

Decision

IN THE MATTER OF
THE ORLOFF COMPANY, INC., ET AL.

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

Docket 6184. Complaint, Feb. 24, 1954—Decision, Jan. 27, 1956

Order requiring an assembler and distributor of its "Geneva" brand watches to cease affixing to them tags printed with fictitious and excessive prices, thereby furnishing retailers with means of deceiving members of the purchasing public as to the usual retail prices.

Mr. Frederick McManus for the Commission.

Mr. Sydney C. Orlofsky, of Philadelphia, Pa., for respondents.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER

STATEMENT OF THE CASE

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on February 24, 1954, issued and subsequently served its complaint in this proceeding upon the respondents named in the caption hereof, charging them with use of unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of the provisions of said Act. Said respondents appeared by counsel and filed their joint answer to the complaint. Thereafter, counsel in support of the complaint and counsel for respondents entered into a stipulation as to the facts dated November 12, 1954,¹ in which it was stipulated and agreed that, subject to the approval of the hearing examiner, the statement of facts therein set forth may be made part of the record and may be taken as the facts in this proceeding in lieu of evidence in support of the charges stated in the complaint, or in opposition thereto, and that the hearing examiner may proceed upon said statement of facts to make his initial decision, stating his findings as to the facts, including inferences which he may draw from said stipulation, and his conclusion based thereon, and enter his order disposing of the proceeding without the filing of proposed findings and conclusions or the presentation or oral argument, but reserving to counsel the right to file briefs in support of their respective positions. There-

¹ Prior to the above-mentioned stipulation as to the facts, the parties entered into a stipulation as to the facts dated July 12, 1954. Said stipulation was thereafter rejected by order of the hearing examiner, dated September 22, 1954, for the reason that it was characterized by such ambiguity and lack of clarity as not to afford a proper basis for the issuance of an initial decision based thereon.

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after, this proceeding regularly came on for final consideration by the above-named hearing examiner, theretofore duly designated by the Commission, upon the complaint, the answer and the aforesaid stipulation as to the facts, said stipulation being hereby approved as affording the basis for an appropriate disposition of this proceeding and being hereby ordered filed as part of the record in this proceeding by the hearing examiner who, after considering the record herein, finds that this proceeding is in the interest of the public and makes the following findings as to the facts, conclusion drawn therefrom, and order:

FINDINGS AS TO THE FACTS

I. The Business of Respondents

Respondent, The Orloff Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business at 116 South 7th Street, Philadelphia, Pennsylvania. It is now, and for more than two years last past has been, engaged in the assembly, sale and distribution of watches under the brand name "Geneva." Said watches are sold to retailers for resale to the purchasing public. Respondents Michael Orloff, Hyman J. Orloff and Harry Orloff are president, vice president and secretary-treasurer, respectively, of said corporation. These individuals formulate, direct and control the policies, acts and practices of said corporate respondent, including those hereinafter referred to. Their address is the same as that of corporate respondent.

II. Interstate Commerce and Competition

In the course and conduct of their business, respondents now cause, and for some time last past have caused, their watches, when sold, to be transported from their place of business in the State of Pennsylvania to purchasers thereof located in other States of the United States and in the District of Columbia. Respondents maintain and at all times mentioned herein have maintained, a substantial course of trade in their said watches in commerce between and among the various States of the United States and the District of Columbia.

Respondents at all times mentioned herein have been in substantial competition with other corporations, persons, firms, and partnerships engaged in the sale of watches of like quality as those sold by respondents in commerce between and among the various States of the United States and the District of Columbia.

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III. The Unfair Practices

A. *The charges*

The complaint alleges that respondents affix price tags to their watches with amounts thereon greatly in excess of the prices at which respondents' watches are usually and regularly sold at retail. The gravamen of the violation charged is that respondents, by affixing price tags containing fictitious amounts to their watches, have placed in the hands of retailers a means and instrumentality whereby the retailers may mislead and deceive the purchasing public as to the usual and regular prices of their watches.

B. *The stipulated facts*

The facts with respect to respondents' method of operation in the sale of their watches have been stipulated, and are found, to be as follows:

1. Respondents in the course and conduct of their business and before shipping their watches to customers, affix price tags to the majority of such watches, on which price tags are printed the following prices: \$33.75, \$47.50 and \$71.50.

2. Respondents do not sell their watches to the ultimate consumer.

3. Respondents' watches are, with the knowledge of respondents, displayed and resold by respondents' customers with the price tags described in paragraph 1 above, attached thereto. The prices at which respondents' said customers resell such watches at retail are \$17.95, \$19.95, and \$22.95, which fact is known to the respondents.

4. The amounts set forth on the price tags attached by respondents are greatly in excess of the prices at which said watches are usually and regularly sold at retail.

5. The determination of whether the price tags affixed by respondents shall or shall not be attached to the watches at the time of their resale to the ultimate consumer is made by respondents' purchasers and not by respondents.

6. Respondents' Geneva watches are sold to the public over the counter by jewelry stores, specialty shops, and department stores.

C. *The contentions of respondents*

Counsel for respondents in the brief filed by him has advanced a number of arguments, reasons and contentions as to why no case has been made out against respondents. These fall into two main categories and may be summarized as follows:

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1. Since the instances in which watches are sold at less than the tag prices are "infrequent" and occur only during the course of "isolated sales," there is nothing false or misleading in representing that the prices appearing on the price tags are the normal and regular prices at which such watches are sold at retail.

2. Since respondents do not control the prices at which the retailer sells to the public and have no knowledge at the time of shipping the watches whether the price tags will remain affixed thereto at the time of resale, or as to the prices at which the watches will be resold, they cannot be held accountable for the acts of retailers in selling watches with tags attached at prices below those indicated on the tags.

Respondents' arguments and contentions are based largely on facts and claimed inferences from facts which are either contrary to the facts which have been stipulated, or are not justified by the stipulated facts. Respondents' contentions are considered below in the light of the actual facts stipulated by counsel and the reasonable inferences to be drawn therefrom.

1. In order to establish that respondents' price tags contain false and misleading representations as to price, it is necessary to show that the watches to which such tags are attached are not usually and regularly sold at the tag prices but at substantially lower prices. Apparently addressing himself to this aspect of the case, counsel for respondents contends that it is a fair inference from the stipulated facts that "the only time the Respondents' watches are ever sold at a price less than the prices appearing on the price tags is in the course and conduct of isolated sales." These instances, counsel states, "are special occasions and not the normal or usual practice." Counsel further contends that it is a fair inference from the facts that "in the normal course when price tags are attached, such watches are sold at the prices appearing on the tags."

The hearing examiner can find nothing in the stipulated facts which even remotely supports the inferences which counsel has sought to draw therefrom. The stipulated facts are (a) that the "majority" of respondents' watches are sold to retailers with the price tags attached; (b) that "[r]espondents' watches are, with the knowledge of respondents, displayed and resold by respondents' customers with the price tags * * * attached thereto"; (c) that "such watches" are resold at retail at specified prices substantially below those listed on the tags; and (d) that the amounts appearing on the tags "are greatly in excess of the prices at which said watches are usually and regularly sold at retail." It has also been stipulated that counsel supporting the complaint could produce "reputable and

credible witnesses who would testify that they at all times sell respondents' watches with the price tags attached" and at specified prices substantially below the tag-indicated prices.

In the light of these facts there is not the slightest basis for any finding that the only time watches with tags attached are sold at below-tag prices is on "infrequent occasions" and in the course of "special sale events." In fact, there is nothing in the stipulated facts to justify a finding that any of respondents' watches has ever been sold at the prices indicated on the tags. On the contrary, the only reasonable inference which can be drawn from the stipulated facts is that with respect to the watches sold by respondents with price tags attached, they are generally resold by the retailer with the price tags attached and at prices substantially below those indicated on the tags.

Counsel for respondents refers to the fact that a large number of watches "which comprise only one less than the majority" are sold by respondents without any price tags attached. Aside from the fact that the record does not establish whether any considerable number of watches are sold by respondents without retail price tags, this fact has no material significance. This proceeding is not concerned with those watches which are sold by respondents without price tags. It is only with respect to those sold by respondents with price tags, which under the stipulated facts involve at least the majority of their watches, that it is claimed respondents have fathered an instrumentality for deception.

2. Counsel's second argument is based on respondents' alleged lack of knowledge and control as to their customers' use of the tags and the prices charged by them. Counsel contends in this connection that (a) respondents have no "apperceptive" knowledge at the time of shipping the watches that they will be resold with the tags attached, or that they will be resold at prices below those appearing on the price tags, and that (b) in any event, they have no control over the use made by their customers of the price tags or as to the prices charged by them.

Counsel's version of the facts is not supported by the record and is based on a misapplication of the facts and the law. By lack of "apperceptive" knowledge, the examiner assumes counsel means that respondents do not have any actual knowledge in advance that any given shipment of watches will in fact be resold with the price tags affixed and at prices below those indicated on the tags. Aside from the facts that there is nothing in the record to support any such finding, respondents' lack of "apperceptive" knowledge is of no significance in view of the stipulated facts that (a) respondents'

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watches which have been sold with price tags are, "with the knowledge of respondents," resold to the ultimate consumer with the price tags attached and (b) that the prices at which they are resold are certain specified prices substantially below those listed on the tags, "which fact is known to the respondents." Counsel concedes in his brief that respondents do know, "but only retrospectively," that a "large number" of their watches will be resold at below-tag prices. Whether or not respondents have actual knowledge in advance that each and every watch sold by them with price tags will be resold with the tags attached and at below-tag prices is not controlling, since it is clear from the stipulated facts, and is so found, that respondents know or have reason to believe that in the normal course of events their watches will be resold with the price tags attached and at prices substantially below those listed on the tags. The fact that a customer could conceivably, if he chose, remove a price tag before resale or possibly resell the watch at the tag-indicated price, does not gainsay the fact that respondents are chargeable with knowledge of the ordinary business "facts of life" concerning what happens to their product.

In addition to his argument based on respondents' alleged lack of "apperceptive" knowledge as to what their customers do with the tags, counsel also relies upon respondents' lack of control over their customers both with respect to their use of the tags and as to the prices at which the watches will be resold. However, counsel chooses to overlook the fact that respondents are aware that, generally speaking, the watches which they sell with tags attached will be resold to the public with the tags remaining thereon and at prices substantially below the tag-indicated prices. Respondents cannot therefore insulate themselves from responsibility for the natural consequences of their acts on the specious theory that their customers are "free agents." It is elementary that one who puts into the hands of another a means or instrumentality by which that other may mislead the public, is himself the public, is himself guilty of deception.²

Counsel for respondents seeks to distinguish the instant situation from that involved in the cases where the above principle has been applied, on the ground that in those cases the respondent was the "author" of an instrumentality which was inherently deceptive, whereas here—

"the Respondents do not furnish a product specifically designed for the purpose of furthering a practice which is illegal. The mere fact

² *F.T.C. v. Winsted Hosiery Co.*, 258 U.S. 483; *Irwin v. F.T.C.*, 143 F. 2d 316 (C.A. 8, 1944).

that some (and from the facts, very few) retailers misuse the tickets should not be sufficient to hold the Respondents subject to a vicarious liability for their actions."

The distinction which counsel seeks to make is based upon a state of facts not supported by the record and is, moreover, an immaterial one. It has not been established that "very few retailers misuse the tickets." On the contrary, as has already been found, the watches sold by respondents with tags are generally resold with the tags attached and at prices below those indicated on the tags, and respondents know, or have reason to believe, that their watches are being so merchandised. There is, in fact, no evidence that such watches have ever been sold at the tag prices. Since the normal use to which the tags are being put is one which, to respondents' knowledge, is a deceptive one, it is of no consequence that the tags are not inherently deceptive in the sense that they could conceivably be put to a non-deceptive use by respondents' customers.

In support of his position, counsel for respondents cites a number of cases dealing with the sale of gambling devices which he interprets as holding that in a "means and instrumentality" case the illegal use of the device must be the "only" use which can be made of the device, and that the mere fact the device "may be" used for illegal purposes is not enough. While it is true that the mere fact a device "may be" misused by third persons is not itself sufficient to charge its author with responsibility therefor, it does not follow that he cannot be held accountable unless the device can "only" be used for illegal purposes. It is sufficient, in the opinion of the examiner, to hold the originator of the means or instrumentality if the device which he distributes is generally used by his distributors for deceptive purposes, and the originator is aware that his distributors are making such use of the device furnished by him.

It is absurd to suppose that respondents would continue to engage in the empty and financially wasteful practice of supplying retail price tags to their customers if such tags were not being used by the customers to advantage in the sale of respondents' watches.³ Since they are aware that the watches to which such tags are attached are usually and regularly sold at substantially lower prices, respondents must also obviously be aware that the device which they have furnished is being used for deceptive purposes. Respondents cannot therefore deny their authorship of, or escape responsibility for, a device which to their knowledge is being widely used for deceptive purposes.

³ See *Seymour Sales Co.*, Docket No. 6060, Dec. 1, 1953, affirmed sub nom., *Seymour Sales Co. v. F.T.C.*, App. D. C., Nov. 4, 1954; *Benmar Sales Co.*, Docket No. 6128, Dec. 17, 1954.

D. Concluding findings

Based on the stipulation entered into by counsel and the reasonable inferences to be drawn therefrom, it is found (1) that a majority of respondents' watches are sold by respondents to jewelry stores, specialty shops, department stores, and other retail outlets with price tags attached thereto; (2) that such watches are generally displayed and resold by respondents' retail customers to the general public with such price tags attached thereto and at prices substantially below those listed on the price tags; (3) that respondents sell and deliver said watches to their retail customers with knowledge that such watches are generally resold with the price tags attached and at prices substantially below those listed on such price tags; (4) that by means of the tags attached to such watches, respondents have represented that the amounts thereon indicated are the usual and regular retail prices for said watches; (5) that such representation is false, misleading and deceptive in that in truth and in fact such amounts are fictitious and greatly in excess of the prices at which said watches are usually and regularly sold at retail; and (6) that respondents, by the practices aforesaid, have knowingly placed in the hands of retailers a means and instrumentality whereby such retailers may mislead and deceive members of the purchasing public as to the usual and regular retail prices of its watches.

E. The effect of the unfair practices

The acts and practices of respondents, as hereinabove found, have had and now have the tendency and capacity to mislead and deceive members of the purchasing public as to the usual and regular retail selling price of said watches and to induce the purchase of substantial quantities thereof because of such erroneous and mistaken belief. As a result thereof, substantial trade in commerce has been and is being unfairly diverted to respondents from their competitors and substantial injury has been, and is being, done to competition in commerce.

CONCLUSION OF LAW

The acts and practices of respondents, as hereinabove found, are all to the prejudice and injury of the public and of their competitors and constitute unfair methods of competition and unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

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ORDER

It is ordered, That respondents, The Orloff Company, Inc., a corporation, and its officers, Michael Orloff, Hyman J. Orloff and Harry Orloff, individually and as officers of said corporation and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of watches in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing in any manner that certain amounts are the regular and usual retail prices of merchandise when such amounts are in excess of the prices at which such merchandise is usually and regularly sold at retail by the class of retailers selling such merchandise.

(2) Putting any plan into operation whereby retailers or others may misrepresent the regular and usual retail prices of merchandise.

OPINION OF THE COMMISSION

By ANDERSON, Commissioner:

This is an appeal by the respondents from an initial decision by the hearing examiner holding that the respondents have misrepresented the prices at which their watches are generally sold to consumers and have knowingly placed into the hands of retailers a means and instrumentality whereby members of the purchasing public may be misled and deceived as to the usual and regular selling prices of respondents' watches, in violation of Section 5 of the Federal Trade Commission Act, as amended [52 Stat. 111; 15 U.S.C.A., Sec. 45].

All of the facts in this matter were stipulated. Accordingly, there has been a narrowing of the issues. The facts pertinent to this appeal are these: Respondents sell watches to retailers. They do not sell to ultimate consumers. On a majority of the watches sold, respondents affix to price tag containing prices greatly in excess of those at which the watches are usually and regularly sold by retailers to consumers. The prices on the tags affixed by respondents are either \$33.75, \$47.50 or \$71.50. The prices at which respondents' customers resell the watches at retail are \$17.95, \$19.95 and \$22.95, which fact is known to the respondents. The determination as to whether the price tags affixed by the respondents shall or shall not be attached to the watches at the time of their resale to the ultimate consumer is made by respondents' purchasers and not by respondents. However, at least some dealers resell the watches with

the price tags attached at \$17.95, \$19.95 and \$22.95, and never at any other price. By means of the prices appearing on the price tags affixed by respondents, it is represented that the amounts thereon are the usual and regular retail prices for the watches.

Reasonable inferences drawn from facts which are based on substantial evidence are adequate to support findings. *Federal Trade Commission v. Pacific States Paper Trade Association*. When there is a choice of reasonable inferences which may be drawn from the facts of record, the Commission may make the choice which in its best judgment should be made. *Excelsior Laboratory, Inc., v. Federal Trade Commission*, 171 F. 2d 484; *Phelps Dodge Refining Corporation v. Federal Trade Commission*, 139 F. 2d 393, 395.

We share the hearing examiner's view that the stipulated facts and reasonable inferences drawn therefrom present a clear case of fictitious pricing, a practice which the Commission and the courts have repeatedly held to be unfair and in violation of the Federal Trade Commission Act. *Miss Youth Form Creations, et al.*, Docket 6351 (1955); *Excel Automatic Products, Inc., et al.*, Docket 6063 (1954); *Melvin Marcus, et al.*, Docket 6083 (1954); *Ray R. Goldie and David Bachman*, Docket 6064 (1954); *Thomas v. F.T.C.*, 116 F. 2d 347 (C.A. 10, 1940); *Brown Fence & Wire Co. v. F.T.C.*, 64 F. 2d 934 (C.A. 6, 1933).

Respondents contend that they were in no way responsible for any misrepresentation which might have been made as to the usual and regular selling prices of their watches. They contend that when they attached a price tag to a particular watch, they had no knowledge as to the price at which the retailer would sell the watch, or whether or not the tag would be attached to the watch at the time of the sale by the retailer, and that, therefore, the respondents could not be held responsible for a misrepresentation as to the usual retail price of the watch by an unscrupulous dealer.

The hearing examiner was not persuaded by these and similar arguments advanced by the respondents, and neither are we. The law is well settled, as the hearing examiner points out, that one who puts into the hands of others a means or instrumentality by which they may mislead the public, is himself guilty of deception. *F.T.C. v. Winsted Hosiery Co.*, 258 U.S. 483 (1922); *Chicago Silk Co. v. F.T.C.*, 90 F. 2d 689 (C.A. 7, 1937); *Marietta Manufacturing Co. v. F.T.C.*, 50 F. 2d 641 (C.A. 7, 1931); *Irwin v. F.T.C.*, 143 F. 2d 316 (C.A. 8, 1944). Respondents argue that this principle is not applicable to the facts in this case because "The elements of design, of purpose and intent to supply a means of deception, of inducing the deception, is lacking in the instant case." We think the hearing examiner correctly disposed of this contention when he said:

"* * * While it is true that the mere fact a device 'may be' misused by third persons is not itself sufficient to charge its author with responsibility therefor, it does not follow that he cannot be held accountable unless the device can 'only' be used for illegal purposes. It is sufficient, in the opinion of the examiner, to hold the originator of the means or instrumentality if the device which he distributes is generally used by his distributors for deceptive purposes, and the originator is aware that his distributors are making such use of the device furnished by him.

"It is absurd to suppose that respondents would continue to engage in the empty and financially wasteful practice of supplying retail price tags to their customers if such tags were not being used by the customers to advantage in the sale of respondents' watches. Since they are aware that the watches to which such tags are attached are usually and regularly sold at substantially lower prices, respondents must also obviously be aware that the device which they have furnished is being used for deceptive purposes. Respondents cannot therefore deny their authorship of, or escape responsibility for, a device which to their knowledge is being widely used for deceptive purposes."

Respondents' objection to the hearing examiner's action of rejecting a stipulation between counsel requires brief comment. It appears that counsel, on July 12, 1954, entered into a written stipulation in which it was stipulated and agreed that, "subject to the approval of the hearing examiner," the facts set forth therein may be taken as the facts in this proceeding. The hearing examiner rejected the stipulation for the reason that it was "characterized by such ambiguity and lack of clarity as not to afford a proper basis for the issuance of an initial decision based thereon." Subsequently, counsel entered into another stipulation as to the facts which was accepted by the hearing examiner. Respondents claim that the rejected stipulation "should have been the stipulation upon which this case should have been determined * * * or, in the alternative, that the facts therein agreed to, not inconsistent with those in the subsequent stipulation, should be considered by the hearing examiner." In rejecting the original stipulation, the hearing examiner was clearly acting within the scope of his authority and no rights of the parties were in any way prejudiced by that action. Respondents were under no compulsion to enter into the subsequent stipulation. Under the circumstances it would not have been proper for the hearing examiner to decide this case on the basis of the facts stipulated in the rejected stipulation, whether or not those facts were inconsistent with the facts in the subsequent stipulation.

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We have considered respondents' exceptions to the hearing examiner's initial decision in the light of the stipulated facts and the applicable law and, in our view, these exceptions are without merit. We think the hearing examiner's findings as to the facts are in accord with the facts stipulated and reasonable inferences drawn therefrom, and that his conclusions and order are fully supported by the findings. Accordingly, respondents' appeal is denied and the initial decision of the hearing examiner is affirmed. Appropriate order will be entered.

Commissioner Kern did not participate in this decision.

FINAL ORDER

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

The Commission having rendered its decision denying respondents' appeal and affirming the initial decision:

It is 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 the order to cease and desist.

Commissioner Kern not participating.

Decision

IN THE MATTER OF

RAY S. KALWAJTYS ET AL.
DOING BUSINESS AS GENERAL PRODUCTSORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT

Docket 6211. Complaint, Sept. 17, 1954¹—Decision, Jan. 27, 1956

Consent order requiring a Chicago firm to cease inducing and attempting to induce purchasers of photograph albums to breach their contracts with competitors and to purchase respondents' albums;

Order requiring the same sellers of photograph albums, engaged in selling certificates for photographs to be taken at various associated studios, to cease representing falsely in advertising, on certificates issued to customers, and through statements made by their sales representatives that they sold only to selected persons, their albums were given free, the prices at which they regularly sold were promotional or reduced prices, and the photographs provided by their certificates were of natural gold-tone finish; and representing falsely through their salesmen that the salesmen were those of competitors.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On September 17, 1954, the Federal Trade Commission issued its amended and supplemental complaint in this proceeding, charging the Respondents with false, deceptive and misleading statements and representations and unfair methods of competition, in violation of the Federal Trade Commission Act, in connection with the sale and distribution of photographic albums and certificates for photographs to be taken at independent studios in various States of the United States.

On October 25, 1955, Respondents submitted an amended answer denying the principal charges of the complaint, which was thereafter modified by a further amendment on the record during the course of the hearing. Subsequently, a Stipulation For Consent Order as to the allegations of Paragraph Seven of the amended and supplemental complaint, relevant to Respondents' alleged practice of inducing persons to breach their contracts of purchase with Respondents' competitors, was entered into by Respondents and counsel supporting the complaint, which removed these allegations from controversy.

Evidence relative to the issues raised by the other allegations of the complaint was duly received in the record, and forms the basis

¹ Amended and supplemental complaint.