

Findings

IN THE MATTER OF
J. H. FILBERT, INC.ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SEC. 2(d) OF THE CLAYTON ACT*Docket 6467. Complaint, Nov. 21, 1955—Decision Sept. 19, 1957*

Order requiring a Baltimore manufacturer of food products—principally salad dressing and oleomargarine sold under the trade name "Mrs. Filbert's"—with annual sales of approximately \$16,000,000, to cease violating Sec. 2(d) of the Clayton Act by such practices as paying sums of money to a Philadelphia food chain as compensation or allowance for advertising furnished in connection with the sale of its products, while not making any allowance available on proportionally equal terms to competitors of the chain.

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

Mr. Nathan Patz, of Baltimore, Md., for respondent.

INITIAL DECISION BY FRANK HIER, HEARING EXAMINER

Complaint herein, issued November 21, 1955, charged respondent with having paid advertising or promotional allowances for services to some of its customers without making such payments available on proportionally equal terms to all of its other customers competing in the resale of respondent's products with the recipients in violation of Section 2(d) of the Clayton Act (15 U.S.C. 13). After service of the complaint, various motions by respondent were made and ruled on and thereupon, on January 24, 1956, respondent filed its answer admitting descriptive and jurisdictional facts, admitting the payment of various allowances, but only for valuable services performed in good faith, and alleging availability and proportionally equal treatment of all its customers. Thereafter, six hearings were held in Baltimore, Maryland, four for the reception of evidence supporting the charge, and two for respondent's defense, at which 29 witnesses testified for a total of 610 pages of transcript, and at which 27 exhibits were received as supporting the charge and 14 exhibits in defense thereof. Thereafter, all counsel filed with the hearing examiner proposed findings and conclusions of law, on consideration of which, together with the entire record herein, said hearing examiner makes the following:

FINDINGS OF FACT

1. Respondent J. H. Filbert, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the

State of Maryland, with its office and principal place of business located at 3701 Southwestern Boulevard, Baltimore, Maryland.

2. Respondent is now and has been engaged in manufacturing, selling and distributing a number of food products, principally salad dressing and oleomargarine which are sold under the trade name "Mrs. Filbert's." Respondent's total sales of all products are substantial, being approximately \$16,000,000 per year.

3. In the course and conduct of its business, respondent has engaged in commerce, as "commerce" is defined in the Clayton Act as amended. Respondent ships its products, or causes them to be transported, from its principal place of business in the State of Maryland to customers located in the same state and other states of the United States and the District of Columbia.

4. Prior to 1950 respondent, in order to promote the retail sale to consumers of its products, drew up printed contracts to be entered into by it with its customers providing for payment by respondent to such customers of an advertising allowance of $\frac{1}{2}\text{¢}$ per pound of margarine purchased for resale by such customers, or 3% of dollar purchases of mayonnaise and beverage syrups, toward the cost of a monthly handbill or newspaper advertisement by the customer of such product if the name and the price thereof occupied at least one inch space; equaled, or exceeded the space used for any competitive brand in the same advertisement, and proof of such advertisements was submitted to respondent. These contracts are referred to by respondent, and by all counsel throughout this case, as respondent's regular cooperative advertising agreements.

5. On their face, there is nothing therein to suggest a violation of the charging statute. The base selected is measurable, capable of being proportionalized, within the reach of, and capable of being used by all of respondent's customers, is definitely and understandably stated, and each applies to products which are competitively different. There is no attack here on these contracts or their terms as such. The attack is under that part of Clayton's Section 2(d) which reads "unless such payment or consideration is available * * * to all other customers * * *" and the construction thereof by the Commission in *Kay Windsor Frocks, Inc., et al*, Docket 5735, and *Henry Rosenfeld, Inc., et al*, Docket 6212, to mean that this requires an affirmative offering of any plan or contract by respondent to each of its customers competitively engaged in the resale of its products. In other words, counsel in support of the complaint contends that respondent did not, as required, offer its participation contracts to all such customers.

6. The record on this point is substantially confined to the Baltimore trading area, and to the year 1954, and the first six months

of 1955, and shows that in that area, and in that time, respondent had an estimate of 2,500 customers to only 76 of whom, according to respondent's account books, it made advertising allowances for 1954, and to only 79 of whom it paid such allowance in the first six months of 1955. This lopsided proportion, however, is no proof by itself of failure to offer, particularly in view of respondent's insistence that all were offered, because respondent's duty under the law is fully discharged if it affirmatively offers the contracts here involved. Opportunity to share is all the law seeks on that point.

7. To prove his contention, counsel supporting the complaint took the testimony of eleven witnesses who either owned or worked for the owners of Baltimore groceries, all of whom were either quite positive that neither respondent's driver-salesmen, making weekly or biweekly calls, or any other employees of respondent, made either payments or offers of respondent's regular cooperative advertising allowances, or else could not recall any such payments or offers. All of these witnesses testified they were in competition in consumer resale of respondent's products, with Food Fair Stores, Inc., or some other chain store recipient of advertising allowances from respondent, or stated facts such as physical proximity, common shoppers, etc., from which such competition could be reasonably inferred.

8. One of these positive grocers, on recall by respondent as its own witness, admitted, when confronted therewith, his signature on one of the contracts he had previously testified he never saw or heard of. Respondent's driver-salesman who serviced this witness' store testified specifically that he had repeated offered such contracts to the witness.

9. Another of these positive witnesses, when recalled by respondent, completely recanted his previous testimony with the flippant explanation that he was only "kidding," previously. Lacking contempt power, the hearing examiner was unable to give him the thirty days indicated to ponder on, and in the future, avoid such a cavalier attitude toward oath and this proceeding, and can do no more than reject his rambling recital for complete lack of credibility.

10. Two more of these witnesses admitted on cross-examination that respondent's driver-salesman had told them that if they, the witnesses, would put out handbills respondent would pay part of the cost. This is corroborated by the driver-salesman referred to, in greater detail as to the offer.

11. Two additional, quite positive, such witnesses, both of whom worked in two of a five store chain or group under common ownership, were flatly contradicted by another employee who testified he was offered respondent's contracts by its driver-salesman and its

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then supervisor, both of whom he identified in the hearing room, but that the offer was refused because the store group did no advertising. This was corroborated by the testimony of the two employees of respondent involved.

12. A seventh such witness was flatly contradicted by his employer, who testified the witness had no authority to discuss such matters, that he the owner, and his son, were offered these contracts by respondent's driver-salesman and that the offer was refused because the owner did no advertising and was not interested in doing any.

13. Of the remaining four witnesses, three were not positive as to no payment and no offer, but stated simply that they could not recall any. The last of the eleven witnesses was positive in his assertion. In each case, respondent's driver-salesman servicing that store was positive that respondent's regular cooperative advertising allowance contracts were offered to each of them, but refused because that particular store did no advertising and had no desire to do so. The first three of these remaining four witnesses appeared to the hearing examiner to be unsteady in their negative recollection, and from his observation of them all, the nature of the transactions, the disinterest in advertising, even discounting for obvious interest in this issue, the testimony of respondent's driver-salesmen, the conclusion is that the evidence of failure to offer affirmatively respondent's regular cooperative advertising contracts to all of its customers is unsubstantial, unreliable and lacks probative value.

14. This rejection of testimony of past recollection of a negative does not mean that the testimony of most of these witnesses as to current events is similarly rejected. There is a vast and obvious difference in the probative value of a witness' present recollection of what did not happen in the past, and his recital of present facts—such as where his grocery is located, what he sells therein, to whom, its physical proximity to competitors, and who those competitors are.

Added to the above, are the facts testified to by respondent's officials and two former and one present driver-salesmen that it was, and is, the fixed policy of respondent to obtain as many of these cooperative advertising contracts with its customers as it could, that they were to be aggressively offered to all, that driver-salesmen were periodically and repeatedly instructed to do so, that the latter, working on salary and commission, had an incentive to do so, because of the anticipated increased sales volume, and that each driver-salesman carried a supply of forms on his truck.

15. The conclusionary finding, therefore, is that, on this record respondent's regular cooperative advertising allowance contracts,

offered, entered into and carried out, as above described, do not violate the statute charged.

16. Respondent's advertising allowance practices are under additional attack in this proceeding because of its payments to the Food Fair Stores, Inc. The record shows that in 1954 respondent paid to Food Fair Stores, Inc., a supermarket chain incorporated in Pennsylvania conducting an integrated interstate operation, \$3,412.25 and in the first six months of 1955, \$1,955.61 on its regular cooperative advertising contracts which it had with Food Fair Stores, Inc., as generally described above, but that in addition it paid Food Fair Stores, Inc. for the same periods \$1,250 and \$1,350 respectively, for special sales promotions of the Food Fair Stores, Inc.

17. In the spring of each year, the latter stages what it calls "Spectacular Anniversary Celebrations" accompanied by saturation advertising—newspaper, radio and television—of the products which it has for sale, their prices and brand names, and the bargains obtainable for that limited period only. Food Fair Stores, Inc. actively solicits financial subsidization by its suppliers in this advertising by form letters, enclosing a number of form contracts in blank, the latter varying in cost to the supplier directly to advertising promised. Respondent executed several of these contracts with Food Fair Stores, Inc. covering its various products and paid the amounts indicated above in paragraph 16 in the years 1954 and 1955. The record is clear that these payments were not proportionalized by respondent among its other customers competitively engaged in the resale of respondent's various products with the recipient. Wherefore the claim that Clayton's Section 2(d) was violated.

18. By way of defense, several contentions are advanced. First, it is asserted that the charging statute does not apply to respondent in this situation in that the Anniversary Sale plans were the purchaser's—Food Fair Stores, Inc.—in origination, solicitation and operation; that any duty to proportionalize was on it, not on respondent, that the latter had its own cooperative advertising allowance plans, and is responsible for none other. This same contention of counsel, and this same attitude of the respondent, and its officials, have been urged in other proceedings analagous, if not the same, as this one; and this same hearing examiner therein ruled that when a supplier "participates" in, or contracts with a purchaser for advertising services and payments therefor, the supplier thereby adopts such purchaser-originated and purchaser-promoted or solicited plan as the supplier's own and must comply in all respects therein with the governing statute, regardless of whether or not such supplier already has his own plan or contracts. There has been no reversal

as yet of such ruling and, on this record, this hearing examiner sees no reason to rule otherwise. To do so would provide a convenient and easy escape hatch to the prohibitions of the charging statute. It would, indeed, be then very simple for a supplier, desiring to favor certain of his larger or most aggressive customers, for the best of commercial or selfish reasons, to have no plan, and simply let such intended favorees draw up one, accept it, pay under it, and leave the vast majority of his customers unsubsidized. This would most certainly emasculate the statute and thwart the will of Congress—which clearly was to insure proportional equality of share by all customers of a supplier's advertising handouts. The contention is rejected.

19. Respondent's second contention is that when solicited to participate in Food Fair's yearly extravaganza, it first determined whether the proffered promotion was worth the charge therefor to it. In view of the varying charges for the varying costs, apparently an affirmative decision was largely routine. Then respondent ascertained whether or not competitive margarines, mayonnaises, salad dressings, etc., were participating—being promoted. If so, and they always were, then respondent felt it had to enter into a contract to meet this competition—in other words, an invocation of Clayton's Section 2(b) as to defense to the charged violation of Section 2(d). The Commission having already explicitly ruled in *Henry Rosenfeld, Inc.*, D. 6212, that Section 2(b) is not available as a defense to a charge of violation of Section 2(d) of the Clayton Act, this contention is rejected without further discussion.

20. Respondent's third contention is far more serious. Despite its admission in its answer that "In the course and conduct of its business, respondent has engaged in commerce, as 'commerce' is defined in the Clayton Act, as amended * * *," respondent asserts a lack of jurisdiction of this proceeding because of a lack of proof of these specific activities being in interstate commerce. Its position in gist is that notwithstanding that it and Food Fair Stores, Inc. are both engaged in commerce in their general operations, that for jurisdiction to exist in this proceeding, counsel supporting the complaint must show that the challenged payments were made to recipients located or operating in states other than Maryland, and secondly, that such out of state recipient must be shown to be in competition with non-recipient customers of respondent and that these two elements must co-exist. More specifically, respondent asserts that no payments have been shown to have been made to Food Fair Stores, Inc., except in the Baltimore and Philadelphia metropolitan areas—

that in the former, there is no commerce, that in the latter, there is no competition shown to exist between the recipient Food Fair Stores, Inc. and any non-recipient.

21. Factually, the situation is that respondent is, as a whole, engaged in interstate commerce with its plant in Baltimore, Maryland. Food Fair Stores, Inc., a Pennsylvania corporation with headquarters at Philadelphia but with branches in other states, is likewise engaged in interstate commerce, buying products from many suppliers located in various states and reselling them to consumers through 216 supermarkets located from New York to Florida, with average annual sales per store being \$2,000,000. In the Washington metropolitan area, respondent sells to only two customers—the Mann Company, a distributor—and Safeway Stores, a supermarket chain, reselling to consumers. There is no evidence of any sales to Food Fair Stores, Inc. in this area or any payment of advertising allowances. Hence, there is no showing of either commerce, or competition between recipient and non-recipients. In the Philadelphia area, respondent has only three customers—Food Fair Stores, Inc., a retailer, Stanley Marvel, a Philadelphia distributor, and Ernest Nicholls, a Trenton, New Jersey distributor. Neither of these presumably compete with Food Fair Stores, Inc. in the resale of respondent's products—at least, there is no such showing. Nor is there in the record any list of the retailers to whom any of these distributors resell. Respondent does, of course, ship its products to the Philadelphia warehouse of Food Fair Stores, Inc. in the regular course of business, and did pay to the latter \$700 in 1954 and 1955 as an advertising allowance for the Anniversary sale. So we have merchandise sold and payments made by respondent in commerce, but no showing of competition between the recipient, Food Fair Stores, Inc. and any non-recipient. In the Baltimore area, such competition is amply shown, but obviously there is no commerce. Payment was made, and goods shipped, from respondent's Baltimore office and warehouse to Food Fair Stores, Inc.'s office and warehouse, which for buying and advertising purposes, is autonomous.

22. No case has been cited, and none has been found, which would sustain the jurisdiction asserted here. Full Federal jurisdiction for anti-trust purposes has been held to reach local transactions where discriminatory sales have been made to purchasers who compete in interstate commerce, where local trade has been restrained through utilization of interstate mechanisms, where the local restraint has a restrictive effect on the free flow of interstate commerce, or where local prices are fixed by interstate commercial transactions. Corn

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Products Refining Co. vs. F.T.C. 324 U.S. 726; Lorain Journal Co. vs. U.S. 342 U.S. 143; Wickard vs. Fulburn 317 U.S. 111; U.S. vs. Frankfort Distilleries 324 U.S. 293; but the record here is factually deficient in bringing this situation within the logical orbit of any of those cases. Nor does Moore vs. Mead's Fine Bread Company, 348 U.S. 115 aid the claimed jurisdiction here. The court's holding there, obviously turned on the use of the profits from an interstate operation being used for the proven purpose and result of financing the driving of a local competitor out of business through ruinous and discriminatory price cutting. There is no evidence in this record of such design, scheme, use, or result.

Several other points raised by counsel for respondent remain for disposition. The latter requests a finding of fact that his client had no intention to violate the charging statute. Intent is immaterial. Similar request for a finding of acting in good faith throughout is denied for the same reason. Similarly denied is a request to find that the services contracted for from Food Fair Stores, Inc., exceeded in value their cost. Respondent's counsel also requests a finding that the practices hereinabove found have existed for many years and were known, or should have been known, to the Federal Trade Commission, but without action from it until now. The statutory discretion of the Commission makes this wholly immaterial, and this hearing examiner has no power, statutory, delegated, or implied, to assess an abuse of administrative discretion by the Commission.

23. The conclusory finding, therefore, is that there is no substantial evidence of the statutorily prescribed prerequisites of jurisdiction under the charge.

CONCLUSION

There being no jurisdiction, this proceeding must be dismissed and respondent's motion to that effect is granted.

ORDER

It is ordered, That respondent J. H. Filbert, Inc., a corporation, its officers, employees, agents, and representatives, directly or through any corporate or other device, in or in connection with the sale of food products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Making or contracting to make, to or for the benefit of Food Fair Stores, Inc., or any other customer, any payment of anything of value as compensation or in consideration for advertising or other services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of the respondent's products, 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, in effect, that the respondent has paid promotional allowances to some of its customers who engaged in the resale of its products, which payments were not made available on proportionally equal terms to its other customers who compete with recipients of those allowances in the resale of respondent's products. The respondent's acts and practices in the latter respect were alleged to be in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

In the initial decision, filed March 1, 1957, the hearing examiner found that there was "no substantial evidence of the statutorily prescribed prerequisites of jurisdiction" and ordered that the complaint be dismissed. Counsel supporting the complaint have appealed from this decision. The case has been submitted on briefs alone, neither side having requested oral argument.

In addition to argument on the question of jurisdiction, respondent urges the Commission to consider also certain "additional defenses and contentions" raised unsuccessfully by the respondent in the proceedings before the hearing examiner. Counsel supporting the complaint have moved to strike from respondent's answering brief all references to any matters not raised in the appeal brief, citing Section 3.22 of the Commission's Rules of Practice.

Respondent J. H. Filbert, Inc., is a Maryland corporation with its office and principal place of business at 3701 Southwestern Boulevard, Baltimore, Maryland.

Respondent manufactures, sells, and distributes food products, including margarine, salad dressing, and beverage syrups under the trade name "Mrs. Filbert's." Respondent's sales of all products total approximately \$16,000,000 per year.

Respondent sells its products to independent retail grocers, to grocery distributors, and to chain store retail grocers, including Food Fair Stores, Inc., a Pennsylvania corporation with its main office and warehouse at 2223 E. Allegheny Avenue, Philadelphia, Pennsylvania. During 1954, respondent paid \$1250 as "special" allowances to Food Fair for advertising respondent's products in anniversary sales promotions by Food Fair. During the first six months of 1955, respondent paid \$1350 to Food Fair for like pro-

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motions. These payments were made pursuant to contracts between respondent and Food Fair.

Section 2(d) of the Clayton Act, as amended, provides:

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.

Respondent's answer admitted, and the hearing examiner found:

In the course and conduct of its business, respondent has engaged in commerce, as "commerce" is defined in the Clayton Act as amended. Respondent ships its products, or causes them to be transported, from its principal place of business in the State of Maryland to customers located in the same state and other States of the United States and the District of Columbia.

The record shows that during 1954 and the first six months of 1955, the respondent sold its products to American Stores, Food Fair, and Schreiber Brothers in Baltimore, to the Mann Company and Safeway Stores in Washington, to American Stores and Stanley Marvel in Philadelphia, and to Ernest Nicholls in Trenton, New Jersey. In addition, respondent sold its products through route salesmen truck driver employees to some 2500 retail stores, which in 1956 included 17 establishments in the District of Columbia, one in Mercersburg, Pennsylvania, and one in Long Island City, New York, as well as to 15 Food Fair stores in Baltimore and its suburbs. Generally, these route salesmen carried a full line of respondent's products, but delivery to Food Fair stores was of margarine only. Delivery of respondent's other products, as well as margarine, was made to Food Fair's Baltimore warehouse, which in 1955 serviced 36 Food Fair stores in Maryland and Pennsylvania. Respondent's products were also sold by 66 Food Fair stores in Pennsylvania, New Jersey, and Delaware, serviced by Food Fair's Philadelphia warehouse.

Competition in the distribution of respondent's products was shown to exist between Food Fair outlets in Baltimore and independent retailers who were customers of respondent in Baltimore.¹ Allowances for advertising of the type granted to Food Fair were

¹ That these customers were engaged only in intrastate commerce is no bar to a finding of a violation of Section 2(d). The statute includes no such requirement. For related cases see *Moore v. Mead's Fine Bread Company*, 348 U.S. 115 (1954) (Section 2(a)); *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F. 2d 150 (2d Cir. 1949) (Section 2(e)).

not made available on proportionally equal terms to these customers competing with Food Fair in the distribution of respondent's products.²

It is clear (1) that respondent is engaged in commerce, (2) that respondent has contracted for and made payments to a customer for advertising provided by such customer in connection with the sale of respondent's products, and (3) that such payments were not available on proportionally equal terms to all other customers competing in the distribution of respondent's products.

The issue here is: were these "special" payments "in the course of such commerce," i.e., the "commerce" in which respondent is "engaged," as specified in the statute? We believe they were.

Respondent's brief submits "that there are two issues to be passed upon, that both of them are those which were specifically ruled upon by the Examiner adversely to the complaint and that they are succinctly presented by these inquiries:

"1. Did the separate and independent payment to Food Fair Stores, Inc., in the Baltimore area, involve interstate commerce within the meaning of the statute, when the Respondent's production for, delivery and sale, as well as such payment, to Food Fair Stores, Inc., were all made entirely and independently and for exclusive use within the State of Maryland?

"2. Did the separate and independent payment to Food Fair Stores, Inc., in and for the exclusive use of the Philadelphia area, in which area the Respondent had no other competing customer with Food Fair Stores, Inc., violate the statute involved?"

Such a statement of the issues is consistent with the hearing examiner's conclusion. He stated, "So [in Philadelphia] we have merchandise sold and payments made by respondent in commerce, but no showing of competition between the recipient, Food Fair Stores, Inc., and any non-recipient. In the Baltimore area, such competition is amply shown, but obviously there is no commerce."

We must decline to restrict ourselves to this fragmented view of either respondent's or Food Fair's business in a "nice and technical inquiry into the non-interstate character of some of its necessary incidents and facilities when considered alone and without reference to their association with the movement of which they were an essential but subordinate part." *Stafford v. Wallace*, 258 U.S. 495, 519 (1922). Nor does such a view appear consistent with the evidence in the record.

² Mr. J. Frederick Diener, respondent's advertising manager, testified that the "special" contracts with Food Fair, unlike the regular cooperative advertising contracts, were not "proportionalized" on any basis, but were based on "publicity values."

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Our conclusion that these "special payments" to Food Fair were made by the respondent in the course of its business in interstate commerce, part of which includes sales to Food Fair for interstate distribution, depends on (a) the character of the Food Fair organization which resells respondent's products³ and (b) the character of the advertising for which such payments were made,⁴ regardless of the mere locus of the transactions between the respondent and Food Fair.

So far as the record shows, all dealing between the respondent and Food Fair occurred in Baltimore. Except for such margarine as was delivered to certain Food Fair outlets by respondent's route salesmen, delivery of all products was made to Food Fair's warehouse in Baltimore.⁵ Contracts for payment for advertising were made as a result of negotiations between respondent's officials and Mr. Joseph Rash, Assistant Secretary of Food Fair Stores, Inc., and Director of Operations of Maryland for Food Fair. Mr. Rash stated "... in addition to my being an officer of the company and directing the operations of our expansion program, I am head buyer of all grocery items purchased in the Maryland area."

As the hearing examiner found, Food Fair Stores, Inc., is "a supermarket chain incorporated in Pennsylvania conducting an *integrated interstate operation*," (emphasis supplied) with "headquarters at Philadelphia but with branches in other states . . ., buying products from many suppliers in various states and reselling them to consumers through 216 supermarkets located from New York to Florida, with average annual sales per store being \$2,000,000." Management of the supermarkets is directed from the organization headquarters in Philadelphia.⁶

³ See *Kentucky-Tennessee Light & Power Co. v. Nashville Coal Co.*, 37 F. Supp. 728, 736-7 (D.C. Ky. 1941), affirmed 136 F. 2d 12, 17 (6th Cir. 1943).

⁴ See *Corn Products Refining Co. v. Federal Trade Commission*, 324 U.S. 726, 744-5 (1945).

⁵ The hearing examiner found: "Respondent does, of course, ship its products to the Philadelphia warehouse of Food Fair Stores, Inc., in the regular course of business . . ." This conclusion apparently rested on an examination of the advertising contract which referred to the Philadelphia warehouse. However, Commission's Exhibit 1, showing sales to all customers of respondent in the Baltimore, Washington, and Philadelphia areas, lists all sales to Food Fair to the Baltimore warehouse. On our view of this case it makes no difference whether the portion of respondent's products which Food Fair distributed from its Philadelphia warehouse were physically delivered by respondent to the Baltimore warehouse or to the Philadelphia warehouse. See *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, 290 (1921); *Lemke v. Farmers Grain Co.*, 258 U.S. 50 (1922). This difficulty in determining to which warehouse respondent made such deliveries suggests the "integrated" character of Food Fair's "interstate operation."

The hearing examiner's conclusion that payments were made to the Philadelphia warehouse appears equally unwarranted.

⁶ A Food Fair official testified that department managers in individual Food Fair Stores may not handle any item not "authorized" by the central management.

That the payments to Food Fair should be regarded as having been made "in the course of such commerce" is indicated by the "special" advertising contracts, some of which were placed in evidence. Commission's Exhibit 13, "Contract of Participation, 1955 Anniversary Plan," shows that Food Fair agreed to render advertising and promotion service of respondent's margarine during a selected week for which respondent agreed to pay \$350 in accordance with Plan No. 2-B. This plan, headed "1955 Anniversary Plan, Food Fair Stores, Inc., Philadelphia, Pa., Baltimore Warehouse—36 Stores," provides for (1) advertising to be placed in newspapers in Baltimore, Maryland, and in Carlisle, Columbia, Harrisburg, Lebanon, and York, Pennsylvania; (2) insertion in circulars to be distributed "in selected trading areas"; (3) a feature display in every store; (4) "extra shipments of [respondent's] product to stores for displays," and (5) "pep-up bulletins telling the merits of [respondent's] product sent to each store manager to insure proper ordering and display."⁷

Commission's Exhibit 15, "Plan 2-P," is part of the contract on which respondent paid to Food Fair \$700 for promotion of respondent's margarine. The same five promotional services are contracted for, except that this program is headed "Philadelphia Warehouse—66 Stores" and provides for advertising in 19 newspapers located in 13 cities in Pennsylvania, 5 cities in New Jersey, and in Wilmington, Delaware.

In addition, respondent contracted with Food Fair for special advertising of mayonnaise, salad dressing, and mustard in Baltimore newspapers only, for which respondent paid \$300 on May 4, 1955.

All three of these contracts were made on March 22, 1955, by respondent's advertising manager, Mr. J. Frederick Diener. Payments were made pursuant to invoices later submitted by Food Fair and processed by respondent's advertising department. We believe it fair to conclude that sales to Food Fair and these payments to Food Fair were made in the whole course of respondent's sale and distribution of its products in interstate commerce.

The motion of counsel supporting the complaint to strike certain portions of respondent's brief was properly made. In any event, we find the hearing examiner dealt fully and correctly with such contentions in paragraphs 18 and 19 and the second part of paragraph 22 in the initial decision, on which we explicitly affirm his rulings.

⁷ Respondent's records show that on June 14, 1955, respondent paid to Food Fairs \$350 for "Anniversary Sale, Baltimore-York-Harrisburg."

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In our decision here, we hold, and so find, that the respondent has contracted for and made payments to Food Fair Stores, Inc., in the course of commerce in consideration for services and facilities furnished by that customer for promoting the resale of the respondent's products. Such payments have not been offered or otherwise been made available by the respondent on proportionally equal terms to all other customers of the respondent engaging in the resale of the respondent's products in competition with certain of the outlets of Food Fair Stores, Inc., named in the advertising contracts. It follows that the respondent's acts and practices in the latter respect have been in violation of subsection (d) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act. The appeal of counsel supporting the complaint is granted accordingly. Rejected, to the extent that they are contrary hereto, are the findings and recitations contained in paragraph 21, the first part of paragraph 22 and paragraph 23, together with the initial decision's legal conclusion that the complaint herein should be dismissed; and the remaining findings of the initial decision are adopted hereby. Our order, which is issuing herewith, contains an order to cease and desist which is being adopted in lieu of the order contained in the initial decision.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the initial decision of the hearing examiner and upon the briefs of counsel, oral argument not having been requested; and the Commission having rendered its decision granting said appeal and variously adopting and rejecting certain findings and conclusions contained in the initial decision as designated in the Commission's accompanying opinion and further directing issuance of an appropriate order in lieu of the order contained in the initial decision:

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

"It is ordered, That respondent J. H. Filbert, Inc., a corporation, its officers, employees, agents, and representatives, directly or through any corporate or other device, in or in connection with the sale of food products in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

"Making or contracting to make, to or for the benefit of Food Fair Stores, Inc., or any other customer, any payment of anything of value as compensation or in consideration for advertising or other

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services or facilities furnished by or through such customer, in connection with the handling, offering for resale, or resale of the respondent's products, 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 the respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist.

Complaint

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IN THE MATTER OF

POMPEIAN OLIVE OIL CORPORATION

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

Docket 6468. Complaint, Nov. 21, 1955—Decision, Sept. 20, 1957

Consent order requiring a Baltimore corporation, engaged in selling its "Pompeian Olive Oil" through food brokers and direct to large retail chain store organizations, with sales in 1954 amounting to \$1,747,493, to cease violating Sec. 2(d) of the Clayton Act by paying money to a Philadelphia food chain as an allowance for advertising, while not making such allowance available on proportionally equal terms to all competitors of the chain.

Before *Mr. Frank Hier*, hearing examiner.

Mr. Andrew C. Goodhope and *Mr. Fredric T. Suss* for the Commission.

Mr. Morton J. Hollander, of Baltimore, Md., and *Mr. James W. Cassedy*, of Washington, D.C., for respondent.

COMPLAINT

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

PARAGRAPH 1. Respondent, Pompeian Olive Oil Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 4201 Pulaski Highway, Baltimore, Maryland.

PAR. 2. Respondent is now and has been engaged principally in the business of selling olive oil. Respondent sells its olive oil through food brokers and direct to large retail chain store organizations. Respondent sells its olive oil under the trade name "Pompeian Olive Oil" and sales of such product made by the respondent are substantial, amounting in the year 1954 to \$1,747,493.

PAR. 3. In the course and conduct of its business, respondent has engaged in commerce, as "commerce" is defined in the Clayton Act. Respondent ships its products, or causes them to be transported, from its principal place of business in the State of Maryland to customers located in the same and any other states of the United States and the District of Columbia.