occurred in the grocery industry where competition is keen and profit margins are extremely low. We think that a vital factor contributing to respondent's willingness to grant these discriminations in their various forms is its confidence that nonfavored customers would be unaware of the benefits conferred on their competitors. Accordingly, it is our opinion that to preserve competition in this industry, respondent should be required to publicize to all customers any future changes in price, cash discount terms or promotional allowances offered to any customer.[20] Such a provision will be included in our order.

The second provision that complaint counsel would add to the order would require respondent to notify the Commission of the terms of any future price schedule which establishes a different price for any individual customer, and submit data in support of the cost justification of such price differences. However, respondent did not make any attempt to defend its price discriminations in this case on the grounds that they were cost justified and, accordingly, we do not believe that the second provision requested by complaint counsel is warranted.

The hearing examiner's order will be modified in accordance with the foregoing discussion.

ADDITIONAL ISSUES

During the course of the oral argument in this case, Commissioner Jones asked respondent's counsel for his transcript references to certain testimony. Also, there was a discussion between Commissioner Elman and complaint counsel concerning a letter signed by respondent's witness, John Dickson, and a memorandum prepared by respondent's counsel of his interview with Mr. Dickson. Subsequently, respondent's counsel directed letters to Commissioner Jones and Commissioner Elman concerning the respective discussions, and forwarded copies of both letters to each of the other Commissioners and to complaint counsel. Attached to Commissioner Jones' letter were excerpts from the official transcript. Respondent's counsel enclosed with his letter to Commissioner Elman a copy of his interview report.

[20] The court, in upholding such a requirement in a Section 2(a) Commission order, has stated that " * * * publicity in the future is tailored to prevent recurrence of past conduct which abetted illegal discrimination." *William H. Rorer, Inc.* v. *Federal Trade Commission*, 374 F. 2d 622 (2d Cir. 1967).

Complaint counsel have filed formal answers to both of respondent's letter submissions. They contend that the transcript excerpt forwarded to Commissioner Jones are not complete and that the copy of the letter signed by Mr. Dickson should have accompanied the copy of the interview report sent to Commissioner Elman. However, complaint counsel went beyond objecting to respondent's submissions and argued the merits of the matters to which they relate. Respondent then filed motions requesting that complaint counsel's objections be stricken from the record or that respondent be permitted to file answers thereto.

Considering the circumstances leading to respondent's submissions, we find that complaint counsel was not justified in attempting to re-argue the merits of matters which had been fully briefed by both parties. Accordingly, respondent's letters and the attachments will be received in the record but complaint counsel's answers and respondent's subsequent motions relating thereto will be excluded.

One final matter remains. In August, 1967, the staff reported to the Commission on a request for an advisory opinion. In its report, the staff made a number of references to this case. By letter of September 12, 1967, the Secretary advised respondent's counsel that because of the possibility that the references to this matter might be considered *ex parte* communications, the Commission had directed that the portions of the staff report which contain such references be made available to respondent's counsel for purposes of this proceeding, and also made a part of the record herein on an *in camera* basis. A copy of the relevant portions of the staff's report was forwarded to respondent's counsel.

Respondent's counsel then fowarded a letter to the Secretary requesting that each member of the Commission who had read the report disqualify himself from further participation in this proceeding. Two Commissioners responded by letters to respondent's counsel, declining to disqualify themselves. Respondent's counsel then requested that its letter to the Secretary be treated as a motion to be acted upon by the Commission.

As grounds for the requested disqualification, respondent's counsel argues that the staff's report contains matters generally to the prejudice of respondent and constitutes an *ex parte* communication. We find no merit in this argument. Respondent has been provided with a copy of the relevant portions of the staff's report and it is now part of the record. Respondent is thus fully advised as to the staff's comments and has been given an opportunity to discuss the report and to make known its position and present any argument that it desires concerning the matters referred to by the staff. Accordingly, we hold that respondent

has not been prejudiced by the staff's report nor has it been denied due process. Its motion requesting disqualification is, therefore, denied.

For the reasons set forth herein, respondent's appeal is denied and the appeal of counsel supporting the complaint is granted in part and denied in part. The initial decision will be modified to conform to the views expressed in this opinion.

Commissioner Elman dissented.

Commissioner Nicholson did not participate for the reason oral argument was heard prior to his appointment to the Commission.

FINAL ORDER

This matter having been heard by the Commission upon cross-appeals from the hearing examiner's initial decision; and

The Commission having determined, for the reasons stated in the accompanying decision, that respondent's appeal should be denied and that the appeal of counsel supporting the complaint should be granted in part and denied in part; and

The Commission having further determined that the initial decision should be modified to conform to the views expressed in the accompanying opinion:

It is ordered, That the initial decision be modified by adding the following paragraph to finding number 15 on page 325:

> Respondent's normal cash discount terms were 2%—10 days. By granting Loblaw cash discount terms of 2%—20 days, respondent discriminated in price between Loblaw and respondent's other customers competing with Loblaw in the sale and distribution of respondent's products. This discrimination enabled Loblaw to sell respondent's products before it had to pay for them, thus giving Loblaw more cash to use for other purposes. Available cash is extremely important in the retail grocery industry. In light of the intensively competitive nature of this industry, the effect of respondent's discrimination may be substantially to lessen competition between Loblaw and its competitors who were not granted cash discount terms of 2%—20 days by respondent.

It is further ordered, That the initial decision be modified by striking the third and fourth sentences in finding number 17 on page 326.

It is further ordered, That the initial decision be modified by striking the last paragraph in finding number 20, beginning on page 327 and ending on page 328, and substituting the following:

> Respondent contends that its payments to State Food Stores were made in good faith to meet the offer of a competitor, San

Giorgio Macaroni Company. Mr. Viviano testified that he was told by his salesman, Mr. High, that respondent would lose the State Food business if it did not participate on the radio program, that the competitor which had made on offer was San Giorgio, and that this competitor had offered $10 a week to participate. He further testified that at that time, San Giorgio was selling its products to the wholesale supplier of State Food.

Mr. High testified that he was told by a State Food official that San Giorgio had offered some free goods and a lot of advertising money. At a subsequent meeting with this official, he was requested to contact his office to see if respondent would participate on the radio program. He did not testify that he was given the information which he allegedly related to Mr. Viviano.

It is further established that respondent's products were State Food's main macaroni line, that State Food was one of the biggest customers of Mr. High on whose report respondent allegedly relied, and that the wholesale supplier of State Food did not carry the San Giorgio macaroni products.

Respondent made absolutely no attempt to verify the report allegedly made by its salesman. On the facts of record, respondent has not shown justification for its discriminatory payments to State Food Stores, and its meeting competition defense must be rejected.

It is further ordered, That the initial decision be modified by adding the following to finding number 22 on page 329:

Respondent's contention that it knew the amount of competitors' offers is not supported on the record. The testimony of the Fox representative, on which respondent relies, establishes at best that the cost of a spot announcement was the same to all participants. However, it is likewise established that participating suppliers took different numbers of spot announcements and that they all could not afford to take the same number of announcements since Fox did not sell a sufficient amount of their products.

The testimony of the Fox representative concerning his discussions with respondent is vague and general. Mr. Viviano testified only that he was told that if he did not go on the program, another company was going on. Additionally, respondent well knew that its payments to Fox for participation on the radio and TV programs were in addition to its regular cooperative promotional payments to Fox. Under the circumstances, the facts replied upon by respondent are not sufficient to warrant a finding that its discrim-

inatory payments to Fox were made in good faith to meet the payments offered by a competitor.

Additionally, although the payments to Fox extended for a three-year period, the agreement was renewed annually. Complaint counsel established that after respondent began participating on the program, no other macaroni supplier attempted to participate or was solicited to participate by Fox. Respondent's failure to show the existence of facts which would reasonably lead it to believe that a continuation of the discriminatory payments was necessary evidences a lack of good faith as required by Section 2(b).

It is further ordered, That the initial decision be modified by striking the last sentence in the first paragraph of finding number 25 and by striking the second paragraph of that finding on page 330, and substituting the following:

Respondent contends that its sales force was advised that prepayments of promotional allowances would be made to any customer who claimed a hardship. This self-serving testimony can be given little weight in view of the contradictory testimony of respondent's salesman. Moreover, this policy, if established, does not meet the requirement of Section 2(d) that promotional payments be made "available" to competing customers since customers would have no knowledge of the existence of the offer unless they informed respondent that it was a hardship for them to wait for payment until after proof of performance.

There is normally a delay of about 60 days before a customer receives payment for a service which he has performed. The testimony of respondent's nonfavored customers, and of respondent's representative, establishes that prepayment of promotional allowances is significant to the customer for the reason that it prevents him from having to spend his money and tie up his cash. As previously found, the availability of cash is extremely important for profitable operation in the retail grocery industry.

We find that respondent by prepaying advertising allowances to certain customers and not according such prepayments on proportionally equal terms to other competing customers, has violated Section 2(d).

It is further ordered, That the initial decision be modified by striking therefrom the last five sentences of finding number 28, beginning on page 331 and ending on page 332, and substituting the following:

Respondent sold its macaroni products to two of the favored customers, Loblaw and Kroger, in interstate commerce. The prod-

ucts were shipped from respondent's plant in Pennsylvania to these customers in Ohio from where payment was made. The MBS services paid for by respondent were furnished in connection with these interstate sales. Additionally, the benefits resulting from these payments accrued to the treasuries of three interstate businesses, Loblaw, Kroger and Thorofare. Accordingly, the MBS services accorded these customers were furnished in the course of interstate commerce.

Respondent contends that the MBS service was accorded to all its customers in the Pittsburgh area and relies on the representation in its contract with MBS that MBS had offered participation on the program to all retail grocery, drug and similar outlets in the area. In further support of this contention, the MBS representative testified that his company attempted to notify all retail stores of the availability of the service by placing ads in local newspapers, by mailings to all such stores listed in the Pittsburgh telephone directory, and by personal contacts.

Representatives of respondent's nonfavored Pittsburgh customers testified that they had never been informed of the MBS service. Respondent was aware that only a few of its customers were receiving the service. Respondent did not attempt to inform its customers of the service, did not advise MBS as to the names of its customers in the area, and made no effort to determine the methods employed by MBS to comply with its contract. Moreover, the methods allegedly used by MBS failed to disclose essential information to retail stores, *i.e.*, the identity of participating suppliers, and these methods were employed by MBS prior to respondent's participation on the program.

Additionally the newspaper ads and mailings used by MBS differed substantially from the service actually rendered in that they represented that there were charges to the retailer for installation of a sound system in his store whereas the chain stores which actually participated did not pay these charges. No reliance can be placed on the testimony concerning personal solicitation since all retailers in the area were not personally contacted and MBS did not know the identity of respondent's customers.

On the basis of the foregoing facts, it is found that respondent did not accord the MBS service to all of its customers in the Pittsburgh area on proportionally equal terms.

It is further ordered, That the initial decision be modified by striking the next to last sentence in finding number 33 on page 334.

It is further ordered, That the initial decision be modified by striking conclusions number 6, 10, and 12 on page 335 and substituting the following:

6. The promotional payments to State Food Stores violate section 2(d) of the Clayton Act, as amended, and respondent has failed to establish that these payments were made in good faith to meet the payments for services or facilities offered by a competitor.

10. The record supports a conclusion that respondent's prepayment of advertising allowances to Loblaw and five other of its customers constitutes violations of Section 2(d) of the Clayton Act, as amended.

12. The services performed by Merchants Broadcasting System for certain of respondent's customers, paid for by respondent, were furnished in the course of interstate commerce. These services violate Section 2(e) of the Clayton Act, as amended, since they were not accorded to all of respondent's competing customers on proportionaly equal terms.

It is further ordered, That the following order to cease and desist be substituted for the order in the initial decision:

ORDER

It is ordered, That respondent Viviano Macaroni Company, a corporation, and its officers, representatives, agents and employees, directly, indirectly, or through any corporate or other device, in or in connection with the sale of its macaroni products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

I

Discriminating directly, or indirectly, in the price of such products of like grade and quality by selling to any purchaser at net prices higher than the net price charged any other purchaser who competes in the resale and distribution of respondent's products with the purchaser, or with customers of the purchaser, paying the higher price. "Net price" as used in this order shall mean the ultimate cost to the purchaser, and, for purposes of determining such cost, there shall be taken into account all rebates, allowances, commissions, discounts, credit arrangements, terms and conditions of sale, and other forms of direct and indirect price reductions, by which such ultimate cost to the purchaser is affected.

II

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 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.

III

Furnishing, contracting to furnish, or contributing to the furnishing of services or facilities in connection with the handling, processing, sale or offering for sale of respondent's products to any purchaser of such products bought for resale, when such services or facilities are not accorded on proportionally equal terms to all other purchasers who resell such products in competition with any purchaser who receives such services or facilities.

It is further ordered, That, in addition to and apart from the provisions of the preceding paragraphs, if respondent at any time after the effective date of this order:

1. Grants or permits any customer to take delivery of, or make payments for, its merchandise on a basis other than regularly published prices, freight prepaid, or

2. Grants or permits any customer to submit proof of performance, or receive payment, for any advertising or other promotional allowance on a basis, or on terms, other than those set forth in respondent's announcements to customers of said promotion, or customarily observed by respondent in such promotions, in any locality, or

3. Grants or permits any customer to make payments for cash discount purposes on terms and conditions other than those contained in respondent's published price lists, or customarily observed by respondent, in any locality,

respondent shall promptly notify all other customers who compete, or whose customers compete, with the customer so granted or permitted, setting forth in writing the details and provisions thereof, and respondent shall allow, and the written notification shall contain a statement that such customers may, at their option, elect such provisions, terms or conditions on an equal basis. In no event, however, shall re-

spondent pay to any customer an allowance for freight, or an allowance for any differing methods of sale or delivery, which exceeds any cost savings to respondent resulting from the differing methods or quantities in which respondent's products are sold or delivered to such customer.

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

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 provisions in the order set forth herein.

Commissioner Elman dissenting, and Commissioner Nicholson not participating for the reason oral argument was heard prior to his appointment to the Commission.

IN THE MATTER OF

CONSOLIDATED MORTGAGE COMPANY ET AL.*

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

Docket 8723. Complaint, Dec. 8, 1966—Decision, Feb. 19, 1968

Order requiring a Providence, R.I., mortgage loan company to cease misrepresenting the terms and conditions under which it makes loans and neglecting to disclose other material facts in connection with its lending operations.

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 Consolidated Mortgage Company, a corporation, and William F. Sullivan, individually and as an officer of said corporation, and Lester S. Cotherman, individually and as General Manager 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

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*Order reopening and dismissing the complaint dated April 19, 1968, p. 711 herein.

thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Consolidated Mortgage Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its principal office and place of business located at 236 Chapman Street, in the city of Providence, State of Rhode Island.

Respondent William F. Sullivan is an individual and an officer of the corporate respondent. Respondent Lester S. Cotherman is an individual and general manager of the corporate respondent. They formulate, direct and control the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising and offering of lending services and the granting of loans to the general public some of which are secured by mortgages on property located in the States of Rhode Island and Massachusetts.

PAR. 3. In the course and conduct of their business, respondents place advertisements in newspapers with interstate circulation and advertise on Providence, Rhode Island, radio and television stations having sufficient power to carry such broadcasts across State lines. The purpose of such advertising is to induce persons residing in the States of Rhode Island and Massachusetts to obtain mortgage loans on real estate located in said States from respondents. As a result of such advertising, persons residing in the State of Massachusetts are induced to come into the State of Rhode Island for the purpose of conducting business with respondents at their place of business. Further, in the course and conduct of their business respondents place in the United States mails and cause to be placed therein for circulation between the States of Rhode Island and Massachusetts, mortgage instruments, correspondence and other documents and materials. Respondents are and have thereby engaged in substantial business intercourse in commerce and maintain and at all times mentioned herein have maintained a substantial course of trade in said lending services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the conduct of their business, and for the purpose of promoting the use and sale of their lending services, respondents have made numerous statements and representations in advertisements inserted in newspapers of general circulation and over the radio and television.

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

Homeowners borrow $2,000 for any worthwhile purpose; repay $16.88 per month first, second, and third mortgages

Borrow	*Repay Per Month*
$1,000	$8.44
1,500	12.66
2,000	16.88
3,000	25.32
5,000	42.20
10,000	84.39

First mortgage repayment schedule

If you're a home owner (or are in the process of buying a home) you can consolidate all your bills and make one low monthly payment. Call 421-0116.

Consolidated Mortgage Co.,
605 Hospital Trust Bldg., Providence.

A $3,000 loan from Consolidated will pay off all the bills, leave you with $450 in cash, and your monthly payment could be a low $25.32.

PAR. 5. Through the use of the aforesaid statements and representations, and others of similar import and meaning but not specifically set out herein, respondents have represented, directly or by implication that:

a. Respondents will arrange loans on repayment schedules as shown in their advertised repayment schedules.

b. Respondents will arrange loans at a six percent rate of interest.

c. Respondents will arrange loans repayable over a period of fifteen years.

PAR. 6. In truth and in fact:

a. Respondents do not arrange loans on repayment schedules as shown in their advertised repayment schedules. Respondents' repayment schedules require a substantially higher monthly payment.

b. Respondents do not arrange loans at a six percent rate of interest. Respondents' usual rate of interest is either nine or twelve percent.

c. Respondents do not arrange loans repayable over a period of fifteen years. Respondents' loans usually must be repaid over a five year period.

Therefore, the statements and representations as set forth in Paragraphs 4 and 5 hereof were and are false, misleading and deceptive.

PAR. 7. Respondents' advertisements and other statements and representations offering their lending services to the public of which

the above quoted advertisement is typical and illustrative, frequently state only one or more, but seldom if ever, all of the elements comprising the terms and conditions on which loans are made, such as the period of repayment, the number of payments required, finance charges, including interest, fees, service charges and discounts, and any other charges or expenses to be paid by the borrower to obtain such loans. By and through such omissions, respondents fail to reveal to the consuming public material facts with respect thereto. Such failure to reveal and disclose material facts has the tendency and capacity to induce substantial numbers of the members of the consuming public to believe that loans are made on terms and conditions different from those actually imposed by respondents so as thereby to be unfairly misled and deceived as to the extent of the financial obligation to be incurred by them.

PAR. 8. In the conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the offering of lending services of the same general kind and nature as that offered by respondents.

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

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

Mr. James A. Ryan supporting the complaint.

McKean & Whitehead, by *Mr. Thomas J. Whitehead* of Washington, D.C., for respondents.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

MAY 31, 1967

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondents on December 8, 1966, charging them with

engaging in unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act, by the use of false, misleading and deceptive statements, representations and practices in connection with the advertising and offering of their lending services and the granting of loans to the general public. After being served with said complaint, respondents appeared by counsel and filed their answer denying, in substance, having engaged in the illegal practices charged.

Pursuant to notice duly given, prehearing conferences were convened on February 9 and February 27, 1967, in Washington, D.C., before the undersigned hearing examiner, theretofore duly designated to act as hearing examiner in this proceeding. By agreement of counsel, the transcripts of said conferences were made a part of the record in this proceeding. Pursuant to prehearing orders of the undersigned, counsel exchanged lists of witnesses (including a brief description of the nature of the testimony of such witnesses) and copies of proposed documentary evidence. A number of the documents proposed to be offered by complaint counsel were marked for identification and received in evidence at the prehearing conference held February 27, 1967. A motion by respondents for the production, by complaint counsel, of certain correspondence and written statements of proposed witnesses and other persons was denied by order of the undersigned dated February 27, 1967.

Hearings on the charges set forth in the complaint were held in Providence, Rhode Island, from March 28 to March 30, 1967. At said hearings, testimony and other evidence were received in support of and in opposition to said charges, such evidence being duly recorded and filed in the office of the Commission. All parties were represented by counsel, participated in the hearings and were afforded full opportunity to be heard and to examine and cross-examine witnesses. At the close of all the evidence, and pursuant to leave granted by the undersigned, proposed findings of fact, conclusions of law and an order were filed by the parties on May 10, 1967. Included in respondents' proposed findings is a motion to reconvene the hearings for the purpose of affording them an opportunity to examine certain interview reports of a Commission investigator, and to further cross-examine certain witnesses. Said motion is hereby denied as without merit.[1]

[1] Access to the interview reports (sought to be examined under the so-called *Jencks* Rule) was denied by the examiner at the hearings on the ground that such reports were not a substantially verbatim recital of any statement made by any of the witnesses interviewed. No further reason has been given by respondents why access should now be permitted. One of the witnesses sought to be recalled is alleged to be an expert witness. Respondents received timely notification of the calling of such witness under the examiner's prehearing orders, and they demonstrated no inability to cross-examine such witness. No

After having carefully reviewed the evidence in this proceeding and the proposed findings and conclusions submitted by the parties,[2] and based on the entire record, including his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT [3]

I. The Respondents

A. *Identity and Business*

1. At all times material herein, respondent Consolidated Mortgage Company was a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its principal office and place of business located at 236 Chapman Street, in the city of Providence, State of Rhode Island (PHO No. 1, par. A 1).

2. At all times material herein, the corporate respondent was engaged in the advertising and offering of lending services and the granting of loans to the general public, some of which loans were secured by mortgages on property located in the States of Rhode Island and Massachusetts (PHO No. 1, par. A 2).

3. The corporate respondent was organized and entered business in or about October 1963, and continued in business until on or about September 1, 1966. Said corporation was formed and operated with funds supplied by respondent Lester S. Cotherman who, prior to coming to Providence, was in the business of buying and rediscounting commercial paper in several other cities. The corporate respondent issued a note of $30,000 to respondent Cotherman as evidence of the funds advanced to it by him. Respondent Cotherman hired respondent William F. Sullivan who, prior thereto, was employed in Providence by another company engaged in a similar line of business. Respondent Sullivan served as a director and as president and office manager of the corporate respondent from its inception until the latter part of 1965, when respondent Cotherman became president and respondent Sullivan as-

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indication is given in their motion as to any subject matter concerning which further examination is necessary, nor as to why respondents were unable to cross-examine the witness at the hearings concerning such subject.

[2] Proposed findings not herein adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters. References to proposed findings are made with the following abbreviations: "CPF" (for complaint counsel's proposed findings); and "RPF" (for respondents' proposed findings).

[3] References are hereinafter made to certain portions of the record in support of particular findings. Such references are to the principal portions of the record relied upon by the examiner, but are not intended as an exhaustive compendium of the portions of the record reviewed and relied upon by him. The following abbreviations are used in referring to the record: "Tr." (for the transcript of testimony), "CX" (for complaint counsel's exhibits), "RX" (for respondents' exhibits), and "PHO" (for the examiner's prehearing orders).

sumed the office of vice president. Respondent Sullivan owned 499 out of the 500 shares of stock issued by the corporate respondent. However, such shares were pledged to respondent Cotherman as security for a loan of $5,000 made by the latter to finance the purchase of the stock by respondent Sullivan. Respondent Cotherman was chairman of the board and served as general manager of the corporation. As mentioned above, he was also elected president in the later part of 1965. As general manager of the corporation, he formulated its advertising program and approved loans submitted to him by respondent Sullivan. Respondent Sullivan did not share in the profits of the corporate respondent, but was paid a weekly salary, which was initially $150 and was later raised to $300. Respondent Cotherman also received a salary, but the amount thereof was based on the corporation's profits. His salary was initially $25,000 a year and was later increased to $35,000 (PHO No. 1, par. A 1: Tr. 98, 104–105, 116–128, 130–133, 320, 350, 358–359, 374–375; RX 58, 60, 61).

B. *Commerce*

4. In the course and conduct of its business, the corporate respondent regularly placed advertisements in newspapers circulating in the States of Rhode Island and Massachusetts, and advertised on Providence radio and television stations whose broadcasts were heard in the States of Rhode Island and Massachusetts. The purpose of such advertising was to induce persons residing in the States of Rhode Island and Massachusetts to obtain loans from said respondent, most of which loans were secured by mortgages on real estate located in said States. As a result of such advertising, many persons residing in the State of Massachusetts were induced to come into the State of Rhode Island for the purpose of conducting business with the corporate respondent at its place of business. Between one-third and one-half of the loans made by said respondent were made to persons residing in the State of Massachusetts (PHO No. 1, par. A 3: Tr. 100–104, 128–129, 360). Further, in the course and conduct of its business, the corporate respondent placed in the mails and caused to be placed therein, for circulation between the States of Rhode Island and Massachusetts, mortgage instruments, correspondence and other documents and material (Tr. 113–115).

C. *Competition*

5. It is admitted by respondents and is, accordingly, found that in the conduct of its business and at all times mentioned herein, the corporate respondent was in substantial competition, in commerce, with

other corporations, firms and individuals in the offering of lending services of the same general kind and nature as that offered by said respondent (PHO No. 1, par. A 8).

II. The Alleged Illegal Practices

A. *The Challenged Advertising*

6. The charges in the complaint are based on (a) the making of certain allegedly false, misleading and deceptive statements in newspapers, and in radio and television advertising, concerning the terms and conditions on which the corporate respondent will make loans to prospective borrowers; and (b) the failure to reveal in such advertising certain material facts. There is no dispute as to the fact that the corporate respondent did advertise its lending services in newspapers and on radio and television in the manner alleged in the complaint. However, respondents contend that such advertising was not "typical," as alleged, since it used other types of advertisements (RPF at 12). While it may be that other types of advertisements were used, those referred to in the complaint were used with sufficient frequency and regularity that they may be regarded as typical of the advertising used by the corporate respondent.[4]

7. Typical of the advertising by the corporate respondent in newspapers is the following (CX 1, 2, 4–10 A):

Homeowners borrow $2,000 for any worthwhile purpose: repay $16.88 per month first, second, and third mortgages

Borrow	*Repay (Per Month)*
$1,000	$8.44
1,500	12.66
2,000	16.88
3,000	25.32
5,000	42.20
10,000	84.39

First mortgage repayment schedule

If you're a home owner (or are in the process of buying a home) you can consolidate all your bills and make one low monthly payment. Call 421-0116.

Consolidated Mortgage Co.,
605 Hospital Trust Bldg., Providence.

[4] The record discloses that the advertisements challenged by the complaint (CX 1–10A) were extensively used from at least June to November 1964 (Tr. 68). There is no indication that respondents ever discontinued this type of advertisement. The other advertisements which respondents claim were used (RX 50–53) involve only the period of May 1964 (Tr. 342).

8. Typical of the advertising used by the corporate respondent in television broadcasts is a program in which the video portion disclosed a blackboard with a "Typical Family Problem" chart thereon, showing obligations for various items totaling $2,550 and monthly payments owing of $183. The announcer, referring to the blackboard chart, makes the following statement (CX 3 A):

> Homeowners, it doesn't take too much imagination to see that this family is in a financial jam. . . .
>
> As you can see, all these bills add up to $2,550.00 and means that this family has to make a regular monthly payment of $183.00. $183.00 is a lot of money—sometimes it is too much, sometimes far more than a family can make.
>
> What can be done to lower this high figure?
>
> Come to Consolidated Mortgage Company first:
>
> Now watch this:
>
> A $3,000.00 loan from Consolidated will pay off all the bills, leave you with $450.00 in cash—and your monthly payment could be a low $25.32.

B. *The Representations*

9. The complaint alleges that through the use of statements in advertising such as those set forth above, respondents have represented, directly or by implication, that they will (a) arrange loans on repayment schedules as shown in the advertised repayment schedules, (b) arrange loans at a six percent rate of interest, and (c) arrange loans repayable over a period of 15 years. Respondents concede that the above-quoted statements do constitute a representation by the corporate respondent that it will arrange loans on the repayment schedules advertised, but only "to borrowers who qualify for such loans." Complaint counsel have accepted the qualification proposed by respondents, and the complaint is deemed amended accordingly. Respondents deny, however, that the advertisements can be interpreted as representing that the loans will be made at a six-percent rate of interest or will be repayable over a term of 15 years. While the above-quoted advertisements do not expressly state that the loans will be repayable over a period of 15 years at a six-percent rate of interest, complaint counsel contend that the advertised repayment schedule is based on the FHA amortization schedule for loans repayable over 15 years at six percent interest, and would be so interpreted by members of the public (PHO No. 1, par. A 5).

10. There is no dispute as to the fact that the above-quoted repayment schedules are based on the FHA-approved schedule of loans repayable over a 15-year term at interest of six percent (CX 10 A–B, 25; Tr. 328, 139–144). The only issue raised in this respect is whether members of the public who read the advertisements were aware of this

association (RPF at 10–11). Most of the borrower-witnesses called in support of the complaint emphasized that it was the low amount of the advertised monthly payments which caught their attention, but gave no indication in their testimony that they had received any impression from the advertisements concerning the actual time-period for repayment of the loan or the rate of interest they would be charged (Tr. 154, 163–164, 183–184, 204, 209, 243, 301). However, several of the borrowers did indicate that they were familiar with the fact that FHA-approved loans were repayable over a long term at a low rate of interest, and testified that they assumed from the low amount of the monthly payments advertised that the loan would be "like an FHA approved loan," repayable over a period of 15 years or a similar long term, and would carry interest of six percent or a similar low rate (Tr. 255–257, 264, 271, 289–290). Respondents suggest that the testimony of the latter witnesses should not be accepted because they were confused or mistaken concerning the duration of, or method of computing interest under, FHA-approved mortgage loans (RPF at 19–21). However, respondents' argument overlooks the fact that such witnesses were not offered as experts on the technicalities of FHA loans, but as indicative of the confusion which the challenged advertising can give rise to in the minds of members of the public.

11. While the advertisements in question did not expressly refer to the duration of the loan or the rate of interest, the corporate respondent's use of a repayment schedule similar to that provided for under an FHA-approved 15-year-term-6%-interest loan was obviously calculated to create an association in the minds of prospective borrowers between the advertised terms and those of FHA loans. The testimony of several of the witnesses indicates that respondent was successful in this respect.[5] While most of the witnesses indicated no familiarity with the terms of FHA loans, they were impressed with the low monthly repayment schedule advertised, which schedule was admittedly based on the FHA schedule for a 15-year loan bearing interest at six percent. Since loans in the advertised amounts could be amortized at the indicated monthly repayment rates only if they were repayable over a 15-year term with interest at six percent, it was implicit in the ad-

[5] In establishing the deceptive character of an advertisement it is not necessary to prove that any particular number of persons were misled thereby. Since the Federal Trade Commission Act was intended to "protect the public—that vast multitude which includes the ignorant, the unthinking and the credulous" (*Positive Products Co.* v. *FTC,* 132 F. 2d 165, 167, 7 Cir., 1942), it is sufficient to establish that there would be some members of the public who would be misled by an advertisement (*Prima Products, Inc.* v. *FTC,* 209 F. 2d 405, 409, 2d Cir., 1954).

vertised repayment schedule that the loans made would be repayable over a 15-year term at interest of six percent.

12. It is, accordingly, concluded and found that through the use of the statements and representations in the above-quoted advertisements and others of similar import and meaning, the corporate respondent has represented, directly or by implication, that it will arrange loans to qualified borrowers, (a) on repayment schedules as shown in its advertised repayment schedules, (b) at a six percent rate of interest, and (c) repayable over a 15-year term or a similar extended period of time.

C. *Alleged Falsity of Representations*

13. The evidence introduced by complaint counsel involved 14 loan transactions by the corporate respondent with 13 borrowers. In each instance, the amount of the monthly payments provided for in the loan documents was two to three times that called for in the advertised repayment schedules; the loans were for a term of five years (except for three which were for terms of four, six and seven years, respectively); and the rate of interest provided for ranged from eight percent compound interest (*i.e.*, interest computed annually on the entire amount borrowed) to 18 percent simple interest (*i.e.*, interest computed at the monthly rate of 1½ percent on the unpaid balance). In no case did the repayment schedule conform to that in the advertisements, nor was the term of repayment 15 years, nor was the rate of interest six percent simple interest (CX 14–23; Tr. 157, 162, 244, 306).

14. Eight of the borrowers were called to testify by counsel supporting the complaint. In each instance the witness had applied for a loan after seeing or hearing one of respondent's advertisements in a newspaper or on radio or television. In each instance the loan, as granted, required substantially larger monthly payments than the witness had anticipated having to pay on the basis of the advertised repayment schedules. Illustrative of such transactions are the following: One witness who had expected to pay $16.88 a month for a $2,000 loan, pursuant to the advertised schedule, was required to pay $53.59 a month; another, who expected to pay somewhere between $8.44 and $16.88 a month for a $1,600 loan, was required to pay $41.90 a month; another, who expected to pay $20 to $25 a month for a $2,500 loan, was required to pay $63 a month; and another, who expected to pay about $25 a month for a $3,000 loan, was required to pay $44 a month for a loan repayable over seven years, but was advised this was a mistake since the term should have been five years, and the payments were increased to $72.82 a month (Tr. 153, 157, 165, 171, 207, 213–214, 243–244, 255, 259, 282, 289, 301, 306).

15. Despite such testimony and evidence, respondents contend that complaint counsel has not sustained the burden of proof, since the reason none of the above-mentioned borrowers was granted a loan in accordance with the advertised schedules was because he or she was not qualified for such a loan due to a preexisting mortgage on his or her property or an otherwise unsatisfactory debt situation (RPF at 15–22). In the opinion of the examiner, respondents' explanation (based on the testimony of respondent Cotherman) as to why the various borrower-witnesses were not granted loans in accordance with the advertised schedule represents an exercise in *ex post facto* rationalization. It presupposes that the corporate respondent did ordinarily make loans on such terms to qualified borrowers, and merely turned down the individuals in question because they failed to qualify. However, as will be hereafter more fully indicated, the corporate respondent did not make such loans to anyone, irrespective of qualification, and it used the advertised schedules merely as a bait mechanism to induce applications from prospective borrowers, without any intention of making loans in accordance with such schedules.

16. As previously found, the advertised repayment schedule was based on the schedule of monthly payments provided for under the FHA-approved amortization schedule for a 15-year loan at simple interest of six percent. Respondents regarded such terms as appropriate for use only in the case of relatively long-term first mortgage loans. However, the corporate respondent did not ordinarily make such loans because it considered them not to be sufficiently profitable. Its business was primarily that of secondary mortgage financing, and its loans were generally made for a five-year term (with a small proportion being made for a term of seven years), and at rates of interest substantially in excess of six percent. Where an applicant for a loan was considered eligible for a first-mortgage loan, the corporate respondent did not ordinarily make the loan, but would refer the individual to a financial institution making such loans, in return for which it received a forwarding fee (Tr. 99, 328–330, 355–357, 360–361).

17. During the time it was in business, from October 1963 to September 1966, the corporate respondent made approximately 1,200 loans (Tr. 129). Except for a few loans made in February 1965, after it had come under investigation by the Commission, respondent made no loans which provided for monthly payments in accordance with the advertised repayment schedule, or for a 15-year term, or for simple

interest of six percent.[6] The handful of loans made at the advertised rates were admittedly made for the purpose of providing respondents with a possible defense in the event of the bringing of a proceeding against them by the Commission.[7] In the light of these undisputed facts, respondents now concede that "they rarely made loans at the [advertised] repayment schedules." However, in apparent justification of their advertising, they cite the fact that they "often arranged for loans to be made at the [advertised] repayment schedules" (RPF at 14). In the opinion of the examiner, the fact that the corporate respondent may have referred some customers to other institutions for first-mortgage loans is irrelevant to any issue in this proceeding. The statements made in its advertisements constituted representations as to the terms on which it, and not some other institution, was offering to make loans. It cannot be seriously argued that the corporate respondent was spending its good money for advertising, in order to obtain business for other lending institutions in return for the incidental payment of some referral fees. It seems evident, therefore, that the truth or falsity of the representations made in its advertising must be determined in the light of the corporate respondent's own performance.

18. The record is clear that although not in the business of making first-mortgage loans, the corporate respondent made extensive use of the repayment amortization schedule of such loans in its advertising. While some of the advertisements contained the apparently cautionary statement, "1st Mortgage Repayment Schedule," beneath the schedule of monthly payments,[8] such statement appeared in much smaller print than the balance of the advertisement. Moreover, the repayment schedule itself was preceded by the heading "1st, 2nd & 3rd Mortgages." The significance of the cautionary note would be lost on all but the most discerning readers as, indeed, the evidence in the record demonstrates it was. Although the corporate respondent did not make first-mortgage loans and was aware that 90% of the people who applied to it for loans were not eligible for first-mortgage loans (Tr. 360), it nevertheless sought to pitch its appeal to the public on the basis of

[6] Respondent Cotherman at first testified that respondent had made six to ten loans at the advertised rates during 1963 and 1964. However, he later conceded that these were not made in 1963 and 1964, and that respondent itself had made only six loans, the other four being made by other institutions to which the borrower had been referred (Tr. 379–381). The documentary evidence reflecting the loans made by respondent at the advertised rates involved only four transactions, all in February 1965 (RX 54–57).

[7] When respondent Cotherman was asked why such loans had been made, in view of the company's policy of not making first-mortgage loans and of referring qualified applicants to other institutions, he gave the following response (Tr. 390):

"I think you will find that those were made shortly after the investigation and I wanted to be able to show that I actually had purchased and held some of these loans."

[8] No such cautionary statement appeared in respondent's television advertisements.

the low monthly repayment schedule of first-mortgage loans. It is clear from the testimony of its own officials that it used such schedule merely as bait to procure applications from borrowers to whom it could make loans on the more profitable terms of secondary mortgages.[9] While it may have referred a small portion of applicants to other lending institutions for first-mortgage loans, after culling out the cream of the more profitable secondary mortgage loans for itself, this was merely incidental to its basic purpose in advertising, which was to secure business for itself.

19. It is accordingly concluded and found that the statements and representations set forth in paragraphs 7, 8, and 12 hereof were false, misleading and deceptive since, in truth and in fact, the corporate respondent did not, irrespective of the qualifications of prospective borrowers:

a. Arrange loans on repayment schedules as shown in their advertised repayment schedules, but used repayment schedules requiring substantially higher monthly payments.

b. Arrange loans at a six-percent rate of interest, but charged rates of interest which were substantially higher.

c. Arrange loans repayable over a term of 15 years, but usually required repayment over a five-year term, with seven years being the maximum term granted.

D. *Alleged Failure to Disclose Material Terms*

20. The complaint alleges that respondents' advertisements failed to disclose a number of the material terms and conditions on which their loans were made, such as the period of repayment, the number of payments required, and various finance charges, including service charges, fees and other expenses which the borrower was required to pay. It is further alleged that the failure to disclose such material facts has a tendency and capacity to induce members of the public to believe that loans are made on terms and conditions different from those actually imposed, thereby misleading and deceiving them as to the extent of the financial obligation which will be incurred by them.

21. As has been found above, a number of the advertisements used by the corporate respondent referred only to the monthly payments which would be required for the repayment of a loan in a given amount. There was no reference to the duration of the loan, the amount of

[9] According to the testimony of a Commission attorney-investigator who interviewed respondent Sullivan, the latter stated that the advertised repayment schedule was "just a lure to get the customer on the phone or into the office" (Tr. 330). Respondent Sullivan denied using the word "lure," and testified that he had told the investigator respondent used such advertising "in order to attract or draw business" (Tr. 352). In the opinion of the examiner, it is unnecessary to resolve this semantic dispute since, whichever expression was used, it is clear that respondent used the advertisement as a form of bait to obtain loan business.

interest to be paid, or to any charges or fees which would be imposed. While, as previously found, some prospective borrowers assumed from the advertisements that they would be receiving a long-term loan at six percent interest, most had no idea until the time of closing as to the duration of the loan or the rate of interest to be charged. Nor were any of the borrowers aware, prior to the time of closing, that they would have to pay various closing expenses, such as legal fees and searching of title. Such expenses ran from a minimum of $110 to as much as $450 (CX 14–D, 15–C, 16–C, 17–D, 18–C, 19–E, 20–C, 21–C, 22–C: Tr. 112–113, 157, 162, 166–167, 183–185, 193, 258–260, 288–289, 298–299, 383).

22. Respondents contend that there is nothing about the advertisements which would lead prospective borrowers to believe that loans would be made on terms and conditions different from those actually imposed. They further contend that the record is lacking in evidence as to what terms and conditions prospective borrowers believed they would be getting after reading the advertisements, or to otherwise indicate they were misled. To the contrary, respondents contend that the record indicates many of the borrowers were "chronic debtors" who showed themselves to be "sophisticated in the area of which the complaint speaks." Respondents also note that the terms and conditions of the loans were fully explained to borrowers at the time of closing (RPF at 23–28).

23. Even without consumer-type testimony, it is clear from the advertisements themselves that the impression sought to be created is one which is contrary to the realities of the corporate respondent's loan program. They seek to minimize the loan amounts and monthly payment amounts, and to maximize the amount of the borrower's take-home. Thus, in addition to the low monthly schedules set forth, the newspaper advertisements advise the borrower that "you can consolidate all your bills and make one low monthly payment" (CX 1, 5–7). The television advertisements advise the borrower that he can reduce his monthly payments on existing obligations of $2,550 from $183.00 to "a low $25.83" by borrowing $3,000 and at the same time "leave you with $450.00 in cash" (CX 3 A–B). There is no suggestion in these advertisements that, through compression of the term of the loan from the 15-year period contemplated by the advertised schedule to five years, through the payment of interest rates of as much as 18 percent instead of the six-percent on which the schedule was based, and through the addition of attorneys' and other closing fees of as much as $450, the amount of the borrower's monthly payments may triple, the amount

of his loan may have to be increased to take care of such additional costs and his take-home from the loan may be eliminated or considerably minimized.[10] Contrary to respondents' contention, there is ample borrower-testimony in the record to establish that the terms and conditions on which the loans were granted were not what the borrowers had been led to expect from reading or viewing the advertisements.[11]

24. The fact that the borrowers were advised as to the terms and conditions of the loan at the time of closing is immaterial since it does not cure the initial deception.[12] Moreover, the record discloses that the terms and conditions were not fully explained at the time of closing or were not fully understood in some instances.[13] While some of the borrowers may have been "chronic debtors," as respondents contend, they can hardly be called "sophisticated in the area of which the complaint speaks." Most of the borrower witnesses were on a relatively low level of the economic and social ladder in terms of income, employment and educational attainments, and impressed the examiner as anything but knowledgeable or sophisticated. The kind of advertising used by the corporate respondent was particularly calculated to mislead persons of this type, who were eager to grasp at any straw in an effort to extricate themselves from the burden of debt in which they were engulfed.

25. It is, accordingly, concluded and found that the corporate respondent has failed to reveal to the members of the consuming public,

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[10] It may be noted that the television schedule of payments contains no reference to any closing fees in its illustration of how the borrower may have a take-home of $450 from a $3,000 loan.

[11] One borrower testified: "I read the ad in the paper and I figured that you get a low payment each month and that was it. I didn't think I was going to pay so much interest and fees and I can't explain it" (Tr. 183). The witness had contemplated borrowing about $2,500 to consolidate debts of around $2,000. As a result of closing fees of $450.00 and additional interest, the amount of the loan was increased to $3,809.60 (CX 21). Another witness, who wanted to borrow $1,000 at the advertised rate of $8.44 a month, was told "the laws were different in Massachusetts and I couldn't get that particular loan." In order to cover the additional interest and the closing charges, he had to borrow $1,600 instead of $1,000 (Tr. 247, 253–254). Another witness, who expected to make a loan which would net him $5,000 from which to pay certain obligations, received a net amount of $3,700 and had to sign a note for $5,637.60 as a result of the additional interest and closing fees (CX 20; Tr. 258–260).

[12] "The law is violated if the first contact or interview is secured by deception (*FTC* v. *Standard Education Society, et al.*, 302 U.S. 112, 115), even though the true facts are made known to the buyer before he enters into the contract of purchase (*Progress Tailoring Co.* v. *FTC*, 7 Cir., 153 F. 2d 103, 104, 105)." *Carter Products, Inc.* v. *FTC*, 186 F. 2d 821, 824, 7 Cir., 1951.

[13] Some of the witnesses indicated that there was a brief or hurried explanation at the time of closing, which they did not understand, and some indicated that they didn't realize what they would have to pay until they received the coupon-payment booklet in the mail following the closing (Tr. 156, 162–167, 184–185, 239–240, 258).

in its advertising, material facts with respect to the terms and conditions on which loans are made. Such failure to reveal and disclose material facts has the tendency and capacity to induce substantial numbers of members of the consuming public to believe that loans are made on terms and conditions different from those actually imposed by the respondent, so as thereby to be unfairly misled and deceived as to the extent of the financial obligation to be incurred by them.

E. *Effect of Practices*

26. It is concluded and found from the record as a whole that the use by the corporate respondent of the aforesaid false, misleading and deceptive statements, representations and practices had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were true, and into the purchase of substantial quantities of said respondent's services by reason of said erroneous and mistaken belief.

F. *Responsibility of Individual Respondents*

27. The complaint alleges that the individual respondents, Sullivan and Cotherman, formulated, directed and controlled the acts and practices of the corporate respondent, and complaint counsel contends that the individual respondents are therefore responsible for such acts and practices (CPF at 2). Respondents concede that respondent Cotherman formulated, directed and controlled the policies of the corporate respondent, but contend that there is no basis in the record for holding respondent Sullivan accountable therefor (RPF at 4; PHO No. 1, par. A 1).

28. As has been previously found, the corporate respondent was organized and financed by respondent Cotherman. While respondent Sullivan was its nominal president and principal stockholder, he was merely a front for respondent Cotherman, who loaned him the money to purchase the stock and held such stock as security for repayment of the loan. According to Cotherman's uncontradicted and credited testimony, he formulated the corporate respondent's advertising program and approved loans made by it (Tr. 128, 359, 364). Under such circumstances, it is the opinion of the examiner that there is no basis for holding respondent Sullivan individually responsible for the acts and practices of the corporate respondent herein challenged. It is concluded and found, however, that since respondent Cotherman formulated, directed and controlled such acts and practices, he should be considered to have participated therein and be held individually accountable therefor.

CONCLUSIONS OF LAW

1. The respondents Consolidated Mortgage Company and Lester S. Cotherman were, at all times material herein, engaged in substantial business intercourse in commerce and maintained a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

2. Said respondents were, at all times material herein, in substantial competition with other corporations, firms and individuals in commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. The acts and practices of respondents Consolidated Mortgage Company and Lester S. Cotherman, as hereinabove found, were all to the prejudice and injury of the public and of said respondents' competitors, and constituted 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.

4. The Commission has jurisdiction over the subject matter of this proceeding [14] and of the respondents, and this proceeding is in the public interest.

ORDER

It is ordered, That respondents Consolidated Mortgage Company, a corporation, and its officers, and Lester S. Cotherman, individually and as general manager of said corporation, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering of or the sale or granting of lending services, or of any similar or related services, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(a) Representing, directly or by implication, that loans are made to customers at a six-percent rate of interest;

(b) Representing, directly or by implication, that loans made or arranged by respondents are repayable over a fifteen-year period;

[14] Respondents contend that the Commission has no jurisdiction over lending services under Section 5 of the Federal Trade Commission Act, citing the testimony of Chairman Dixon at congressional hearings on the Truth in Lending Act, to the effect that if Congress should substitute the Commission for the Federal Reserve Board as the enforcing agency for the bill, it should be given jurisdiction under the "money" clause of the Constitution (RPF at 5–S, 28). Respondents have obviously misread the Chairman's testimony. There is no suggestion therein that the Commission does not now have jurisdiction over such practices under the "commerce" clause, but merely a request to broaden such jurisdiction so that it would be coextensive with that which the Board would have under the "money" clause, thereby covering acts and practices which do not occur in commerce.

(c) Representing, directly or by implication, that loans are made at any stated repayment schedule, interest rates, period of repayment or under other stated terms or conditions; *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that loans are readily and in the regular course of business made available to customers under the stated repayment schedule, interest rates, period of repayment or other terms or conditions as stated;

(d) Misrepresenting in any manner the monthly repayment schedules, interest rates, periods of repayment or other terms or conditions under which respondents' loans are made.

It is further ordered, That respondents Consolidated Mortgage Company, a corporation, and its officers, and Lester S. Cotherman, individually and as general manager of said corporation, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering of or the sale or granting of lending services, or of any similar or related services, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist, in those cases where representations are made as to the terms and conditions of respondents' loans, from failing, clearly and conspicuously, to reveal in advertising:

(a) The period of repayment;

(b) The number of payments required;

(c) The finance charges expressed in terms of dollars and cents;

(d) The simple annual percentage rate or rates at which the finance charge has been imposed on the monthly balance;

(e) Any other charges or expenses which are to be incurred or paid by the borrower to obtain such loans.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to respondent William F. Sullivan in his individual capacity.

Opinion of the Commission

By MacIntyre, *Commissioner:*

This matter is before the Commission upon the cross-appeals of counsel supporting the complaint and the respondents from the hearing examiner's initial decision filed May 31, 1967, holding that respondents, except for William F. Sullivan, had violated Section 5 of the Federal Trade Commission Act as charged. The complaint alleges that such Act was violated by the use of false, misleading and deceptive statements, representations and practices in connection with the advertising and offering of respondents' lending services and the granting of loans to the general public. The hearing examiner entered an order against the

respondents, except William F. Sullivan, to cease and desist the practices he found unlawful. The issues raised on the respective appeals will be considered below.

There is no question about the deceptive nature of respondents' advertising and the unfairness of their practices. It is unnecessary to relate the details here, since the examiner has fully covered them in his initial decision. The gist of the challenged representations was that respondents would arrange low-interest loans payable over a long period of time. Such representations were false and wrongful in that they induced or tended to induce the general public to apply to respondents for loans, which they might not have done had they known the truth. The examiner found that the borrower witnesses who testified were on a relatively low level of the economic and social ladder in terms of income, employment and educational attainments. The representations were particularly calculated to mislead persons of this type, who, as the examiner further found, were eager to grasp at any straw in an effort to extricate themselves from the burden of debt in which they were engulfed.

Respondents have made no appeal from the examiner's findings and conclusions as to the falsity and misleading character of their advertisements and the deception of the public. Rather, they argue that the complaint should be dismissed on the grounds it is no longer in the public interest to issue an order to cease and desist. First they seek dismissal of the complaint against the corporate respondent because of the claim that it no longer exists. The assertion is that two months before the issuance of the complaint Consolidated Mortgage Company ceased doing business, closed its office, and that dissolution proceedings were instituted.

The Commission has determined on this that the corporate respondent has not yet been dissolved under the laws of the State of Rhode Island, the jurisdiction in which it was organized and given a corporate charter, and, accordingly, that it is appropriate to prohibit such corporation from engaging in the acts and practices found to be unlawful. During the course of the oral argument respondents' attorney requested permission to file information showing the fact and the date of asserted "forfeiture" under the laws of the State of Rhode Island, which, it was claimed, would demonstrate that Consolidated Mortgage Company has been dissolved.[1]

[1] Respondents, on December 13, 1967, filed a paper designated "Motion To Suspend Proceedings," which was a motion to suspend for 30 days for the purpose of inserting into the record information and data regarding the asserted dissolution of respondent Consolidated Mortgage Company. Complaint counsel filed an answer in opposition to the request. Respondents have since filed certain information in this connection. Their request for a 30-day time extension is now moot and need not be further acted upon.

The respondents, on January 12, 1968, submitted certain materials, which include, among other things, a letter from the Chief Tax Examiner for Corporations for the State of Rhode Island, acknowledging the receipt of the tax return filed and the request for forfeiture and stating in part as follows: "The effective date of forfeiture for failure to pay tax would be December 31, 1969 as provided for by statute." [2] As we understand it, the corporate respondent is in the process of being dissolved under the laws of the State of Rhode Island and that under the procedures mentioned dissolution would occur on December 31, 1969. We believe it is clear, in the circumstances, that there is an existing corporation and that it is wholly appropriate to enter a cease and desist order against it for the violations of law found in this proceeding.

Respondents next request dismissal as to both the individual respondents (though the examiner, in his initial decision, did dismiss as to respondent Sullivan) on the ground that the individuals are no longer in the business and that they have no intention to reenter the type of business conducted by respondent Consolidated Mortgage Company. We believe an order is justified in this case against the individual respondents in spite of the declared present intention of each not to reenter such business at any future date. Here the respondents, in a calculated fashion, misled and deceived the unknowledgeable and unsophisticated. They continued these practices until after the Commission had opened its investigation against them. Both individual respondents have in the past been associated with the lending business in other connections. Respondent Cotherman, in Erie, Pennsylvania, had previously operated the Great Lakes Discount Corporation, which he described as a business similar to that of the corporate respondent (Tr. 376). Respondent Sullivan had previously been the manager of Domestic Credit Corporation in Providence, Rhode Island. The Commission cannot be assured, in all such circumstances, that the individuals will not again engage in the practices. Where there is doubt, as here, an order to cease and desist is fully justified.

One further point has been raised, and that concerns the examiner's dismissal of the complaint as against individual respondent Sullivan. Complaint counsel has appealed from this dismissal. The examiner believed there was no basis for holding this respondent individually responsible for the acts and practices found unlawful since the testimony indicated that the corporate respondent was organized and financed by respondent Cotherman and that the latter made the decisions in the business. Although Mr. Sullivan was the corporation pres-

[2] Complaint counsel filed a motion to reject the information submitted by respondents, and respondents thereafter filed a reply.

ident and principal stockholder, the examiner found that he was merely a front for respondent Cotherman.

We do not agree with the dismissal of the complaint as to respondent Sullivan. Though his position as president of the corporation may have been to an extent a formality, he was part and parcel of the daily business operation. He was the "front" man. It was respondent Sullivan who first saw the applicants and who accepted and processed the loans of applicants. In passing himself off as president (which he in fact was), respondent Sullivan, we have no doubt, was benefiting himself (*e.g.*, his employment) as well as Mr. Cotherman, and having allowed himself to be used in this manner cannot now be heard to deny his responsibility for the results. Accordingly, we will overrule the examiner on this point and hold respondent Sullivan liable in his individual capacity.

The appeal of complaint counsel will be granted and that of the respondents denied. The initial decision will be modified to conform with the views expressed herein and as so modified will be adopted as the decision of the Commission. An appropriate order will be entered.

Commissioner Nicholson did not participate for the reason that oral argument was heard prior to his taking the oath of office.

Final Order

This matter having come on to be heard upon the cross-appeals of complaint counsel and the respondents, and the Commission having determined, for the reasons appearing in the accompanying opinion, that the appeal of complaint counsel should be granted and that of respondents denied; and the Commission having further directed that the initial decision be modified in conformity with the views of the Commission expressed in its opinion and as so modified adopted as the decision of the Commission:

It is ordered, That the appeal of complaint counsel be, and it hereby is, granted and that the appeal of respondents be, and it hereby is, denied.

It is further ordered, That Finding 28 of the initial decision be, and it hereby is, modified by substituting for the last two sentences thereof the following:

> It is concluded and found, therefore, that respondent Cotherman, who formulated, directed and controlled the acts and practices herein involved, did participate therein and is individually accountable for them. Respondent Sullivan was the "front" man in the daily operation of the business. It was he who first saw the ap-

plicants and who accepted and processed the loan applications. In passing himself off as the president of the corporation, respondent Sullivan was benefiting himself (*e.g.*, employment), as well as Mr. Cotherman, and having allowed himself to be used in this manner, cannot now be heard to deny his responsibility for the results. It is concluded and found that respondent Sullivan, in the circumstances presented, is likewise accountable for the challenged acts and practices.

It is further ordered, That the following order to cease and desist be substituted for the order contained in the initial decision:

ORDER

It is ordered, That respondents Consolidated Mortgage Company, a corporation, and its officers, Lester S. Cotherman, individually and as General Manager of said corporation, and William F. Sullivan, individually and as an officer of said corporation, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering of or the sale or granting of lending services, or of any similar or related services, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(a) Representing, directly or by implication, that loans are made to customers at a six-percent rate of interest;

(b) Representing, directly or by implication, that loans made or arranged by respondents are repayable over a fifteen-year period;

(c) Representing, directly or by implication, that loans are made at any stated repayment schedule, interest rates, period of repayment or under other stated terms or conditions: *Provided, however*, That, except for the terms and conditions covered by subparagraphs (a) and (b) above, it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that loans are readily and in the regular course of business made available to customers under the stated repayment schedule, interest rates, period of repayment or other terms or conditions as stated;

(d) Misrepresenting in any manner the monthly repayment schedules, interest rates, periods of repayment or other terms or conditions under which respondents' loans are made.

It is further ordered, That respondents Consolidated Mortgage Company, a corporation, and its officers, Lester S. Cotherman, individually and as General Manager of said corporation, and William F. Sullivan, individually and as an officer of said corporation, and said respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering of or the sale or granting of lending services, or of any similar or related services, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forth with cease and desist, in those cases where representations are made as to the terms and conditions of respondents' loans, from failing, clearly and conspicuously, to reveal in advertising:

(a) The period of repayment:

(b) The number of payments required:

(c) The finance charges expressed in terms of dollars and cents;

(d) The simple annual percentage rate or rates at which the finance charge has been imposed on the monthly balance;

(e) Any other charges or expenses which are to be incurred or paid by the borrower to obtain such loans.

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

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

Commissioner Nicholson not participating for the reason oral argument was heard prior to his taking the oath of office.

IN THE MATTER OF

GENERAL TRANSMISSIONS CORPORATION OF WASHINGTON ET AL.

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

Docket 8713. Complaint, Sept. 26, 1966—Decision, Feb. 23, 1968

Order requiring a Washington, D.C., automobile transmission repair garage to cease misrepresenting the nature and cost of its services, deceptively quoting prices before all facts are known, neglecting to disclose that an "overhaul" does not include reassembly, falsely claiming that its transmissions are factory-rebuilt, making false guaranties, misusing the terms "free," "no money down," and "easy credit," and systematically defrauding its customers.

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 General Transmissions Corporation of Washington, a corporation, Walter Dlutz, individually and as an officer of said corporation, and William J. Greene,* individually and as an agent of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent General Transmissions Corporation of Washington is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 2912 Bladensburg Road, NE., in the city of Washington, District of Columbia.

Respondent Walter Dlutz is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His principal business address is 5818 Torresdale Avenue, in the city of Philadelphia, State of Pennsylvania.

Respondent William J. Greene is general manager of the corporate respondent. He formulates, directs and controls the acts and practices of said corporate respodent, including the acts and practices hereinafter set forth. His address is the same at that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the advertising, repair, overhauling, rebuilding, offering for sale, sale and distribution of automobile transmissions to the public within the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products and services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their business as aforesaid and for the purpose of inducing the purchase of their said transmissions and transmission repair service, respondents have made and are now making many statements and representations about their products and services.

Typical, but not all inclusive, of said statements and representations appearing in respondents' advertising are the following:

*Respondent's correct name is William J. Green, Jr., as noted in the initial decision.

TRANSMISSIONS AND MOTORS

LABOR CHARGES FOR REMOVAL, DISMANTLING, AND THOROUGH INSPECTION
OVERHAUL $22
RESEAL
Plus Necessary Parts
Factory Rebuilt Trans.—$99.50
(Most cars)
One Day Service ! No Money Down ; E–Z Terms ; Free Towing
Available lifetime warranty ; written guarantee on all work

* * * * * * *

WE CAN SAVE YOU MONEY
Modern Shop Equipment Assures Low Cost to You
Servicing your transmission is our only business
AVAILABLE LIFETIME WARRANTY
Written Guarantee on All Work

* * * * * * *

TRANSMISSIONS

One day service		*Our prices are the lowest*
OVERHAUL		$60
RESEAL		$25
REBUILTS	complete from	$89

OPEN 24 HOURS A DAY—SUNDAYS 10–2
Come in Today for a Free Checkup
NO MONEY DOWN ; E–Z TERMS ; FREE TOWING
ASK ABOUT OUR LIFETIME GUARANTEE
OVERHAUL OF CLUTCHES, BANDS, SEALS, GASKETS, STEEL SEALING, RINGS AND LABOR

PAR. 4. By means of the statements and representations in their advertisements, as set forth in Paragraph Three hereof, and others similar thereto but not specifically referred to herein, respondents have represented directly or by implication that:

1. Respondents will remove, dismantle, thoroughly inspect, reassemble and reinstall a transmission for $22.

2. Respondents are making a bona fide offer to overhaul any transmission for $60 and reseal any transmission for $25.

3. Respondents' offer to overhaul or reseal transmissions for $22 plus parts is a bona fide offer.

4. Respondents' offer to overhaul a transmission includes removal, disassembly and replacement of all worn parts and the reassembly and reinstallation of the transmission in the vehicle.

5. Respondents' offer to sell and install rebuilt transmissions for as little as $89 is a bona fide offer.

6. Respondents will overhaul or reseal a transmission or install a rebuilt transmission in one day.

7. Respondents grant credit to their customers on a no money down easy terms basis.

8. Respondents provide free towing service.

9. Respondents unconditionally guarantee all work done by them in writing.

10. Respondents sell and install factory rebuilt transmissions for most cars for $99.50.

11. Respondents are expert in the repair of automotive transmissions and can be relied upon to repair them in such a manner that they will function properly.

PAR. 5. In truth and in fact:

1. In many instances after removing and dismantling a transmission respondents refuse to reassemble and reinstall it for $22 price.

2. Respondents are not making a bona fide offer to overhaul transmissions for $60 or reseal all transmissions for $25, but are engaged in the practice of "lo-balling" wherein the customer is attracted into respondents' establishment by their advertised low prices for automobile components or transmission services, then induced into expensive additional repairs when faced with respondents' refusal to reassemble unless the said repairs are effected.

3. Respondents' offer to overhaul or reseal transmissions for $22 plus parts is not a bona fide offer but is made for the purpose of attracting customers to their place of business where respondents can convince them that they need more costly repairs.

4. Respondents' offer to overhaul a transmission does not include replacement of all worn parts.

5. Respondents' offer to install rebuilt transmissions for as little as $89 is not a bona fide offer but is made for the purpose of attracting prospective customers to respondents' place of business where an attempt is made, and frequently with success, to sell a more expensive rebuilt transmission.

6. Respondents usually take more than one day to overhaul or reseal a transmission or to install a rebult transmission or to otherwise repair a transmission.

7. Respondents do not extend credit to any customer but require cash payment or payment through a limited number of credit cards. A customer not having the limited credit cards or cash is denied possession of his car until financing is obtained from a finance company to which the customer is referred by respondents.

8. Respondents' offer of free towing service is not unconditional, but is limited in certain respects, which limitations are not disclosed in

respondents' advertising or made known to the customer prior to the rendering of service.

9. Respondents do not provide an unconditional guarantee on work performed by them. Such guarantee as they give is limited, which limitations are not contained in respondents' advertising or made known to the customer prior to sale.

10. Respondents do not sell factory rebuilt transmissions for most cars for $99.50. The rebuilt transmissions sold by them have been rebuilt by them and cost substantially more than $99.50.

11. Respondents, either through negligence or inability, on numerous occasions repair transmissions in such a manner that they do not function properly and often cause further damage of an extensive nature.

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

PAR. 6. In the further course and conduct of their said business respondents engage in the following unfair or deceptive acts and practices:

1. When a customer brings his automobile to respondents' place of business for transmission repairs he is usually told that the problem is slight and can be repaired for a small or nominal sum of money and that all work is unconditionally guaranteed. Respondents thereby obtain authorization to do limited repair work which is described in general terms. When the customer returns to pick up his automobile he is almost invariably told that he needs a major repair job, or a rebuilt transmission, costing a substantial sum of money. Often the customer is told the transmission has been removed from his car and disassembled whereupon respondents refuse to perform the originally authorized repair work or restore the vehicle to its previous condition and represent that the transmission cannot be reassembled or that the previously agreed upon price does not include reassembly and reinstallation of his transmission. Respondents thereby obtain further authorization to do the additional repair work or install a rebuilt transmission.

2. Upon completion of a transmission repair job respondents guarantee the job for a certain number of days under normal driving conditions, and for an additional number of days or miles, whichever occurs first, on a fifty-fifty parts plus labor basis. If the transmission has problems or malfunctions during the period of respondents' guarantee or warranty, the customer is told that they are minor, self-adjusting and will disappear with continued driving, thus respondents avoid or seek to avoid honoring their guarantee or warranty.

3. Respondents refuse to give their customers itemized bills for parts and repairs for which they are charged.

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

PAR. 8. The use by the respondents of the aforesaid false misleading and deceptive statements, and representations and unfair or deceptive acts 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 and services by reason of said erroneous and mistaken belief and by reason of said unfair or deceptive acts and practices.

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

Mr. Robert E. Freer, Jr., and *Mr. Anthony I. Janulewicz* supporting the complaint.

Mr. Burton Caine, *Wolf, Block, Schorr* and *Solis-Cohen*, Philadelphia, Pa., for respondents.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

MARCH 14, 1967

STATEMENT OF PROCEEDINGS

The Federal Trade Commission complaint in this proceeding issued September 26, 1966, charging the corporate and individual respondents with violation of Section 5 of the Federal Trade Commission Act through the alleged use of unfair or deceptive acts and practices and unfair methods of competition in commerce in the sale and repair of automotive transmissions within the District of Columbia.

Respondents General Transmissions Corporation of Washington and William J. Green, Jr. (incorrectly named in the complaint William J. Greene), and respondent Walter Dlutz on October 31, 1966, filed answers denying the charges of the complaint and affirmatively alleging that if respondents' acts and practices are unlawful, the

claimed existing similar acts and practices of respondents' competitors within the District of Columbia are equally unlawful, and further, that if respondents were to be subjected to an order to cease and desist and their competitors are simultaneously not so restricted that respondents will be seriously injured and may be forced out of business.

Respondents on November 14, 1966, filed motion to suspend proceedings supported by affidavit of William J. Green, Jr., as to the claimed existing similar acts and practices of respondents' competitors. Said motion to suspend was certified to the Commission on November 17, 1966, with the recommendation that it be denied and the Commission order denying the same was entered December 1, 1966. Respondents' application of December 3, 1966, to the hearing examiner for order to take depositions and the issuance of supporting subpoenas duces tecum was denied by the hearing examiner December 6, 1966. Respondents' request of December 9, 1966, to the Commission for permission to file interlocutory appeal from the hearing examiner's aforesaid order of December 6, 1966, was denied by order of the Commission on December 28, 1966, for reasons as stated in the said Commission order.

Respondents' accompanying motion of December 9, 1966, to the hearing examiner to suspend hearings in the interim pending Commission action on respondents' aforesaid requested permission to appeal to the Commission was denied by the hearing examiner on the record [1] and the hearing on the merits commenced December 13, 1966, and concluded December 19, 1966. At the close of the presentation of the case-in-chief respondents elected not to call the individual respondents or any other defense witnesses and rested their case.[2]

Respective counsel were afforded full opportunity to be heard, to examine and cross-examine all witnesses and to introduce such evidence as is provided for under Section 3.14(b) of the Commission's Rules of Practice for Adjudicative Proceedings. Proposed findings of fact, conclusions, and supporting briefs were filed by respective counsel. Counsel for respondents filed a reply to the proposed findings of fact, conclusions of law and order of counsel supporting the complaint. Complaint counsel waived the filing of a reply to the proposed findings of fact, conclusions of law and brief of counsel for the respondents.

Proposed findings of fact and conclusions submitted and not adopted in substance or form as herein found and concluded are

[1] Tr. 150.

[2] Tr. 914. See in this connection the above Commission order of December 28, 1966 [70 F.T.C. 2848], and reasons given therein for denying respondents' request for permission to file interlocutory appeal from the hearing examiner's order of December 6, 1966.

hereby rejected. After carefully reviewing the entire record in this proceeding as hereinbefore described, and based on such record and the observation of the witnesses testifying herein,[3] the following Findings of Fact and Conclusions therefrom are made, and the following Order issued:

FINDINGS OF FACT

1. Respondent General Transmissions Corporation of Washington is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 2912 Bladensburg Road, NE., in the city of Washington, District of Columbia.[4]

2. Respondent Walter Dlutz is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His principal business address is 5818 Torresdale Avenue, in the city of Philadelphia, State of Pennsylvania.[5]

3. Respondent William J. Green, Jr. (incorrectly named in the complaint William J. Greene), was general manager of the corporate respondent. He also formulated, directed and controlled the acts and practices of said corporate respondent, including the acts and practices

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[3] Observation by the hearing examiner of the customer-witnesses while testifying herein left no doubt as to the truthfulness of their expressed beliefs that they had been unfairly victimized in their business dealings with the respondents. Further, some testified to having taken recourse to lawsuits which were either settled before trial or went to trial and judgment against the respondents (customer-witness McDonald at Tr. 543; customer-witness Montgomery at 592–593; customer-witness Shanklin at 901–904). In the words of customer-witness Stiles at Tr. 319:

"It preyed on my mind for a while, for about a month and a half. So I finally decided that I could not get it out of my system, so I wrote to the Better Business Bureau. I made three copies.

"The Better Business Bureau—well, they sent me a letter a couple of days later which I have, which told me for further satisfaction to go to Small Claims Court, which I did.

"I had a marshal deliver some kind of order from the court for the manager to appear with me. He did not show up. I won the case.

"I took the judge's verdict back to the transmission company. He said just present it to him and cash on demand, you will get your money. So I went back in there and I was—at this time, I met Mr. Green. He said, just take your paper over there and drop it down and get the 'H' out of here. I thought I was—well, I am not going to say anything about his manner anymore."

[4] Admitted in both answers.

[5] Comm. Ex. Nos. 1, 2, 63–B. See also testimony of witness Dlutz at Tr. 151–163, 207–209, 211, 214–216, 240; customer-witness Stiles at Tr. 320; customer-witness Hayes at Tr. 438–440, 457–462; customer-witness Klein at Tr. 490, 502; customer-witness McDonald at Tr. 543; customer-witness Briscoe at Tr. 887, 890.

hereinafter set forth. His business address was the same as that of the corporate respondent.[6]

4. Respondents were and are now engaged in the advertising, repair, overhauling, rebuilding, offering for sale, sale and distribution of automobile transmissions to the public within the District of Columbia. Respondents at all times mentioned herein have maintained a substantial course of trade in said products and services in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents in the course and conduct of their aforesaid business have been and are in competition with corporations, firms and individuals similarly so engaged in such sales and services.[7]

5. In the course and conduct of their business as aforesaid and for the purpose of inducing the purchase of their said transmissions and transmission repair service, respondents have made and are now making many statements and representations about their products and services such as the following, among others:

TRANSMISSIONS
ONE-DAY SERVICE
DAILY: 24 HOUR SERVICE
"Our Prices Are The Lowest"
Hours: Sun. 10–2

OVERHAUL ---------- $60
RESEAL ---------- $25
REBUILTS ---------- Complete from $89

NO MONEY DOWN; EZ TERMS; FREE TOWING

Come In Today For A Free Checkup

GENERAL

Ask about our lifetime guarantee: overhaul of clutches, bands, seats, gaskets, steel seating rings and labor. 2919 Bladensburg Rd. 832–3700.[8]

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[6] Admitted in answer for the corporate respondent and individual respondent William J. Green, Jr. See also, testimony of witness Green at Tr. 177–186 and of the various customer-witnesses following. Respondent Green is now in charge of a Dlutz franchised operation in Milwaukee, Wisconsin.

[7] Admitted in answer for corporation as to the corporate respondent. See also, footnotes 5 and 6 above.

[8] Comm. Ex. No. 9 inserted by the respondents in The Washington Post on October 24, 1965. For the evolution in style and content of respondents' newspaper advertising and that payments for the same were issued in Philadelphia, Pennsylvania, see the testimony of the classified advertising representative of this newspaper at Tr. 522–537 and Comm. Ex. Nos. 40, 41. This witness also testified that the daily circulation of the newspaper approximated 457,000 copies, the greater majority of which was in the metropolitan area of Washington, Virginia and Maryland.

TRANSMISSIONS & MOTORS
Labor Charges for Removal, Dismantling and thorough inspection
OVERHAUL RESEAL (Central Charge Service) $22
PLUS NECESSARY PARTS
FACTORY REBUILT TRANS.
(Most Cars)---------- $99.50
AVAILABLE LIFETIME WARRANTY
WRITTEN GUARANTEE ON ALL WORK
ONE DAY SERVICE: NO MONEY DOWN; EZ TERMS; FREE TOWING
OPEN DAILY 7 A.M. to 7 P.M.
2912 BLADENSBURG RD., NORTHEAST, WASH., D.C.
832-3700
GENERAL TRANS. INC.[9]

GENERAL TRANSMISSION
COAST TO COAST
WHILE YOU WAIT
OVERHAUL $65 ANY CAR
1 YEAR WARRANTY
INCLUDED AS REQUIRED
- Seals
- Clutches
- Bands
- Gaskets
- Fluid
- Labor

NO MONEY DOWN—UP TO 2 YRS. TO PAY
UP TO 2 YRS. TO PAY
FREE TOWING TO SHOP
DAILY, 8 to 7 .... SUNDAY, 10 to 2
2912 Bladensburg Rd., N.E.
832-3700
1327 S. Capitol St., S.E.
547-4477
Foot S. Capitol St. Bridge[10]

6. An examination by the hearing examiner[11] of respondents' newspaper advertisements in evidence shows their meaning to be plainly susceptible of being interpreted and understood by a prospective cus-

[9] Comm. Ex. No. 50 inserted by the respondents in The Washington Daily News on April 4, 1966. Payments for these advertisements were also issued from the office of the individual respondent Dlutz in Philadelphia, Pennsylvania. See testimony of the witness from this newspaper at Tr. 759-773 and Comm. Ex. Nos. 16, 52, 53, 54. According to this witness the newspaper had a daily circulation of approximately 225,000 copies in the District of Columbia, Virginia and Maryland.

[10] Comm. Ex. No. 24 inserted by the respondents in The Washington Post on November 7, 1966.

[11] As to the propriety of a finding based on such an examination, see April 8, 1966, opinion of the Commission in Docket No. 8635, *Merck & Co., Inc., et al.* [69 F.T.C. 526], and cases therein cited.

tomer of the respondents [12] as representing, directly or impliedly, that:

(1) Respondents will give the prospective customer a free checkup and will remove, reseal or overhaul and reinstall the customer's transmission or a factory or other rebuilt transmission at the advertised price.

(2) Respondents will furnish the prospective customer free towing and one-day service with no down payment and easy credit terms.

(3) Respondents are transmission specialists and will furnish the prospective customer a lifetime guarantee, or a 1 year warranty or a written guarantee of their work.

(4) Respondents' entire charge to the prospective customer for each of the above will be its advertised price.

The record testimony in this proceeding shows a substantial number of instances wherein the respondents' methods of business operation conflict with and belie the meaning of their advertising as it is herein found susceptible of being interpreted and understood by the public.[13]

The record testimony herein also discloses respondents to have adopted a more or less common pattern in dealing with various of the testifying customer-witnesses: Upon first contact with the prospective customer the automobile was usually subjected to a short road test following which the prospective customer in some instances would be advised that only a minor transmission repair or servicing at a small charge appeared indicated.

Upon authorizing the work and leaving the premises the customer was later telephoned, or upon returning for his automobile was told, that the transmission had been removed and dismantled and allegedly shows the need for further work and additional replacement parts to be properly operable upon reinstallation in the automobile. The customer was thus confronted by the respondents with an unexpected substantially higher price than the nominal price which the respondents first led the customer to believe would only be necessary of payment.

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[12] In *Aronberg* v. *Federal Trade Commission,* 132 F. 2d 165, at 167, the appellate court admonishes:

" * * * the buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied. * * * The law is not made for experts but to protect the public—that vast multitude which includes the ignorant, the unthinking, and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions * * * ."

[13] That the customer-witnesses testifying herein likewise so interpreted and understood the respondents' advertising is clear on the record in this proceeding. For example, see the testimony, among others, of customer-witness Stiles at Tr. 321–324, 327–331; customer-witness Sollers at Tr. 725–726, 730–731; customer-witness Schneider at Tr. 775–779.

If the customer balked at paying this substantially advanced price, as one customer-witness put it, the respondents had him "over a barrel." The customer was told, for example, that to reassemble and reinstall the transmission without repair would require an additional charge over the advertised price, or that the transmission could not be reassembled for installation without the alleged necessary further work and parts. It was thus made exceedingly clear to the customer that he would either be spending more money to reassemble and reinstall a still faulty transmission in the automobile, or if the transmission was not capable of being reassembled and reinstalled without repair as the respondents alleged, that the customer would be unable to drive the automobile from the respondents' premises unless consenting to the proposed new transaction.[14]

7. In truth and in fact, the respondents in their hereinbefore described advertising are not making a bona fide offer to perform in the manner and at the prices therein stated, but are engaged in the practice of "lo-balling" wherein the prospective customer is enticed into the respondents' business establishment by their advertised low prices for automobile transmission sales and repairs, one-day service and other advertised inducements, and then inveigled by the respondents into the outlay of further substantial amounts of money when faced with the respondents' business tactics as hereinbefore and hereinafter related.

Only one of the many testifying customer-witnesses who went into the respondents' place of business and were assured that the advertised low price transmission sale, repair or service would solve their particular problem was able to repossess the automobile without paying more than the advertised price. In this one instance, customer-witness Klein testified that he was able to obtain the requested transmission work only after a lengthy discussion and steadfast refusal to authorize more to be done by the respondents to the automobile. Mr. Klein further testified to writing complaining letters to the Washington, D.C., Better Business Bureau, the respondent corporation at its local address and to the individual respondent Dlutz, plus a personal telephone call to the respondent Dlutz, in Philadelphia, Pennsylvania.[15]

The substantial amount of money which respondents' aforedescribed business tactics further extracted from customer-witnesses in the face

[14] For example, see among others, the testimony of customer-witness Jacobs at Tr. 248–252, 257–260; customer-witness Stiles at Tr. 310–313, 319–320; customer-witness Hayes at Tr. 438–444, 451, 458, 461; customer-witness Montgomery at Tr. 582–586, 592–593; customer-witness Briscoe at Tr. 870–878.

[15] Customer-witness Klein's testimony and complaining letters are at Tr. 471–472, 490–491, 501–503, and marked Comm. Ex. Nos. 38 A–B, 39.

of respondents' advertised low prices testifies to the effectiveness of their methods of doing business challenged in the complaint.[16] Commission Exhibit No. 17 shows the respondents to have collected $448.05 from customer-witness Jacobs; Commission Exhibit No. 18 shows the respondents to have collected $231.75 from customer-witness Johnson; Commission Exhibit No. 20 shows the respondents to have collected $245.94 from customer-witness Holt; Commission Exhibit No. 25 shows the respondents to have collected $133.90 from customer-witness Stiles; Commission Exhibit No. 35 shows the respondents to have collected $289.43 from customer-witness Sollers; Commission Exhibit No. 36 shows the respondents to have collected $154.50 from customer-witness Hayes; Commission Exhibit No. 42 shows the respondents to have collected $199.82 from customer-witness Montgomery; Commission Exhibit No. 44 shows the respondents to have collected $281.27 from customer-witness Satterfield; Commission Exhibit No. 57 shows the respondents to have collected $210.20 from customer-witness Smith; Commission Exhibit No. 58 shows the respondents to have collected $348.14 from customer-witness Briscoe.

8. The hearing examiner on the record before him in this proceeding can make no finding other than that the aforedescribed advertising representations and accompanying acts and practices of the respondents are false, misleading and deceptive to the injury and prejudice of the public and of respondents' competitors, and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act as charged in the complaint in this matter.

Nothing in the record validly supports respondents' advertising representations to a prospective customer that they will remove, reseal or overhaul and reinstall the customer's transmission or a factory [17] or other rebuilt transmission at the advertised price. With reference to the respondents' advertising representations to the prospective customer of free towing,[18] one-day service [19] with no down payment and

[16] As set forth herein in preceding Paragraph 5, respondents' advertised price on October 24, 1965, for an overhaul was $60, a reseal $25 and for rebuilts complete from $89; on April 4, 1966, respondents' advertised price for an overhaul and reseal, plus necessary parts was $22, and for a factory rebuilt transmission for most cars $99.50; on November 7, 1966, respondents' advertised price for an overhaul for any car was $65, including parts, fluid and labor as required.

[17] Witness Dlutz at Tr. 208 testified that respondents do not sell factory rebuilt transmissions in the respondents' Washington operation.

[18] See testimony of customer-witness Stiles as to towing conditions imposed by respondents and not disclosed in respondents' advertising at Tr. 318, 320, 322.

[19] See the testimony relating to respondents' failure to supply this advertised one-day service inducement to customer-witness Jacobs at Tr. 248–252; to customer-witness Johnson at Tr. 278–279; to customer-witness Stiles at Tr. 312–313; and to customer-witness Satterfield at Tr. 681, 683–684. Customer-witness Klein's experience is set forth in footnote 15, *supra*.

easy credit terms,[20] the record discloses these representations also to be illusory. Further, the respondents do not disclose certain limitations in their advertised guarantees or warranties of their automobile transmission sales, repairs and services and such are not unconditional as represented to the prospective customer.[21]

Illustrative of a prospective customer's reaction to the respondents' advertising is the following at Tr. 775:

Q. I now show you Commission's Exhibit 30 and ask you to identify that. It is a copy of an advertisement, is it not?

A. Yes, from one of the local newspapers. Also one that I responded to with regard to having my transmission resealed.

Q. Did you later include the original of this in a message to the Better Business Bureau?

A. Yes, I did.

Q. What is particularly important to you about that advertisement? What attracted you to that company first?

A. Well, a number of things. One was the cost, the location of the company on Wisconsin Avenue, which is about four miles from home, a written warranty on the work, or a written guarantee on the work, and the daily, one-day service.

Q. How did you interpret that one-day service?

A. Well, bring it in in the morning and take it home at night. I was so informed by the manager of the Wisconsin Avenue branch that that would be it, if I brought it in by 7:30 in the morning I would have it by 4:30 in the afternoon.

Typical of the other customer-witnesses subjected to respondents' business tactics is the further experience of this customer-witness according to his testimony at Tr. 776–777:

Q. Was there any question that anything else might be wrong with the automobile?

A. No, I didn't anticipate anything wrong. The car was functioning perfectly when I took it in there.

Q. What did you tell them?

A. I wanted a reseal job to correct the oil leakage.

Q. That is all you told them you wanted to do?

A. That's right.

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[20] See testimony as to the experience of customer-witness Jacobs at Tr. 258–259; customer-witness Johnson at Tr. 283, 300; customer-witness Holt at Tr. 378 and Comm. Ex. Nos. 21, 22, 23; customer-witness Hayes at Tr. 444; customer-witness Briscoe at Tr. 879–883, and Comm. Ex. Nos. 59, 60.

[21] See testimony of customer-witness Johnson at Tr. 282–285; customer-witness Holt at Tr. 389–392; customer-witness Briscoe at Tr. 883–885.

Q. What was your next contact with the company?

A. Well, when I took the car in, they said the $22 on here covered labor only and there was another $12 and something for the reseal kit, which were the parts.

Well, it said parts extra on there, so I told them to go ahead and reseal it.

About 4:15 the same day, I went back and they had a transmission laying on a work bench, and said, this is your transmission and here are some parts of metal that were found in it and the pump is completely shot and needs replacing. So I talked to the manager and said, what will that cost? He said, well, it would cost about another $42, which raised the cost of the job to about $76.

So I told him to go ahead with it, take the thing that was torn down, if they needed a new pump, to put it in. He said it would be ready the next afternoon.

Well, I called the next morning to find out if the car would be ready and he examined it further and said, "All the bushings are shot and needed replacing."

I said, what is that going to cost? He said, well, the total job is now $107.

I said, forget it, reseal it the way I originally requested, and I'll pick it up tonight. So that, as far as I know, it was only resealed and I paid $48 and something for the reseal job.

Q. This is different from the additional $12 to the $22. Why was it more?

A. Well, they said that the additional resealing parts were necessary due to the additional inspection that they had made to find then that the bearings were shot.

Finally and as did other of the customer-witnesses, this witness testified at Tr. 778–779:

Q. I ask you as a consumer, how do you define the term "overhaul"? What does it mean to you?

* * * * * * *

A. Well, if I took an automobile in for an overhaul, if I told them to overhaul it completely, I would expect them to examine every part and replace all worn parts, broken parts, etc.

Q. I notice that you used the term "completely." Just to make it straight, if you just saw the term "overhaul" without any explanation, no limitation on it, just the term "overhaul," what would you make of it?

HEARING EXAMINER SCHRUP: Mr. Freer, you are confining yourself to transmissions, are you?

MR. FREER: Yes, sir, I am.

THE WITNESS: I would imagine they would take the transmission out of the car, open it up, inspect it, and replace all used or worn parts to put it back in complete operating condition again.[22]

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[22] See also the testimony of customer-witness Sollers at Tr. 725–726 and mechanic-witness Bair at Tr. 812. Respondents would argue that their advertising representations of "factory rebuilt" and "overhaul" are a correct usage of trade terminology. As noted in footnote 17, *supra*, respondents do not sell "factory rebuilt" transmissions and the record disputes the trade meaning of "overhaul" as contended for by respondents. See testimony of mechanic-witness Bair at Tr. 834–839. Further, the pertinent issue in this proceeding is the meaning to the prospective customer of the respondents' advertising representations. See Tr. 819, 827–839.

9. The preceding customer-witness further testified at Tr. 777 and 779–780 as follows:

Q. I would like to direct your attention back to the advertisement again. I believe you mentioned that there was available a lifetime warranty and written guarantee on all work.

A. That's right.

Q. Did you expect to receive some sort of guarantee on the work done on your automobile?

A. On the reseal job, yes.

Q. I now show you a copy of what purports to be a contract between Mr. J. J. Schneider and the General Transmissions Corporation and ask you if you recognize that.

A. Yes, I do. It is a copy of my bill and a work sheet, a repair sheet.

Q. You say copy. What do you mean by copy? Is it a Xerox or a yellow carbon or—

A. It is a yellow carbon of the original. This is the copy they returned to me, stamped "Paid."

Q. What is this down here?

A. "Not guaranteed"?

Q. Yes.

A. Well, I discovered that the next day.

Q. You didn't see it at the time you paid?

A. No, I didn't. It was close to 5:30 in the evening and they were rushing around and I had to wait for them to put the transmission back in the car. I didn't notice it because it was stamped down at the bottom. When I got home, I found out that the job wasn't guaranteed, because the car wasn't functioning properly on the way home.

Q. Did you have any discussion with them about this?

A. When I got home, I called. The manager of the shop was out and I talked to one of the mechanics. He said, "I told the manager the transmission needed a new pump and he walked away from it, and that was it." I just got the car and left.

Q. Was the automobile still leaking?

A. It was still leaking, and when you would stop for a traffic light and go to start up, it wouldn't go. It would all of a sudden leap out.

HEARING EXAMINER SCHRUP: Did it have that trouble when you took it in?

THE WITNESS: No, it didn't. It was functioning perfectly when I took it in except for the little oil that was leaking.

The refusal of the respondents to give the customer-witness the expected advertised guarantee or warranty of the respondents' work requires a further word.[23] The testimony of other customer-witnesses

[23] The renewed motion of respondents' counsel to strike the testimony of this customer-witness is herein denied. See the testimony of this customer-witness at Tr. 775 and that of witness Dlutz at Tr. 240. Also see the colloquy between the hearing examiner and counsel at Tr. 781–782, 784–787. Respondents' further contention that this particular transaction was purely an intrastate phase of respondents' business and not subject to the Commission's jurisdiction is without merit. See, *C. E. Niehoff & Co.*, 51 F.T.C. Decisions at 1143.

herein disclosed the refusal of the respondents to furnish an itemized statement [24] of the labor done and the parts installed [25] in the face of the respondents' guarantee or warranty limitations undisclosed in advance to prospective customers that they are for a limited time only and on a "50–50" basis, that is, the customer pays fifty percent of both the cost of the labor and the retail price of the parts installed.[26] This serves the purpose of not only facilitating the respondents' "lo-balling" techniques but also places the customer at an unexpected and unfair disadvantage in attempting to establish the validity of bills later tendered by the respondents for guarantee or warranty work.[27] the foregoing takes on added weight in the light of the record facts in this proceeding in that various of the customer-witnesses relying on respondents' ad-

[24] For example, the testimony of customer-witness Jacobs at Tr. 259:

"So I went out to Langley Park in company with this fine young gentleman, and I went in and I got $400 cash and he carried me back to the General Transmission Company and I gave the man the $400. I says, 'Now, will you please give me an itemized statement of what work was done here.' I says, 'I would like to know what I'm paying for.' He says, 'We do not give itemized statements.' I says, 'I never heard of that.' He says, 'I'm sorry, but we don't give itemized statements.' I says, 'Why not'? 'Well,' he says, 'in the first place,' he says, 'we have secret methods of doing our work here and,' he says, 'we don't like to itemize them so other companies will know exactly the way we fix transmissions.' He says, 'This is our business.' He says, 'The only thing we can do,' he says, 'we can give you a receipt for your money, and we will give you our regular standard guarantee.' I says, 'What is this guarantee'? He says,—I think it was either four months or 90 days or 4,000 miles. Well, at that stage I was pretty disgusted, and I says, 'Well, all right.' I had no alternative. In other words, unless I complied with what he told me to do, no car."

[25] Compare testimony of mechanic-witness Bair as to his customary method of itemizing transmission repairs at Tr. 839 and see Comm. Ex. No. 46.

[26] See testimony of witness Dlutz at Tr. 202–203. See also the testimony of customer-witness Johnson at Tr. 282; customer-witness Briscoe at Tr. 883–885.

[27] See the testimony of customer-witness Johnson at Tr. 283–285, 287–288, 291–295. This witness testified with relation to his knowledge of the respondents' repair bills on his automobile transmission:

"Q. I am asking you do you know what he did the second time?

"A. No, you never know. You don't know what they did the first time, actually."

Customer-witness Satterfield at Tr. 666 testified as to his experience with the respondents as follows:

"Q. How did you select the garage that you went to?

"A. This selection is made by the way that I do a lot of things. I got an accumulation of estimates and AAMCO, as previously mentioned—I am familiar with the outlet—gave me an estimate. Mr. Green, whom is in the courtroom right here, gave me an estimate after a road test of approximately $75.00. The nomenclature of the repair, it was some type of an overhaul or repair kit.

"I am a layman in this sense and I do not recall the nomenclature.

"Q. You mentioned that you are familiar—well, strike that. You stated that Mr. Green gave you a quotation of—

"A. Verbally only.

"Q. This was on the telephone?

"A. No, this was not. This was at the location on Bladensburg Road, Northeast, Washington, D.C., after a test drive.

"Q. Do you recall the amount of that?

"A. As vaguely—it is vague in my mind, because the amount has gone into excess of $400.00 at this time.

"But the original estimate—well, the original estimate was less than $100.00. I believe it was $75.00. I cannot say exactly $75.00, but I will swear to God that it was less than $100.00." See also this customer-witnesses' further testimony at Tr. 667–670, 683–685.

vertising representations as being transmission specialists [28] have testified to both the uncorrected as well as the further automobile transmission troubles they encountered following the respondents' unsatisfactory work or servicing.[29]

10. In the conduct of their business and at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms and individuals in the sale of automotive parts and services of the same general kind and nature as those sold by respondents. Respondents herein would argue that the instituting of these proceedings was an abuse of discretion by the Commission and not in the public interest. This contention was rejected by the Commission in its order and opinion herein of December 28, 1966.

This statement in the foregoing Commission opinion of December 28, 1966 [70 F.T.C. 1848, 1850], is further noted by the hearing examiner:

Respondents rely upon the Commission's order of December 1, 1966 [70 F.T.C. 1833], as an invitation for them to produce direct evidence as to the practices of their competitors. They have misconstrued the Commission's order. If anything, the language relied upon indicates that the Commission intends to rely upon its own investigation of the matters alleged by respondents. The Commission's order of December 1 made it clear that it would take respondents' allegations under consideration and take whatever action is appropriate. This it intends to do.

11. Respondents would further argue that any cease and desist order to be issued in this proceeding should not include the individual respondent Dlutz. The Washington based corporate respondent herein is but the creature of the individual respondent Dlutz who in turn is engaged in various other automobile transmission sales, repair and service enterprises elsewhere.[30]

Commission Exhibit No. 1, the annual report of General Transmissions Corporation of Washington, as received and filed April 7, 1966, in the Office of the Recorder of Deeds, Corporation Division, Washington, D.C., lists the following:

Director—Walter Dlutz, 5818 Torresdale Ave., Phila., Pa.
Director—Virginia E. Dlutz, 5818 Torresdale Ave., Phila., Pa.
Director—Stanton S. Oswald, 12th Floor Packard Bldg., Phila., Pa.
President—Walter Dlutz, same as above
Secretary—Virginia E. Dlutz, same as above
Treasurer—Walter Dlutz, same as above

[28] See testimony of customer-witness Jacobs at Tr. 248; customer-witness Satterfield at Tr. 679–681; customer-witness Briscoe at Tr. 870–871.

[29] The testimony of customer-witness Johnson at Tr. 289 appears to sum up the prevailing situation:

"Q. Why didn't you take it back to the respondents?

"A. Well, because I figured they had two cracks at it and they couldn't fix it, so what's the use of going back and keep getting taken." See also testimony of customer-witness Montgomery at Tr. 589–591; customer-witness Satterfield at Tr. 685.

[30] See testimony of the witness Dlutz at Tr. 215–217, 227–228, 234, 240, and see also footnote 5, *supra*.

Walter Dlutz owns all the corporation's stock; Virginia E. Dlutz is his wife (Tr. 154). Stanton S. Oswald is a law partner of the respondents' counsel in this proceeding (Tr. 521). The corporation has but 10 shares of common stock of $100 par value per share.

The individual respondent Green, one of a changing number of managers of the Washington based corporate respondent herein, formerly worked as a manager of a Dlutz automobile transmission sales, repair or service enterprise in Wilmington, Delaware, and is now the franchised operator of a Dlutz automobile transmission sales, repair or service enterprise in Milwaukee, Wisconsin.[31]

Any order to cease and desist herein not encompassing the respondent Dlutz both individually and as an officer of the corporate respondent would appear both improvident and futile. The record herein discloses many facts which contradict the self-serving testimony of the witness Dlutz as to claimed lack of knowledge and responsibility on his part for the advertising representations and accompanying acts and practices challenged in the complaint.

The self-serving denials of knowledge, responsibility or control by officer-owners of the acts and practices of a corporation has been held insufficient to reverse a finding that the officer should be named individually in an order. As recently as June 8, 1966, the Eighth Circuit affirmed the Commission in naming John A. Guziak individually in an order. *Guziak* v. *F.T.C.*, 361 F. 2d 700, 704 (1966). As in the instant proceeding Guziak was the owner of several corporations engaged in the same business. On the issue of personal liability the court said:

> In attacking the findings, the petitioner has relied heavily upon his own testimony and the fact that many of the findings were based upon activities of the corporations rather than on his personal activities. These contentions are not convincing. As the motivating and controlling force behind the corporations, the petitioner was responsible for their activities.
>
> The Commission was fully justified in finding the petitioner responsible for the corporate activities and in enjoining him from engaging in similar activities in the future. *Benrus Watch Co.* v. *F.T.C.*, 352 F. 2d 313 (8th Cir. 1963), 324–25; *F.T.C.* v. *Standard Education Society*, 302 U.S. 112, 119 (1937). Furthermore, the mere fact that some of the findings of fact were in conflict with petitioner's testimony does not render them erroneous. The findings of fact in this case were supported by substantial evidence. Such findings are therefore conclusive and binding upon this court.

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[31] See testimony of the witness Green at footnote 6, *supra*, and testimony of the customer-witness dealing with this individual respondent cited, *supra*.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter and of the respondents in this proceeding.

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

3. The use by respondents of the false, misleading, and deceptive representations, statements and accompanying acts and practices as found herein has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said representations and statements were and are true, and into substantial purchases of the respondents' products and services by reason of such erroneous and mistaken belief.

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

5. The following order to cease and desist should be and is herein issued.

ORDER TO CEASE AND DESIST

It is ordered, That respondents General Transmissions Corporation of Washington, a corporation, and its officers, and Walter Dlutz, individually and as an officer of said corporation, and William J. Green, Jr., individually and as an agent of said corporation, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale and sale, repair and servicing of automobile transmissions and related parts in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Falsely representing, in any manner, that the low prices, guarantees and warranties, one-day service, no down payment, free towing and easy credit terms advertised and set forth in the respondents' sales, repair and service offers to customers are available and obtained by all customers of the respondents.

2. Falsely representing, in any manner, the low prices advertised and set forth in the respondents' sale, repair and service offers to be the entire charge to customers, including all labor

and necessary parts, for which the respondents will remove, reseal or overhaul and reinstall a customer's transmission or remove and reinstall a factory or other rebuilt transmission.

3. Using in any manner the above representations to attract customers to the respondents' place of business for the purpose of inducting customers to enter into sale, repair or service transactions more extensive or at higher prices.

4. Failing to disclose to customers in advance that the respondents' guarantees and warranties contain conditions and limitations including a charge to customers of 50 percent of the price of the parts and the labor supplied by the respondents under the guarantees and warranties.

5. Failing to furnish customers itemized statements of the parts and labor paid for and subject to the respondents' guarantees and warranties and itemized statements of the parts and labor thereafter paid for by customers under the respondents' guarantees and warranties.

6. Falsely representing, in any manner, that transmissions rebuilt by the respondents are factory rebuilt; that transmissions rebuilt other than in a factory generally engaged in such rebuilding are factory rebuilt; that the respondents offer for sale factory rebuilt transmissions.

7. Failing to disclose to customers in advance that to remove, disassemble, reassemble and reinstall a transmission without repair by the respondents will result in an additional labor charge to customers.

8. Falsely representing, in any manner, the need by customers for a transmission adjustment, servicing, reseal, overhaul, rebuilding, or the replacement of any transmission or other part required to the operation of the transmission.

9. Falsely representing, in any manner, the type and number of parts and the amount of labor necessary to or supplied to customers to adjust, service, reseal, overhaul, rebuild, or make the transmission operable.

10. Falsely representing, in any manner, the nature, extent and quality of any offered or consummated transmission sale, repair or service by the respondents.

OPINION OF THE COMMISSION

FEBRUARY 23, 1968

BY ELMAN, *Commissioner:*

I

The complaint in this proceeding, issued September 26, 1966, charged that the corporate and individual respondents have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by engaging in various unfair or deceptive acts and practices and unfair methods of competition in commerce in the sale and repair of automotive transmissions in the District of Columbia. By answers dated October 28, 1966, the respondents denied the allegations of the complaint and affirmatively alleged that their acts and practices are the same in all material respects as those used by their competitors, that if respondents' acts and practices are unlawful, those of their competitors are equally unlawful, and that entry of an order against respondents without simultaneously restricting the similar practices of their competitors would seriously injure respondents and might force them out of business.

Before any hearings were held, on November 14, 1966, respondents filed a motion requesting that proceedings be suspended until the Commission acted to proscribe the allegedly similar activities of their competitors. That motion was denied by the Commission on December 1, 1966 [70 F.T.C. 1833]. Respondents then applied to the hearing examiner for an order to take depositions and for the issuance of supporting subpoenas duces tecum directed to their competitors. The examiner denied the application on December 6, and the Commission, by order dated December 28, 1966 [70 F.T.C 1848], denied respondents' request for permission to file an interlocutory appeal.

After full evidentiary hearings, at which respondents elected not to call any defense witnesses, instead resting their case after presentation of the case-in-chief, the examiner issued an initial decision in which he upheld most of the charges in the complaint but entered an order different from that proposed by complaint counsel. The case is before us on the cross-appeals of respondents and complaint counsel.

Respondents contend primarily that the examiner erred in not dismissing the complaint againt the individual respondent, Walter Dlutz; that the evidence is insufficient to support the charges of violation of Section 5; and that entry of an order against respondents without proceeding against their competitors would not be in the public interest. Complaint counsel argue that the order entered by the examiner is too narrow and would not effectively terminate the violations found to have occurred.

II

The facts are adequately set out in the initial decision and need not be repeated at length here. To the extent they are not inconsistent with findings made in this opinion, the examiner's findings are hereby adopted as those of the Commission.

General Transmissions Corporation of Washington is a corporation organized and doing business under the laws of Washington, D.C., with its principal place of business at 2912 Bladensburg Road in Washington. Respondent William J. Green, Jr., was at all relevant times the corporation's general manager, while respondent Walter Dlutz is president of the corporation, one of its three directors, and its sole stockholder.[1] Respondents are engaged generally in the business of repairing, overhauling, rebuilding, and selling automotive transmissions.

The complaint alleges, and the examiner found, that respondents, through their advertising and by means of oral representations, had made a variety of false and misleading statements concerning the price and quality of their services and the conditions upon which those services would be performed. More important, respondents' whole method of operation was found to be unfair and deceptive, disclosing a common pattern by which a customer was induced to authorize respondents to repair his vehicle by representations as to the low cost of repairs, was later informed of the need for much more extensive repairs than those originally anticipated, and was told that to reassemble and reinstall the transmission without repair would require an additional charge over the advertised price or would be impossible without the supposedly necessary additional work and parts.[2] This method of operation is described by the shorthand label "lo-balling" in the initial decision.

We have read the record and find that the evidence amply supports the examiner's findings in this regard. In addition to testimony cited in the initial decision, it is pertinent to note here the testimony of several witnesses, all of whom were credited by the examiner, indicating the flagrant nature of the violations here found. For example, the customer-witness James T. Smith testified that after test driving his car, respondent Green informed him that the transmission needed new clutches, new seals and a general overhaul and that the cost of these

[1] Respondent Dlutz's wife is the only other officer of the corporation and is also a director.

[2] *Cf. Holland Furnace Co.* v. *Federal Trade Commission,* 295 F. 2d 302 (7th Cir. 1961), *affirming,* 55 F.T.C. 55 (1958); see also *Holland Furnace Co.* v. *Federal Trade Commission,* 269 F. 2d 203 (7th Cir. 1959), *cert. denied,* 361 U.S. 932 (1960).

repairs would be low. (R. 851.) Mr. Smith authorized the repairs. After the alleged overhaul, he encountered more difficulties with the transmission and brought the car back to respondents' place of business. However, he did not identify himself nor did he show his guarantee. After a test drive he was informed that the transmission needed an overhaul, "new clutches and seals, and new bands—the same identical thing he told me the first time. So that is when I sprung the guarantee on him. So, then, he wanted to know why, why I did not show him the guarantee, you know, the warranty, in the first place. * * *" (R. 852.)

Virtually all the other customer-witnesses testified to similar representations by respondents as to the minor nature of the repairs needed and the low cost of their services, designed to obtain the customer's authorization to work on the car, at which point the cost of repairs represented to be necessary would be sharply inflated, but this testimony of Mr. Smith makes clear the systematic nature of these practices. Seen in the context of the pattern established by the testimony of all these witnesses, respondents' dealings with Mr. Smith negate their protestations that all that has been shown is an occasional underestimate of the cost of their services and that there is insufficient evidence to support the examiner's findings that they systematically inveigled customers into authorizing repairs by deliberately misrepresenting the nature and extent of the required repairs and that they had no intention of providing the advertised services at the low advertised prices.[3]

In any event, seemingly conclusive evidence of the fraud here involved is to be found in the testimony of Mr. Smith, and other witnesses familiar with transmissions, who disassembled transmissions on which extensive repairs had allegedly been made by respondents and found that no such repairs had been made. On Mr. Smith's second trip to respondents' establishment, they represented to him that the transmission would have to be rebuilt. After they had allegedly performed these services, the transmission, while operable, continued to perform inadequately. He and a friend who works as a repairman, taking apart and rebuilding transmissions (R. 855, 861), disassembled

[3] In this connection it is worth noting, in addition to the evidence cited in the initial decision, that many of the customer-witnesses experiencing minor difficulty with their automobiles were told an identical story by respondents, that after the transmission had been disassembled it was discovered to contain metal filings which had ruined important parts of the transmission necessitating extensive, and expensive, additional repairs. See, *e.g.*, R. 492 (customer-witness Klein); 776 (customer-witness Schneider); 878, 896 (customer-witness Briscoe); *cf.* R. 588, where the witness Montgomery, who was familiar with transmissions, testified that "an automatic transmission will not operate with any dirt at all on it."

Mr. Smith's transmission [4] and found that repairs alleged to have been made by respondents had not been made and discovered in particular that a major part alleged to have been put in the transmission, a new reverse cone, had not been put in. (R. 855–58.)

Similarly, another customer, William E. Shanklin, testified that respondents had allegedly replaced his torque converter, but that in fact the old converter was never taken off his car and a washer that he had placed on the converter two years before when doing some work on it had not been touched. (R 897–98.) He went on to explain that he later went to court and obtained a decree requiring respondents to place a new factory rebuilt transmission in his car. Respondents purported to perform their obligation under the decree but apparently did not replace the old transmission—a fact that became evident since the supposedly new transmission had the same unpainted, generally dirty appearance of the old one, contained an unusual clamp, not ordinarily found on a transmission, that had been installed by respondents on the old transmission to hold the emergency brake cable in place after respondents had damaged the old cable,[5] and exhibited the same defects in performance as did the former transmission. R. 897–904.

We note also the testimony of the expert witness, Eugene Bair, who repaired the transmission of the witness George E. Sollers less than two months after respondents had allegedly installed a rebuilt transmission. (R. 719, CX 35.) He testified that in his opinion the transmission had not been rebuilt in any recent time and that certain of the "hard" parts [6] were worn and torn up in a way that would have taken "a considerable amount of time to do." He stated that "some cars can run 50,000 miles and never bother" the part of the transmission that he found to be worn and that it would take "quite a bit longer" than 30 days to do the kind of damage that he found. (R 794–97.)

Without belaboring the point and without burdening this opinion with further examples of respondents' practices, some of which are also set out in the initial decision, we think it clear from the record

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[4] Mr. Smith had himself taken apart several transmissions and was well qualified to testify to what he observed when he and his friend worked on the transmission previously "rebuilt" (CX 57) by respondents. R. 856–60.

[5] That respondents damaged the car in working on it was not unusual. Several witnesses testified to the generally sloppy work done by respondents. See, *e.g.*, R. 444–45 (grease all over car, speedometer unhooked), R. 315–16 (car returned without dip stick for testing transmission fluid level); R. 285–87 (car left on the street in a snow storm, respondents later unable to find it after snow stopped).

[6] In the trade the words "soft," "service," or "friction" parts are used to describe parts such as clutches and seals, while the term "hard" parts refers to items like the pump, pump cover, valve body and gears. (R. 813–14.)

that respondents' entire method of operation is tainted by deception and illegality. This is not merely a case of fake or bait advertising, inadequate disclosure of the terms of a guarantee and deceptive use of trade terms, although those elements are indeed present. The record discloses a systematic method of luring customers into authorizing respondents to repair their cars, the transmissions of which, for the most part, exhibited minor defects in performance, by giving low estimates of the cost of the work to be done, followed by the supposed discovery after disassembling the transmission of unexpected defects necessitating much more costly repairs, and a refusal, based on the alleged impossibility of reassembling the transmission, to reinstall the transmission in its original condition. The customer was then confronted with the Hobson's choice of paying a much higher price than had been anticipated, or losing his automobile. Almost invariably the result was that respondents were authorized to do the additional work—which was usually unnecessary and was often not performed—and any repairs made were usually unsatisfactory. In short, the evidence supports the conclusion that respondents engaged in the worst kind of fraud, taking advantage of their own apparent expertise which their customers lacked,[7] and that in many cases they did not make the expensive repairs that they claimed to have made.

In these circumstances respondents' contention that the evidence in the record is insufficient, since there is no evidence as to the volume of their business and the transactions here involved may arguably represent only a small percentage of their sales, is unpersuasive. The present record discloses several cases of willful fraud, embodied in the deliberate nonperformance of services for which payment was received. Even in the unlikely event that these instances represent a small fraction of the total sales made by respondents or even if the bilked customers represent only a small part of the total number of their customers, an order to cease and desist would be justified.[8]

Moreover, the testimony of all the customer-witnesses establishes a clear pattern and reveals a method of doing business so permeated by deception as to negate respondents' contention that there are plausible innocent explanations for the dissatisfaction of their customers and that what is involved here is an occasional mistaken analysis of the

[7] In this connection we note that there is evidence indicating that when respondents showed their customers mangled parts of transmissions alleged to have come from their automobiles, at least in some cases, the worn parts shown to customers did not come from the customer's own car. See, *e.g.*, R. 587–88, 606–08 (customer-witness Montgomery); R. 874–76, 890–91 (customer-witness Eriscoe).

[8] *Cf. Coro, Inc.* v. *Federal Trade Commission*, 338 F. 2d 149, 154–55 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965).

defects in a customer's transmission with a resulting underestimate of the cost of the parts and services necessary to make the required repairs.[9] Respondents cite *Globe Readers Service, Inc.* v. *Federal Trade Commission*, 285 F. 2d 692 (7th Cir. 1961), to support their position. While the proposition of law for which that case is cited is far from settled,[10] it does not, in any event, control the instant proceeding. The record in that case was barren of any evidence that respondents had encouraged or tacitly approved the action of their solicitors found to be unlawful by the Commission—in fact the only available evidence was to the contrary—and there was no evidence of deliberate fraud. It was in that context that failure to introduce evidence as to the percentage of respondents' sales tainted by the deceptive practice was held to render the Commission's finding that respondents had engaged in "bait and switch" practices defective. In the instant case, however, there is both direct evidence of fraud and ample testimony making clear that the deceptions charged are a basic part of respondents' way of doing business.[11]

For similar reasons we reject respondents' contention that this proceeding should be suspended until an investigation of respondents' competitors is completed and proceedings are brought against them. In declining to hear an appeal from the denial of a discovery motion by respondents made on the same ground, we stated:

> An unfair trade practice does not cease to be so because competitors engage in identical practices. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 493–94 (1922). The widespread prevalence of an unfair trade practice neither constitutes a legal defense on the merits to the allegations of a complaint nor provides any reason for the Commission to withhold remedial or corrective action. As previously indicated, the extent to which the allegedly illegal practices are also followed by competitors will be considered by the Commission in exercising its discretionary powers to fashion appropriate relief.[12]

Consideration of respondents' unfair and deceptive business practices, the facts of which are now before us in an adjudicative record

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[9] See initial decision pp. 409–411 and evidence there cited. In particular compare the fluctuating, but consistently low prices advertised by respondents for particular services with the actual prices paid by the customer-witnesses. Initial decision p. 411.

[10] See *National Trade Publications Serv., Inc.* v. *Federal Trade Commission*, 300 F. 2d 790 (8th Cir. 1962), reaching a contrary result on virtually identical facts; *cf. Standard Distributors, Inc.* v. *Federal Trade Commission*, 211 F. 2d 7, 12 (2nd Cir. 1954).

[11] See, *e.g., Standard Distributors, Inc.* v. *Federal Trade Commission*, 211 F. 2d 7 (2nd Cir. 1954); *Consumer Sales Corp.* v. *Federal Trade Commission*, 198 F. 2d 404, 407 (2nd Cir. 1952), *cert. denied*, 344 U.S. 912 (1953); *Steelco Stainless Steel, Inc.* v. *Federal Trade Commission*, 187 F. 2d 693, 696–97 (7th Cir. 1951).

[12] In addition to the *Winsted Hosiery* case, see, *e.g., Federal Trade Commission* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 312–13 (1934); *Independent Directory Corp.* v. *Federal Trade Commission*, 188 F. 2d 468, 471 (2nd Cir. 1951); *Permanente Cement Co.*, Docket No. 7939 (April 24, 1964) [65 F.T.C. 410].

made after a full and fair hearing, compels the conclusion that to delay the issuance of a cease and desist order against these practices would be harmful to the public interest.[13] Respondents' plea that their competitors are engaged in similar practices is based entirely on newspaper advertisements of their competitors that are somewhat similar in content to respondents' advertisements. But, as we have noted, deceptive advertising constitutes only one element of the charges against respondents and the present record discloses an unfair method of operation, and a number of violations of law, the illegality of which does not depend on advertising. The bare citation of similar advertising claims made by respondents' competitors does not show that their competitors fail to perform in accordance with those claims and certainly does not establish that the fraudulent course of conduct shown in this record reflects a broader industrywide pattern. Nor has there been any showing that requiring respondents to advertise and perform their services honestly, fairly and in accordance with the law will adversely affect their business or place them at a competitive disadvantage. Especially where an industry is rife with fraud, an honest seller should have no trouble attracting—and keeping—customers. In view of the injury to the consuming public that would occur were respondents permitted to continue their illegal activities, we think that the sooner an appropriate order is issued, the better it will be for the public.[14]

III

The order entered by the examiner is not completely adequate to eliminate many of respondents' illegal practices and therefore it must be modified in certain respects. More specifically, the examiner limited his order to prohibit deceptive practices only "in connection with the advertising, offering for sale and sale, repair and servicing of automobile transmissions and related parts. * * *" No reason is given for so limiting the order. It is true that the practices giving rise to this proceeding concern the sale and repair of transmissions but it would be relatively easy for respondents to utilize their present illegal tactics in

[13] In this regard we note that among respondents' customers are the poor and the uneducated on whom the burden of paying respondents' inflated charges weighs most heavily and who are least equipped to seek redress from respondents either informally or by resort to the courts.

[14] See, *e.g.*, *Federal Trade Commission* v. *Universal-Rundle Corp.*, 387 U.S. 244 (1967); *Moog Industries* v. *Federal Trade Commission*, 355 U.S. 411 (1958), *affirming inter alia*, *C. E. Niehoff & Co.*, 51 F.T.C. 1114, 1153 (1955); *Benrus Watch Co.* v. *Federal Trade Commission*, 352 F. 2d 313, 321 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *Clinton Watch Co.* v. *Federal Trade Commission*, 291 F. 2d 838, 840–41 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962); see also authorities cited, *supra*, note 12.

connection with the sale and repair of other automobile parts—for example, mufflers, brakes, or even engine tune ups and overhauls [15]—or in connection with the sale and repair of radios, television sets, home appliances and a number of other products. Nor is it unrealistic to fear that respondents might switch to one of these related fields in an effort to evade the Commission's order. In view of the ease with which respondents' deceptive practices could be adapted to other fields and in view of the magnitude of the deceptive practices here found and their effect on consumers, we think respondents should be prevented from engaging in their deceptive and fraudulent practices in connection with the sale of any other product or services.[16] We are therefore modifying the order to give it broader applicability thus preventing evasion of the order or recurrence in any other guise of the fraudulent activities revealed in this record. Should respondents in fact discontinue their transmission business at some future time to enter a wholly different form of business as to which the operation of the Commission's order may prove unduly burdensome, Section 3.72(b)(2) of the Commission's Rules provides a procedure by which respondents can move to reopen and to modify the order in light of such changed conditions.[17]

Our order is intended to eliminate each of the deceptive activities disclosed in this record, and to require respondents to perform their services honestly and fairly without misrepresenting the cost to their customers. It proscribes the practice of attracting customers by advertising low prices for services or giving low estimates of the cost of necessary repairs when in fact respondents do not intend to perform the advertised service at the advertised price or when the estimate is either deliberately understated or is inaccurate because of the impossibility of analyzing the defect without disassembling the transmission. Also prohibited is respondents' practice, once having obtained authori-

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[15] See, *e.g.*, CX 50, an advertisement of respondents which indicates that they repair "transmissions and motors."

[16] See, *e.g.*, *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394–95 (1965); *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428–31 (1957); *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473–75 (1952); *Benrus Watch Co.* v. *Federal Trade Commission*, 352 F. 2d 313, 324 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F. 2d 337, 342–43 (7th Cir.), *cert. denied*, 364 U.S. 883 (1960); *P. Lorillard Co.* v. *Federal Trade Commission*, 186 F. 2d 52, 58–59 (4th Cir. 1950); *cf. Gulf Coast Aluminum Supply, Inc.*, Docket No. 8662 (March 25, 1967) [71 F.T.C. 339]; *The Empeco Corp.*, Docket No. 8702 (February 14, 1967) [71 F.T.C. 158]; *Panat Jewelry Co., Inc.*, Docket No. 8660 (February 8, 1967) [71 F.T.C. 99].

[17] *Cf. Consumer Sales Corp.* v. *Federal Trade Commission*, 198 F. 2d 404, 408–09 (2nd Cir. 1952), *cert. denied*, 344 U.S. 912 (1953); see also Section 3.61(c) of the Rules, which provides an expeditious method for a respondent to secure advice from the Commission as to whether a proposed course of action complies with an outstanding order.

zation to repair an automobile, of inflating the cost of repairs and refusing to replace the transmission in its original condition, leaving the customer no real choice but to authorize the more expensive repairs. The evidence establishes that another integral element in respondents' illegal course of dealing is their refusal to provide their customers with itemized statements of the parts and labor required to repair the transmissions.[18] Since others in this trade routinely provide such statements,[19] requiring respondents to do so will not put them at any competitive disadvantage.

These provisions of the order, together with a provision obligating respondents not to misrepresent the services actually performed and permitting them to charge only for services that have in fact been performed, strike at the heart of respondents' deceptive practices. They are not intended to put respondents out of business or to make it impossible for them to compete, nor should they have this effect. All that is required is that respondents carry on their business honestly, free of fraud and deception. Our order will not prevent respondents from giving potential customers an estimate as to the cost of repairs in cases where external observation and/or a test drive permit a reasonably accurate diagnosis of the defects in a car. However, in cases where an accurate estimate is impossible, none may be given, and, if the original analysis, although bona fide, proves faulty, respondents must promptly [20] inform the customer and must stand ready in every case to replace the transmission in its original condition at a specific price clearly stated to the customer *before* his transmission is disassembled.[21] We recognize that our order may create problems of proof in any penalty proceeding that might arise which an order containing absolute proscriptions on the giving of estimates or price advertising would not, but we are reluctant at this stage to restrict respondents in the conduct of their business any more than appears necessary to terminate the fraud here found. [22] On the other hand, any less stringent order than that here entered would create too many possibilities of evasion, thus jeopardizing the public interest and rendering the proceeding a nullity. While the order may limit respondents' freedom of action, they

[18] See initial decision pp. 414–415.

[19] See R. 839; CX 46; *cf.* R. 259.

[20] The record contains numerous examples of extended delays by respondents in making repairs or in contacting customers to tell them of the need for further repairs. See *e.g.*, R. 250–51 (customer-witness Jacobs); R. 312–13 (customer-witness Stiles).

[21] See, *e.g.*, R. 441–42.

[22] In view of the difficulty of drafting orders in language so explicit that it cannot be evaded by a wily or cunning respondent who wants to do so, and in view of the Commission's limited resources devoted to enforcement of orders, we must rely, to a certain extent, on the good faith of a respondent under almost any cease and desist order.

"must remember that those caught violating the Act must expect some fencing in." [23]

Similarly, advertising the price of particular services such as a reseal job or an inspection is not forbidden, although an absolute ban would be easier to enforce, but is permitted on condition that the advertisement also disclose that there are many defects in transmissions which require additional parts and labor to repair and that such repairs cost substantially more than the advertised price.[24] There is, of course, a possibility that advertising permitted by this provision might be used by respondents as a subterfuge to conceal their continuation of practices found to be illegal, but related provisions of the order barring the use of a scheme or device by which misleading statements are used to obtain leads and barring the use of representations purporting to offer particular merchandise or services for sale when the offer is not bona fide are intended to obviate the risk that advertising which seemingly complies with this provision in fact conceals conduct that the order is intended to stop. Since we think the order will be effective as drawn, we reject complaint counsel's contention that a more stringent order is necessary.

The remaining paragraphs of the order are directed to the other deceptive practices here found. Use of the term "factory rebuilt" is forbidden except where used to describe a transmission rebuilt in a factory engaged in such rebuilding.[25] Similarly, we find substantial support in the record for the examiner's finding that respondents' advertised representations as to free towing, one day service, easy credit terms and no down payment are illusory,[26] and our order proscribes any such representations. We also find that the evidence establishes that customers were misled or under a misapprehension as to the meaning of the term "overhaul" used in respondents' advertisements, and as to what services would be performed as part of the advertised "overhaul" and what parts would be replaced.[27] We do not find that respondents have established a trade use of the term limiting it to replacement of soft parts,[28] and in any event, such trade use would not

[23] *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431 (1957), citing *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 187 (1944).

[24] See footnote 9, *supra*.

[25] Respondent Dlutz testified that respondents do not sell factory rebuilt transmissions in their Washington operation (R. 208) although the evidence establishes that they purported to sell and install such transmissions. See, *e.g.*, CX 11; R. 257–58, 263–64 (customer-witness Jacobs).

[26] Initial decision p. 411.

[27] See, *e.g.*, R. 593, 637–40 (customer-witness Montgomery), R. 725–26 (customer-witness Sollers), R. 778–79 (customer-witness Schneider), R. 858, 865–66 (customer-witness Smith).

[28] See RX 1; R. 194–95 (respondent Dlutz), R. 810–12, 818, 834–39 (mechanic-witness Bair).

require us to permit respondents to continue to use the term in a way that deceived consumers.[29] The order therefore permits the use of this term only if in conjunction therewith full disclosure is made of the parts that will be replaced in connection with the overhaul, and their price if purchased separately, and disclosure is also made either of the parts that will not be replaced, as well as their price or of the fact that in many cases substantial additional costs will be incurred if parts other than those regularly included in the overhaul are needed to repair the transmission.

Finally, the order requires respondents to reveal all the terms and conditions of any guarantee given, the manner in which it will be performed, and the identity of the guarantor. Respondents' failure to make clear to their customers the nature and duration of the guarantee, and their apparently willful attempts to avoid fulfilling the guarantee are set out at length in the record.[30] Our order will prevent respondents from again engaging in these practices or otherwise using their guarantee to deceive their customers. It imposes no greater obligation than elementary principles of fair dealing require.[31]

IV

Respondent Walter Dlutz contends that the examiner erred in applying the proscriptions of the order to him in his individual capacity. There is overwhelming support in the record for the exam-

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[29] See, *e.g.*, *DeGorter* v. *Federal Trade Commission*, 244 F. 2d 270, 282 (9th Cir. 1957); see also cases cited, *supra*, note 12.

[30] See, *e.g.*, R. 391–92 (customer-witness E. L. Holt); R. 589–90 (customer-witness Montgomery); R. 681–82 (customer-witness Satterfield); R. 777, 779–80 (customer-witness Schneider); R. 852 (customer-witness Smith). We note that respondents have renewed their motion to have the testimony of the witness, Mr. Schneider, stricken on grounds of relevancy and on the ground that his dealings were with respondents' short-lived Maryland operation, not the Washington, D.C., outlet, and he is a Maryland resident. Respondents argue that this transaction was intrastate and thus not subject to the Commission's jurisdiction. The evidence clearly establishes the connection of the individual respondents with the Maryland operation which respondent Dlutz testified that he owned (R. 240; see also R. 775), and respondents advertised both outlets in newspapers that crossed State lines. See, *e.g.*, CX 5a–f. While the complaint names only the Washington, D.C., outlet in describing respondents' deceptive practices, it does name both respondent Dlutz and respondent Green individually. Evidence as to their related activities in Maryland was therefore plainly admissible. See, *e.g.*, *Holland Furnace Co.* v. *Federal Trade Commission*, 269 F. 2d 203 (7th Cir. 1959), *cert. denied*, 361 U.S. 932 (1960); *Consumers Home Equipment Co.* v. *Federal Trade Commission*, 164 F. 2d 972, 973 (6th Cir. 1947); *C. E. Niehoff & Co.*, 51 F.T.C. 1114, 1143 (1955).

Moreover, the fact that this outlet was advertised in interstate commerce negates respondents' jurisdictional objection quite apart from the fact that the Maryland outlet was in competition with a number of businesses in interstate commerce (see, *e.g.*, CX 48, 49; *cf.* R. 861) and probably drew customers across State lines. See *S. Klein, Inc.*, 57 F.T.C. 1543, 1544 (1960), complaint dismissed on other grounds, 60 F.T.C. 388 (1962).

[31] See, *e.g.*, *Montgomery Ward & Co.* v. *Federal Trade Commission*, 379 F. 2d 666 (7th Cir. 1967); see generally Guides Against Deceptive Advertising of Guarantees.

iner's finding and we adopt it. It is perhaps true that respondent Dlutz did not work regularly at the Washington, D.C., outlet repairing transmissions, although it seems clear from the testimony of customer-witness Alan Hayes (R. 438–40, 457–61) that Mr. Dlutz worked on his car in the spring of 1966 and made representations to him similar to those made to the other witnesses and fitting perfectly the pattern of deception here established. Mr. Dlutz himself testified that he worked at the Washington outlet for two weeks in July of 1966.

However, we need not rely on these indicia of respondent's involvement, important though they be. Respondent Dlutz is the sole stockholder of the corporate respondent, its president and one of its three directors. It is he who hired the manager and ordered the equipment for the Washington, D.C., place of business; he signed the lease for the corporation, and he ordered merchandise for it;[32] all records were kept in his Philadelphia office, transmitted there daily from Washington, and all bookkeeping was done there;[33] most bills were paid from that office, and only respondent Dlutz, his wife, and, for the past year, Mr. Green, had the authority to sign corporate checks.[34]

Despite respondents' contrary protestations, we think it is also clear that he had full knowledge of the way in which the Washington operation was being run, quite apart from his own participation in those activities noted above. The testimony of the witness Samuel Klein (R. 490, 502) and the letter he wrote to respondent Dlutz (CX 39), negate respondent's contention that he never received any complaints from customers of the Washington operation (R. 211) that he was only vaguely aware of what went on in Washington (R. 213), and that, apart from signing the checks, he was not involved in the settlement of claims against the Washington corporation.[35] His denials are also contradicted by the credited testimony of customer-witnesses who were informed by respondents in Washington that settlements had to be approved by the Philadelphia office or by the president who was in Philadelphia.[36] The examiner was not required to accept respondents' rather flimsy denials of his complicity.[37] We hold that on all the facts

[32] See, *e.g.*, CX 16, 40, 41, 52a–54b, 63B, par. 3; R. 152–56, 230–31.

[33] R. 159–61; 767.

[34] R. 215.

[35] Respondent did admit, however, that he had been informed:

"[N]ot only by management in Washington but also by various attorneys in Washington that the Washington district seems to be one of the areas that is more prone for lawsuits, and I accepted this as such. This was brought to my attention by attorneys in Washington and by management in Washington."

[36] See R. 320 (customer-witness Stiles); R. 543 (customer-witness McDonald); R. 887, 890 (customer-witness Briscoe).

[37] See, *e.g.*, *Guziak* v. *Federal Trade Commission*, 361 F. 2d 700, 704 (8th Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967).

in this record, the examiner's conclusion that respondent Dlutz formulates, directs, and controls the policies, acts, and practices of the corporate respondent is clearly correct.[38]

Respondent Dlutz cites *Coro, Inc.* v. *Federal Trade Commission*, 338 F. 2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965), and *Bankers Securities Corp.* v. *Federal Trade Commission*, 297 F. 2d 403 (3rd Cir. 1961), as indicating that it would be error to join him in his individual capacity. We do not agree. In both of those cases the reviewing court recognized that the proper scope of a cease and desist order depends on the facts of each case. The *Coro* case involved a large widely held public corporation, control of which was not vested in a single man; the violation of law there charged did not involve the kind of blatant fraud found in this case, and the possibility that the individual respondent might attempt to evade the Commission's order, making it a nullity, was far more remote than it is here.[39] In that situation, the failure of complaint counsel to adduce evidence of some personal involvement by the individual respondent in the unlawful activity charged, evidence that is not lacking in the present case, was held to require dismissal of the complaint as to that individual.[40]

Similarly, in the *Bankers Securities* case the corporate respondent was engaged primarily in the real estate business, but operated as a single separate and distinct division, a retail department store known as Snellenbergs. It also was a stockholder in various corporations that owned and operated retail stores, but there was no showing that respondent's stock ownership gave it any control over the activities of those corporations or that it exercised or even attempted to exercise any "authority over management functions, particularly advertising practices and policies, of any such operating corporation." The order would have subjected respondent to the risk of "a contempt citation if at any time in the future another corporation, in which it owns a substantial stock interest, does what Snellenbergs has done," a risk that the court thought unjustifiable in view of the absence of any

[38] See, *e.g.*, *Guziak* v. *Federal Trade Commission*, 361 F. 2d 700, 704 (8th Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967); *Benrus Watch Co.* v. *Federal Trade Commission*, 352 F. 2d 313, 324–25 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F. 2d 351, 367–68 (9th Cir. 1966), appeal argued November 6, 1967, 36 U.S. L. Week 3201; *Consumer Sales Corp.* v. *Federal Trade Commission*, 198 F. 2d 404, 407–409 (2d Cir. 1952), *cert. denied*, 344 U.S. 912 (1953); *Steelco Stainless Steel, Inc.* v. *Federal Trade Commission*, 187 F. 2d 693, 697 (7th Cir. 1951); *Sebrone Co.* v. *Federal Trade Commission*, 135 F. 2d 676, 678 (7th Cir. 1943).

[39] See, *e.g.*, *Federal Trade Commission* v. *Standard Educ. Soc'y*, 302 U.S. 112, 119–20 (1937); *cf. Goodman* v. *Federal Trade Commission*, 244 F. 2d 584, 593–94 (9th Cir. 1957).

[40] *Cf. Benrus Watch Co.* v. *Federal Trade Commission*, 352 F. 2d 313, 324–25 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966), and *Clinton Watch Co.* v. *Federal Trade Commission*, 291 F. 2d 838, 841 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962), reaching an opposite result to that reached in the *Coro* case on somewhat similar facts.

willful wrongdoing by respondent and the generally insubstantial nature of the violation charged. In the present case, respondent Dlutz is not a mere passive investor in the Washington operation, oblivious of the practices being followed by his agents, although even in such circumstances he could be subjected to a cease and desist order;[41] on the contrary, his control of the corporation, its policies and practices, his responsibility for the violations charged, as well as their fraudulent nature, have all been shown. Failure to subject either the respondent Dlutz or the respondent Green to our order would eviscerate it and insure its ineffectiveness. We hold that the order was properly directed against respondent Dlutz in his individual capacity.

We have considered the other objections raised by respondents and find them to be without merit. The findings and conclusions of the hearing examiner, except to the extent they are inconsistent with this opinion, are adopted as the findings and conclusions of the Commission. The examiner's order is modified and an appropriate order will be entered in accordance with this opinion.

Commissioner Nicholson did not participate for the reason oral argument was heard prior to his appointment to the Commission.

Final Order

This matter has been heard by the Commission on the cross-appeals of complaint counsel and respondents from the initial decision of the hearing examiner filed on March 16, 1967. The Commission has rendered its decision denying respondents' appeals in all respects, granting complaint counsel's in part, and adopting the findings of the hearing examiner to the extent they are consistent with the opinion accompanying this order. Other findings of fact and conclusions of law made by the Commission are contained in that opinion. For the reasons therein stated, the Commission has determined that the order entered by the hearing examiner should be modified and, as modified, adopted and issued by the Commission as its final order. Accordingly,

It is ordered, That respondents, General Transmissions Corporation of Washington, a corporation, and its officers, and Walter Dlutz, individually and as an officer of said corporation, and William J. Green, Jr., individually and as an agent of said corporation, and their agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, repair, overhauling, rebuilding, offering for sale, sale or distribution of any transmission,

[41] *Cf. Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F. 2d 351, 368 (9th Cir. 1966), appeal argued November 6, 1967, 36 U.S. L. Week 3201; *Consumers Home Equipment Co.*, 164 F. 2d 972, 973 (6th Cir. 1947).

motor, or other automotive component, or any other product or service in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Misrepresenting, in any matter, the nature, extent or quality of any mechanical adjustment, replacement of parts or components, or any other repairs performed on any automobile transmission, other automotive component, or any other product;

2. Misrepresenting, in any manner, the nature, cost or extent of any services rendered or parts used in repairing any automobile transmission, other automotive component, or any other product, or charging for any services not in fact performed or parts not in fact used;

3. Representing, in any manner, that removal, dismantling, inspection, or any similar service will be performed on an automobile transmission, other automotive component, or any other product or component thereof, when the estimate quoted or price advertised for such service does not include reassembly and replacement of the component in the car, or other product, in its former condition;

4. Quoting or estimating a price for repairing an automobile transmission, other automotive component, or any other product, before determining by inspection, or by some other reasonable method, the nature and extent of the repairs needed so that the quoted or estimated price accurately reflects the actual price of the needed repairs;

5. Advertising the price of particular services such as an overhaul, inspection, or reseal job, unless in conjunction therewith disclosure is made, in a prominent place and in a type size that is easily legible, that there are many possible defects in an automobile transmission, other automotive component, or other product, for which the advertised services are ineffective and which require additional parts and labor to repair and that such repairs will cost substantially more than the advertised price;

6. Representing, directly or by implication, that any merchandise or service is offered for sale when such offer is not a bona fide offer to sell said merchandise or service;

7. Representing, directly or by implication, that any merchandise or service is offered for sale when the purpose of the representation is to sell the offered merchandise or service only in connection with the sale of other merchandise or services;

8. Using, in any manner, a sales plan, scheme or device wherein false, misleading or deceptive representations are made in order

to obtain leads or prospects for the sale of merchandise or services or to induce sales of any merchandise or services;

9. Obtaining any agreement or authorization from any customer to repair or otherwise service any automobile or other product without:

(a) Specifically listing in such agreement or authorization the extent, nature, and actual cost of the repairs to be performed;

(b) Promptly disclosing to the customer the precise extent, nature and cost of such repairs prior to performance thereof, if, despite respondents' best efforts accurately to estimate the cost of repairs in advance, the extent, nature, or cost of the needed repairs differs in any degree from what was set out in such agreement or authorization;

(c) Performing according to such agreement or authorization or returning said vehicle in its original condition at a specific price agreed to in advance and fully set out in said authorization;

10. Failing to provide all customers, at the time they are billed, with an itemized list of parts and labor including in the repair, overhaul, reseal, rebuilding or other service performed on an automobile transmission, other automotive component, or other product, repaired or serviced by respondents or any one of them;

11. Falsely representing, in any manner, that transmissions rebuilt by the respondents are factory rebuilt; that transmissions rebuilt other than in a factory generally engaged in such rebuilding are factory rebuilt; that the respondents offer for sale factory rebuilt transmissions;

12. Using the term "overhaul" to refer to any transmission service which does not include the removal, disassembly, and replacement of all worn parts, hard or soft, and the reassembly in reinstallation of the transmission in the vehicle, unless in conjunction with the use of the term "overhaul," in a prominent place and in type that is easily legible, disclosure is made of:

(a) The parts that will be replaced in connection with the "overhaul" and are included in the overhaul price, as well as their price if purchased separately, and

(b) The parts that will not be replaced as part of the overhaul and their price, and/or

(c) The fact that in many cases substantial additional costs will be incurred if parts other than those regularly in-

cluded in the overhaul must be replaced in order to repair the transmission;

13. Representing that any article of merchandise or service is guaranteed, unless all of the terms and conditions of the guarantee, the identity of the guarantor, and the manner in which the guarantor will in good faith perform thereunder are clearly and conspicuously disclosed, and, further, unless all such guarantees are in fact fully honored and all the terms thereof fulfilled;

14. Using the word "free" or any other word or words of similar import, as descriptive of an article of merchandise or service: *Provided, however*, That it shall be a defense in any enforcement proceeding hereunder for respondents to establish that in fact no charge of any kind, directly or indirectly, is made for such article of merchandise or service;

15. Using the terms "no money down," "E-Z Credit" or "easy credit," or any word or words of similar import, in connection with respondents' offer to sell any merchandise or services.

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 of their compliance with this order.

Commissioner Nicholson not participating for the reason oral argument was heard prior to his appointment to the Commission.

IN THE MATTER OF

DIRECTIONAL CONTRACT FURNITURE CORP.

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

*Docket 8741. Complaint, July 21, 1967—Decision, Feb. 23, 1968**

Consent order requiring a New York City wholesaler of furniture to cease discriminating in price among competing resellers of its furniture in violation of Section 2(a) of the Clayton Act, withholding date of compliance.

COMPLAINT

The Federal Trade Commission, having reason to believe that Directional Contract Furniture Corp., the party respondent named in the caption hereof and hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection

*Order setting date of compliance dated Dec. 8, 1969.