

IN THE MATTER OF
CHESTNUT FARMS CHEVY CHASE DAIRY

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

Docket 6465. Complaint, Nov. 21, 1955—Decision, May 21, 1957

Order requiring a large manufacturer and distributor of dairy products in Washington, D.C., to cease discriminating in price in violation of sec. 2(d) of the Clayton Act through granting advertising allowances to some of its customers on unequal terms and paying none at all to other customers, competing with those favored.

Mr. Andrew C. Goodhope and Mr. Frederic T. Suss for the Commission.

Whiteford, Hart, Carmody & Wilson, of Washington, D.C., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Complaint in this matter issued November 21, 1955, charging respondent with granting advertising allowances to some, but not to all, of its customers competitively engaged in the resale of respondent's products in violation of subsection (d) of section 2 of the Clayton Act (15 U.S.C. 13), as amended by the Robinson-Patman Act. Answer filed January 20, 1956, admitted descriptive and jurisdictional facts but denied the substance of the charge. After various postponements, hearing for the reception of evidence was held May 14, 1956, at which time the case in support of the complaint was completed, motion to dismiss made and denied, and, on June 4, 1956, respondent offered its evidence and the case was completed on that day, resulting in a transcript of 313 pages and 13 exhibits. The case was then closed for proof taking, counsel for both sides having waived the right to submit proposed findings and conclusions, and the hearing examiner now, upon consideration of the record, makes the following:

FINDINGS OF FACT

1. Respondent is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 2535 Pennsylvania Avenue, N.W., Washington, D.C. Respondent's correct corporate name is not that given in the caption, but is Chestnut Farms-Chevy Chase Dairy Company.

1050

Findings

On November 21, 1955, the date when the complaint was issued in this matter, Chestnut Farms-Chevy Chase Dairy Company was, and has been since January of the year 1929, a wholly-owned subsidiary corporation of National Dairy Products Corporation, a Delaware corporation, with its principal office and place of business located at 260 Madison Avenue, New York 16, New York. On October 1, 1956, subsequent to the filing of the initial decision, the business conducted by respondent was taken over by National Dairy Products Corporation and since that date this business has been operated as a division of National Dairy Products Corporation. For the purpose of this proceeding, and in accordance with the provisions of section 261 of the Code of Laws for the State of Delaware, respondent is still an existing corporation against which this action may be prosecuted. Its successor and assign is National Dairy Products Corporation for the purpose of any future compliance or enforcement order issued against respondent and its successors and assigns, to the extent that such order relates to the business so taken over by National Dairy Products Corporation of selling milk, cream, butter, oleomargarine, eggs, cheese, and frozen juices in the District of Columbia and surrounding metropolitan area.

2. Respondent was for a number of years and its successor and assign now is engaged in the processing, selling, and distributing of milk, cream, butter, oleomargarine, eggs, cheeses, and frozen juices in the District of Columbia and the State of Maryland and Virginia. Respondent has sold and its successor and assign now sells these products to a large number of customers, including consumers, independent grocery stores, and retail chain store organizations operating stores in the District of Columbia and the States of Maryland and Virginia, total sales for 1952 being in excess of \$27,500,000. Respondent was and its successor and assign now is a substantial competitive factor in the area described.

3. In the course and conduct of its business, respondent was engaged and its successor and assign is now engaged in commerce, as "commerce" is defined in the Clayton Act, as amended. Respondent purchased the products which it processed in states other than the District of Columbia and caused such products to be transported from such states to its principal place of business in the District of Columbia, and, in turn, sold and distributed its processed products from its principal place of business to customers located in the District of Columbia and the States of Maryland and Virginia. Its successor and assign is now so engaged.

4. According to exhibits compiled from respondent's records for the year 1954 and the first six months of 1955, respondent made

Findings

53 F.T.C.

payments for cooperative advertising to 23 of its customers in the following amounts, the total purchases of each from respondent and percentage of allowance to total purchases also being set out below:

Customer	Advertising allowance	Total purchases	Percent allowances to purchases
American Stores Company.....	5,292.12	1,066,388.46	0.50
District Grocery Stores.....	15,571.36	2,080,042.74	.75
B. B. Earnshaw Co.....	5,537.48	393,941.51	1.41
Federal Super Markets.....	3,440.82	218,179.50	1.58
Food Fair.....	16,666.80	979,337.66	1.70
Food Town, Inc.....	8,412.90	649,920.53	1.29
Giant Food Shopping Center, Inc.....	4,250.51	3,050,233.70	.14
A. & P. Tea Co.....	6,559.41	1,362,284.26	.48
Magruder.....	672.30	65,489.55	1.02
Mazo Bros., Inc.....	4,917.22	266,324.76	1.85
Rochdale Coop.....	649.00	87,125.13	.74
Sheridan Super Markets.....	1,054.03	188,569.53	.56
Shirley Food Stores.....	156.50	181,646.44	.09
Hyman's Super Market.....	50.00	4,063.14	.123
Abe Zitzman Market.....	10.00	3,676.86	.27
Charles Rhodes Stand.....	48.00	22,433.76	.21
Springview Farms.....	10.00	10,556.82	.0009
Virginia Market.....	20.00	549.29	.40
Carver Food Mart.....	5.00	7,396.56	.06
Royal-Delicatessen.....	30.00	4,000.00	.75
Normandy Market.....	20.00	18,254.34	.10
Midtown Delicatessen.....	3.08	9,883.80	.03
Laurel Food Mart.....	52.94	12,346.92	.42

The variances in percentages shown above make it obvious that either purchase volume was not used as a base or yardstick, or if it was, then the grants were not on proportionally equal terms.

5. In order to prove that some of respondent's customers never received any such advertising allowances, nor were offered any, and were in competition with those who did receive such allowances, set out above, counsel in support of the complaint offered the testimony of nine retail grocery or delicatessen officials, operating 12 stores, four in northeast Washington, two in Arlington, Virginia, one in Alexandria, Virginia, and five in northwest Washington. Nine of these outlets had never received any allowance or offer thereof from respondent, three of them advertised by 7,000 handbills a week, including advertising of respondent's products, but not until several months prior to testifying was their manager advised by a "good-will man" of respondent's that a one percent advertising allowance was available. The manager of these three stores sent in to respondent the handbills used and a printing bill, but had heard no more of it. All of these stores but one were in direct competition with one or more of the recipients of allowances from respondent as found in paragraph four above. Their monthly purchases from respondent ranged from \$75 per month to \$1,200 per month per outlet.

6. Cross-examination brought out that only a few of them did any advertising, some of them saying that they could not afford to do so. This is the basis of respondent's contention that it need not affirmatively offer its advertising allowances on proportionally equal terms to any customer whom respondent, in its business judgment, deems unreceptive to such offer, or to any customer whose operation makes it unlikely, in respondent's judgment, that such customer could or would engage in advertising. In short, respondent asserts it should not be required to do a vain and futile thing. Phrased otherwise, the claim is that the law leaves to respondent's subjective and independent opinion whether or not to offer, with the customer left out in the cold. The legislative history of this amendment indicates to this examiner an exactly contrary aim—to wit, an effort to take away from the seller the picking and choosing for largesse, and in the buyer's interest, puts it in the hands of public authority—this Commission—as an umpire to prevent that picking and choosing. The Commission's opinion in the Kay Windsor Frocks, Inc., et al, case, Docket No. 5735, August 18, 1954, interpreting the statutory term "available," leaves no doubt that an affirmative offering to each and every competing customer must be made by the seller once the latter decides to grant advertising allowances to any.

7. Cross-examination also developed that most of these non-recipient customers furnished free delivery service and extended credit to consumer purchasers, unlike the recipient cash-and-carry stores with whom they testified they competed. In the absence of proposed findings from the respondent, it is assumed that, from this, it is claimed that these small "pop and mom" retailers, therefore, do not, in fact, compete. If this be the contention, it is rejected. The Congressional Committee hearings are full of testimony with cited instances that the small independent retailer, because he lacks volume purchasing power, among other things, cannot compete in price with chain super markets and must furnish these consumer attractions to overcome the price disadvantage. In fact, one of these testifying retailers said that he had to pay respondent here 22 cents for its milk and furnish refrigeration, while his competitor, Giant Food Department Stores, Inc., a block away, was selling the same milk to consumers for 22 cents.

8. Against this testimony respondent produced its vice president and its sales promotion and advertising manager, who testified that respondent sold to 1,582 retail outlets for off premise resale in the Washington metropolitan area, of which 517 (23 customers) got an advertising allowance from respondent (in 1954 and 1955 as

Findings

53 F.T.C.

shown above in paragraph four) and of which 1,070 received no such allowance; that the total monthly purchases of the latter amounted to only \$78,000, or an average of about \$78 a month per outlet. These officials stated that for many years it was general knowledge in the area that cooperative advertising allowances for milk and dairy products were given, that in the fall of 1954, due to the heavy institutional and wholly paid for advertising by other local dairies, respondent, the sales leader in the field, after a spot survey among its customers prepared, with the help of an outside advertising agency, a 12-page sales brochure of which the theme was that respondent, "your business partner offers you a program based on leadership," setting forth how milk sales had increased more than grocery sales, how its advertising had increased, how it was a traffic builder for other retail items, and how respondent was going to advertise its "Sealtest" products on television, radio, Sunday comics, and in weekly newspapers. The record shows that to inaugurate this, each chain store's officials were brought to small meetings with respondent's officials, who explained the program. The 1,070 independents were not so invited. Respondent's 65 driver-salesmen were called into another meeting, indoctrinated in the advertising campaign's details, and instructed to advise all their customers thereof in detail, each being given a brochure for that purpose. Brochures were also furnished to the chain store officials. Nowhere does this brochure, however, speak of any cooperative advertising allowance as such, available in cash to a customer. It does offer "In Your Ads—Advertising Support—Mats."

9. As a defense this testimony and the exhibit fail in several respects. The advertising done was wholly by respondent, benefited all of its customers equally, those who received the substantial cash allowances set out above in paragraph four, as well as those who received no such payments. Such advertising is not under attack in this proceeding. Secondly, the testifying officials were unable to point to any broadening of the cash allowance picture, customer-wise, or to any increase therein, which, taken with the testimony of respondent's nonrecipient customers, summarized in paragraph five above, leads to the conclusion either that respondent's driver-salesmen did not carry out their instructions of offering, or that whatever was said was too vague to be understood as an offer.

10. Respondent's officials further testified that for more than 20 years respondent has consistently paid one percent of purchases for cooperative advertising (this being increased to 1¼ percent in 1955), that their driver-salesmen had always been instructed to so advise every customer, that customers must have known about it from

1050

Findings

seeing advertisements of respondent's products by other customers. There was at no time any circularization of all customers, nor was such an offer ever put into writing, although respondent did at the end of every quarter advise by letter, or orally by telephone, each of its multiple outlet customers of what was available to it, on the basis of the previous quarter's purchases. But no such advice in any manner ever went to the 1,070.

11. The evidence is thus in direct conflict, and in the examiner's opinion the weight is against respondent. A representative member of respondent's smaller customers testified flatly they had no such offer made to them, nor ever heard of it, and it is strange indeed if such practice had been in operation for 20 years, that they had not, and that after so long a time only 23 or so were getting it and 1,070 not. It is also most remarkable that 65 driver-salesmen over a 20-year period should miss even one such customer, let alone that number.

12. There was also evidence that respondent had occasionally had imprinted, at its expense, on match books, its product name and that of the customer, and had on occasion paid for, or partially paid for handbills for some customers who were solely interested in that method of advertising. However, there are no names, dates, or amounts in the record, and respondent's vice president admitted that such an activity was insignificant. Hence, it is disregarded here.

13. Respondent also defends on the ground that the regulations of the Virginia State Milk Commission, inserted in this record, forbid cooperative advertising of dairy products. Without construing these regulations, or whether respondent violated them, suffice it to say, that respondent, nevertheless, as found in paragraphs four and five above, did make such allowances to some of its retailer customers reselling in Virginia and not to others. If respondent violated local regulations for some, it must do so for all, or quit the practice entirely in that jurisdiction. Respondent apparently does not think the regulations apply at all.

14. The picture here is strikingly similar to that developed in Docket 6212, Henry Rosenfeld, Inc., et al, and exemplifies the same interpretation of the word "available" as that respondent had—"we give advertising allowances if a customer finds out about them and demands them," and "it is general knowledge in the trade that such sales aids exist." The Commission in Kay Windsor Frocks, Inc., et al, Docket 5735, flatly rejected this misconception and required an affirmative offering to every customer, no matter how commercially insignificant he might be.

Opinion

53 F.T.C.

15. The facts here in summary show that respondent granted advertising allowances to some of its customers on unequal terms, and did not pay any allowances at all to the great majority of the rest of its customers, nor offer them to them.

CONCLUSION

The acts and practices of respondent, as found above, are in violation of subsection (d) of section 2 of the Clayton Act as amended.

ORDER

It is ordered, That respondent Chestnut Farms-Chevy Chase Dairy Company, a corporation, its officers, employees, agents, representatives, and successors and assigns, directly or through any corporate or other device, in or in connection with the sale of milk, cream, butter, oleomargarine, eggs, cheeses, and frozen juices in the District of Columbia and surrounding metropolitan area, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of any customer, any payment of anything of value as compensation or in consideration for any advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of products sold to him by respondent or its successors and assigns, unless such payment is affirmatively offered or otherwise made available on proportionally equal terms to all other customers competing in the distribution or resale of such products.

OPINION OF THE COMMISSION

By TAIT, Commissioner:

The complaint in this proceeding charges the respondent with engaging in acts and practices in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act. In the initial decision filed June 28, 1956, the hearing examiner found that respondent granted advertising allowances to some of its customers on unequal terms, and did not pay any allowances at all to the great majority of the rest of its customers, or offer such allowances to them. He concluded that the Act was violated as charged and ordered respondent to cease and desist the practices found to be unlawful. Respondent has appealed from the initial decision.

Subsequent to the oral argument on this appeal, counsel supporting the complaint and counsel for the respondent filed on March 20, 1957, a joint motion to reopen the record in this proceeding for

1050

Opinion

the sole purpose of receiving as a part thereof a certain stipulation and to thereafter close the record. Counsel waived all rights to further consideration of the record by the hearing examiner because of the addition of the stipulation.

The stipulation, dated March 20, 1957, is by and between counsel for respondent, Chestnut Farms-Chevy Chase Dairy Company, counsel supporting the complaint, and Robert S. Gordon, vice president and general counsel, National Dairy Products Corporation on behalf of National Dairy Products Corporation. The stipulation sets forth that Chestnut Farms-Chevy Chase Dairy Company was a wholly-owned subsidiary corporation of National Dairy Products Corporation on November 21, 1955, the date the complaint was issued in this proceeding, but on October 1, 1956, the business conducted by Chestnut Farms-Chevy Chase Dairy Company was taken over by National Dairy Products Corporation and this business has been operated as a division of National Dairy Products Corporation since that date. It also states that National Dairy Products Corporation is a Delaware Corporation, with its principal office and place of business located at 260 Madison Avenue, New York 16, New York. The parties have further stipulated, among other things, that for the purpose of this proceeding, and in accordance with the provisions of section 261 of the Code of Laws for the State of Delaware, Chestnut Farms-Chevy Chase Dairy Company is still an existing corporation against which this action may be prosecuted and that for certain purposes relating to any future compliance or enforcement order issued in this proceeding, National Dairy Products Corporation is its successor and assign.

This stipulation was received into the record by order of the Commission issued April 1, 1957. As a result thereof, the initial decision will be modified as deemed appropriate, and the Commission's decision herein will be based on the whole record including the initial decision as so modified.

The respondent in this proceeding, Chestnut Farms-Chevy Chase Dairy Company,* is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 2535 Pennsylvania Avenue, N.W., Washington, D.C.

Respondent has been and its successor and assign now is engaged in the business of processing, selling and distributing milk, cream, butter, oleomargarine, eggs, cheeses and frozen juices. Respondent sold these products to customers with stores located in the District of Columbia and the States of Maryland and Virginia, which cus-

*Incorrectly named in the complaint as Chestnut Farms Chevy Chase Dairy.

Opinion

53 F.T.C.

tomers included independent retail grocery stores and retail chain store organizations. In 1952, respondent's sales were in excess of \$27,500,000.

The record shows that for the year 1954 and the first six months of 1955, respondent granted advertising allowances to some of its customers, but not to other customers competing with the favored customers in the distribution of the respondent's products, and that no offer of such allowances was made to some of its customers not favored. The allowances granted were generally in payment for cooperative advertisements relating to the sale of respondent's products.

During this period, respondent sold its products to some 1,582 individual retail outlets or stores. Of these, 517 received advertising allowances while 1,070 did not. The 517 stores represent 23 customers, some of which sell through multiple outlets. One of the 23, Giant Food Shopping Center, Inc., received \$1,000 for certain advertising services under an individualized contract.

In connection with the amounts received by the 23 favored customers, there is a considerable variance in the percentages of payments to purchasers, ranging from 0.0009 percent of purchases for one customer to 1.85 percent of purchases for another over the period covered by the record. The situation suggests a lack of any plan or policy by which allowances could have been available on proportionally equal terms. Respondent's officials testified that there was a plan in effect under which payments were based on amounts of purchases; that up to January, 1955, the allowance was fixed at a maximum of 1% of purchases and thereafter at a maximum of $1\frac{1}{4}\%$ of purchases. The percentage-wise variation was explained as being due to the fact that not all recipients advertised to the extent of their full available allowance, and were paid only upon proof of performance. Assuming that such a plan was employed, it is obvious from the record that payments were made outside its terms, that is, payments in excess of $1\frac{1}{4}\%$ of purchase. While there is testimony that respondent's policy was to adjust in subsequent quarters for such overages, the record of the payments does not bear this out.

Respondent's officials further testified that their driver salesmen had always been instructed to advise every customer of the availability of the promotional allowances, but a number of small store customers testified that they had received no such information.

On this appeal, respondent contends in the main that under Section 2(d) a supplier is not obliged in the first instance to affirmatively offer an advertising allowance, but that even if such is a

1050

Opinion

valid requirement, the evidence is insufficient as a matter of law to sustain a 2(d) violation finding on the ground either that respondent breached the affirmative offer requirement or that the advertising allowances granted to respondent's customers were paid to them on proportionally unequal terms.

The Commission's interpretation of the word "available" used in Section 2(d)¹ as requiring an offer has been clearly expressed in the matters of *Kay Windsor Frocks, Inc., et al.*, Docket No. 5735, and *Henry Rosenfeld, Inc., et al.*, Docket No. 6212. It is that, under the Act, an allowance cannot be deemed "available" to a reseller, and a denial of opportunity to share therein occurs, when a seller fails to inform or otherwise offer promotional allowances to a customer while granting such payments for similar services to the reseller's rivals. This record shows that the respondent has not informed resellers, such as independent stores, as to advertising allowances, while granting such allowances to their competitors, such as large chain organizations, and so has not made the allowances "available" as required by Section 2(d). But that is not the entire case against respondent.

It appears that respondent either did not have a plan or policy for granting its promotional payments or, if it did, that the plan was not followed in all cases. Some favored customers, over the 18-month period covered by the evidence, received allowances in excess of the percentage of purchases claimed by respondent as a basis for the payments. Thus, some of the payments have all the appearances of individually negotiated deals.

This is exemplified, perhaps, in the arrangements made with Giant Food Shopping Center, Inc. An official of the respondent testified that the amount paid under the contract with Giant was not in excess of that which the customer could have collected on the basis of 1¼% of purchases, and that it was, therefore, a payment under an agreement the same as that available to other customers. Such an interpretation strains all reason. The contract itself provides that it is not to alter or replace currently existing advertising or merchandising agreements between that customer and the respondent. Thus, it cannot be construed on its face as being within whatever regular policy on advertising allowances the respondent might have

¹ This Section reads: "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 as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

Order

53 F.T.C.

had. Furthermore, there is no provision in the contract that payment is to be based on purchases as in the case of the plan which respondent claims it employs. Clearly, it was an arrangement negotiated with a customer on the customer's terms. The resulting payment was an allowance for services or facilities which was not available on proportionally equal terms or on any terms to customers competing in the distribution of the products, since it involved a separate and individual arrangement, and it is surely within the prescription of the statute. Such individualized and preferential treatment was the very thing Section 2(d) was designed to prevent.

In addition, whatever respondent's policy may have been, there is no question that independent stores generally were not informed of it. Of the witnesses from this group, eight of the nine testified that they had not been advised as to respondent's advertising allowances. The reasonable conclusion is that respondent did not, as a general rule, reach such customers with information as to advertising allowances. On the other hand, respondent was most diligent in giving such information to the favored group. It went so far as to notify the favored customers by mail or phone as to the amounts to which they were entitled. The effect of its practices was to deny to some of its customers an opportunity to share in the promotional payments while granting payments to other customers competing in the distribution of the products. We must conclude from the evidence that customers generally in a somewhat particular group have not been advised of the allowances.

Respondent argues that a majority of its customers were not interested in advertising and that if respondent is nevertheless obliged to make an offer, it is being required to do a vain and useless thing. Once a seller determines upon a plan of advertising allowances, the plan must be affirmatively made known to every customer. Whether or not a customer participates therein is a decision for the customer. The customer obviously must know the specific terms of a plan before he can determine whether he is interested in participating. In this respect the seller's offering of a plan serves a worthwhile purpose.

Respondent's appeal is denied. It is directed that the findings of fact contained in the initial decision be modified in accordance with the views expressed in this opinion and that an appropriate order be substituted for that contained in the initial decision.

FINAL ORDER

This matter having been heard on the respondent's appeal from the hearing examiner's initial decision, and the Commission having

1050

Order

concluded that respondent has violated the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, and having rendered its opinion denying the appeal; and

The Commission in its opinion having directed that the findings in the initial decision be modified in accordance with its views as therein expressed and that an appropriate order be substituted for that contained in the initial decision:

It is ordered, That Paragraph 1 of the findings of fact contained in the initial decision be, and it hereby is, modified by adding to the end thereof the following:

On November 21, 1955, the date when the complaint was issued in this matter, Chestnut Farms-Chevy Chase Dairy Company was, and has been since January of the year 1929, a wholly-owned subsidiary corporation of National Dairy Products Corporation, a Delaware corporation, with its principal office and place of business located at 260 Madison Avenue, New York 16, New York. On October 1, 1956, subsequent to the filing of the initial decision, the business conducted by respondent was taken over by National Dairy Products Corporation and since that date this business has been operated as a division of National Dairy Products Corporation. For the purpose of this proceeding, and in accordance with the provisions of section 261 of the Code of Laws for the State of Delaware, respondent is still an existing corporation against which this action may be prosecuted. Its successor and assign is National Dairy Products Corporation for the purpose of any future compliance or enforcement order issued against respondent and its successors and assigns, to the extent that such order relates to the business so taken over by National Dairy Products Corporation of selling milk, cream, butter, oleomargarine, eggs, cheeses, and frozen juices in the District of Columbia and surrounding metropolitan area.

It is further ordered, That Paragraph 2 of the findings of fact contained in the initial decision be, and it hereby is, modified to read as follows:

2. Respondent was for a number of years and its successor and assign now is engaged in the processing, selling, and distributing of milk, cream, butter, oleomargarine, eggs, cheeses, and frozen juices in the District of Columbia and the State of Maryland and Virginia. Respondent has sold and its successor and assign now sells these products to a large number of customers, including consumers, independent grocery stores, and retail chain store organizations operating stores in the District of Columbia and the States of Maryland and Virginia, total sales for 1952 being in excess of \$27,500,000. Re-

Order

53 F.T.C.

spondent was and its successor and assign now is a substantial competitive factor in the area described.

It is further ordered, That Paragraph 3 of the findings of fact contained in the initial decision be, and it hereby is, modified to read as follows:

3. In the course and conduct of its business, respondent was engaged and its successor and assign is now engaged in commerce, as "commerce" is defined in the Clayton Act, as amended. Respondent purchased the products which it processed in states other than the District of Columbia and caused such products to be transported from such states to its principal place of business in the District of Columbia, and, in turn, sold and distributed its processed products from its principal place of business to customers located in the District of Columbia and the States of Maryland and Virginia. Its successor and assign is now so engaged.

It is further ordered, That the findings of fact, as modified, and the conclusion contained in the initial decision be, and they hereby are, adopted as those of the Commission.

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

It is ordered, That respondent Chestnut Farms-Chevy Chase Dairy Company, a corporation, its officers, employees, agents, representatives, and successors and assigns, directly or through any corporate or other device, in or in connection with the sale of milk, cream, butter, oleomargarine, eggs, cheeses, and frozen juices in the District of Columbia and surrounding metropolitan area, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of any customer, any payment of anything of value as compensation or in consideration for any advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of products sold to him by respondent or its successors and assigns, unless such payment is affirmatively offered or otherwise made available on proportionally equal terms to all other customers competing in the distribution or resale of such products.

It is further ordered, That respondent, Chestnut Farms-Chevy Chase Dairy Company, and its successor and assign, National Dairy Products Corporation, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with said order.

Decision

IN THE MATTER OF

DRAKE LABORATORIES, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 6610. Complaint, Aug. 17, 1956—Decision, May 22, 1957*

Consent order requiring sellers in Detroit, Mich., to cease advertising falsely in newspapers and magazines and by radio broadcasts that their hair and scalp preparation "Persulan" would prevent and overcome falling hair and baldness and cause new hair to grow, restore healthy scalp, relieve skin irritations and ailments, etc.

Mr. Harold A. Kennedy for the Commission.

Mr. John C. Ray, of Detroit, Mich., for respondents.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on August 17, 1956, issued and subsequently served its complaint in this proceeding against respondents Drake Laboratories, Inc., a corporation, and Morris S. Plotkin, Elaine Plotkin, and Joseph P. Boltach, Jr., individually and as officers of said corporation, with their office and principal place of business located at 10610 Joy Road, Detroit, Michigan.

On December 21, 1956, there was submitted to the undersigned hearing examiner an agreement between respondents and counsel supporting the complaint, providing for the entry of a consent order. By the terms of said agreement, respondents admit all the jurisdictional facts alleged in the complaint, and agree that the record may be taken as if findings of jurisdictional facts had been duly made in accordance with such allegations. By such agreement, respondents waive any further procedural steps before the hearing examiner and the Commission; waive the making of findings of fact and conclusions of law; and waive all of the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement. Such agreement further provides that it disposes of all of this proceeding as to all parties; that the record on which this initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement; that the latter shall not become a part of the official record unless and until it becomes a part of the decision of the Commission; that the agreement is for settlement purposes only and does not constitute an admission by respondents that they have