

Decision

IN THE MATTER OF
SIDNEY J. KREISS, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 7264. Complaint, Sept. 30, 1958—Decision, May 19, 1960*

Consent order requiring New York City distributors of women's hosiery to retail stores, to cease representing falsely—in advertising in magazines and newspapers and in "mailers" supplied their customers for use in promoting sales—that certain of their hosiery was created, designed or fashioned by famous fashion designers.

Charges of fictitious pricing and of offering hosiery "free of charge" were dismissed.

Mr. Edward F. Downs for the Commission.

Guzik and Boukstein, of New York, N.Y., for respondents.

INITIAL DECISION BY EARL J. KOLB, HEARING EXAMINER

This proceeding is based upon a complaint brought under Section 5 of the Federal Trade Commission Act charging respondents with the use of unfair and deceptive acts and practices and unfair methods of competition in commerce in connection with the sale and distribution of their hosiery.

This proceeding is now before the hearing examiner for final consideration upon the complaint, answers thereto, testimony and other evidence, proposed findings of fact and conclusions of law filed by all parties and brief filed by respondent. The hearing examiner has given consideration to the proposed findings of fact and conclusions submitted by the parties, and brief in support thereof, and all findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith rejected, and the hearing examiner having considered the record herein and being now duly advised in the premises makes the following findings as to the facts, conclusions drawn therefrom, and order:

1. Respondents Sidney J. Kreiss, Inc., and Picturesque Hosiery Company, Inc., are corporations organized under the laws of the State of New York with their offices and principal places of business located at 350 Fifth Avenue, New York, New York. Respondents Sidney J. Kreiss and Mildred Kreiss are individuals and officers of both corporate respondents. Respondent Sidney J. Kreiss formulates, directs and controls the acts and practices of said corporate respondents. Respondent Mildred Kreiss, wife of Sidney J. Kreiss,

does not actively participate in the management or operation of the business of said corporations.

2. Respondents are now and for several years last past have been engaged in the sale and distribution in interstate commerce of women's hosiery to retail stores for resale to the consuming public. In such sale and distribution respondents are engaged in substantial competition with corporations, firms and individuals who are likewise engaged in the sale and distribution of hosiery products in interstate commerce.

3. On or about June 1, 1956, the respondent Picturesque Hosiery Company, Inc., entered into an agreement with Jeanne Lanvin, S. A., a corporation of Paris, France, and through and by virtue of the terms of this agreement said Jeanne Lanvin, S. A., granted to said respondent an exclusive license to use the name "Jeanne Lanvin" as a brand name or trade mark for its women's hosiery sold and distributed in the United States.

4. On or about the 27th day of June 1956, respondent Sidney J. Kreiss, Inc., entered into a contract with Oleg Cassini by the terms of which contract Oleg Cassini granted to said respondent an exclusive license to use the name, likeness and crest of said licensor in connection with the manufacture, sale, distribution and advertising of said respondent's hosiery.

5. Jeanne Lanvin, S. A., and Oleg Cassini are engaged in the designing and styling and in the manufacture and sale of women's apparel in Paris, France, and New York, New York. In some instances the corporate respondents purchased greige goods which were sent to a finisher for dying and finishing, and in other instances bought the finished hosiery from the mill. This hosiery was variously sold under the brand name of Lanvin and Oleg Cassini by the corporate respondents. The hosiery was not created, designed, styled or manufactured or in any other way controlled by Jeanne Lanvin and Oleg Cassini.

6. The respondents have falsely represented that the hosiery sold by them under the brand names Lanvin and Oleg Cassini were created, designed and fashioned by famous fashion designers such as Jeanne Lanvin and Oleg Cassini. Such representations were made by respondents in advertising placed by them in magazines having a national circulation and in local advertising disseminated by customers of respondents with the cooperation of respondents. Typical of representations in national magazines were advertisements placed by respondent for its Lanvin brand hosiery bearing the legend:

NYLONS BY JEANNE LANVIN

7. The corporate respondents granted advertising allowances to all their retailer customers advertising their Lanvin and Cassini hosiery. The advertising issued by respondents' retailer customers with reference to the Lanvin brand hosiery consisted of newspaper advertising and circulars or cards generally referred to as mailers. In such consumer advertising it was represented directly and by implication that respondents' Lanvin hosiery was created, designed or fashioned by famous fashion designers such as Jeanne Lanvin. Among and typical of the representations contained in such consumer advertising of respondents' Lanvin brand of hosiery were the following:

Jeanne Lanvin, the world renowned couturiere, brings you her luxurious nylons.

* * * exciting as the fashions from Lanvin's Paris atelier.

Only Paris could inspire such fantastically-flattering nylons!

* * * French couturier nylons, created by the famous Parisian designer and perfumer.

Newest fashion from Lanvin studios in Paris * * *

* * * you know Lanvin is a great house of the Paris couture * * * now meet Lanvin hosiery exclusively at Davison's.

French couturier nylons created by the famous Parisian designer, Jeanne Lanvin.

8. The plans of distribution used in connection with the Oleg Cassini stockings was to offer one box of three as a gift, provided the purchaser agreed to purchase three additional boxes. In 1957 this plan of sale was discontinued and this stocking was sold on the same plan as that of Lanvin hosiery. The circulars and mailers used by respondents and their retailer customers to advertise Oleg Cassini hosiery generally contained, among other things, the likeness and crest of Oleg Cassini with representations and statements similar to those used in connection with respondents' Lanvin hosiery, namely, that the hosiery sold under the Cassini brand name was created, designed or fashioned by famous fashion designers. Among and typical of the representations contained in such consumer advertising of respondents' Oleg Cassini hosiery were the following:

Prized above all else—glamorous nylons by Paris-born Oleg Cassini, a man who really knows beauty. Internationally famous as a couturier, he has created the ultimate in stocking elegance * * *.

* * * This famed designer's talented touch is obvious in every crystal-clear pair * * *.

In the highly competitive world of fashion design, few names are regarded as highly as that of Paris born Oleg Cassini. The skill, imagination and craftsmanship which are found in his creations have endowed him with a reputation of international scope. Mr. Cassini has now turned his talents to the

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manufacturing of exquisitely beautiful nylon stockings which we now have the pleasure of presenting to you at this Christmas Season for your gift requirements and for yourself.

9. It was contended by the respondents that they did not participate in the local advertising of their customers, consisting of newspaper advertisements, circulars and mailers in which appeared the false representations above described. Respondent Sidney J. Kreiss testified that the corporate respondents granted advertising allowances to all their retailer customers advertising their Lanvin and Cassini hosiery in local newspapers and in circulars and mailers; that all such advertising was prepared by the retailer customer and not seen by the respondents until submitted for payment of advertising allowances. This testimony is completely refuted by documentary evidence in the record:

(1) On July 11, 1957, respondent Sidney J. Kreiss wrote Miss Jean Rothenberg, Hecht Company, Washington, D.C., which letter read in part as follows:

When you were in my office last week, we discussed with you the possibility of your store running a promotion on Jeanne Lanvin nylons using a direct mailing piece such as has been used very successfully by many of our other customers.

In line with that discussion, I had our printer set up a mailing piece for you to consider. I did this so that if you were to give the matter further consideration you would have the mailing piece in front of you so that you and whoever in the store might be concerned with this promotion could consider the matter further.

(2) On February 11, 1957, respondent Sidney J. Kreiss, Inc., wrote McCurdy's Department Store, Rochester, New York, which letter read in part as follows:

In reply to our conversation of last week, Sidney J. Kreiss feels that it would be impossible to run Oleg Cassini as we have in the past. Due to the fact that it was a losing proposition, we are presenting this promotion in a different way.

In the very near future, I will have for you a copy of a mailer on Oleg Cassini. This mailer will offer \$1.50 per pair Oleg Cassini hose at \$1.09. The prices are to be \$7.25 for 60's and \$7.75 for Seamless. We will pay for the complete mailer plus half the postage on a minimum order roughly from 400 to 500 dozen. I will have further details on this later on.

(3) On March 20, 1957, respondent Sidney J. Kreiss, Inc., wrote Karl Hoffman, McCurdy's Department Store, Rochester, New York, which letter read in part as follows:

In reference to my past letter to you concerning our new Oleg Cassini promotion, I am enclosing herewith a mailer just made for the May Company, which with this I feel sure that you can get an idea of what we intend to do.

* * * This mailer is self explanatory, and I would appreciate your reading it through and giving me your opinion regarding same. As previously written you, we supply the mailer free of charge.

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Conclusions

(4) On September 25, 1957, respondent Sidney J. Kreiss wrote Miss Helen Pinkus, Lansburgh's, Washington, D.C., which letter read in part as follows:

We are enclosing herewith the proof for your Oleg Cassini mailer. Please look this over and make any corrections, and send it back to us as soon as possible, so we can get to work on it.

(5) On October 8, 1957, respondent Sidney J. Kreiss wrote Miss Jean Rothenberg, Hecht Company, Washington, D.C., which letter read in part as follows:

I am having my office set up the quantities for the Lanvin promotion. I thought it would be a good idea to confirm our deal in writing so that we both know what is involved in this matter.

We are printing 200,000 triplefold direct mail cards which we will ship to you free of charge. We are also going to absorb the cost of the POSTAGE to cover the mailing of these 200,000 cards. This amounts to \$3000 to cover the cost of 200,000 cards at a penny and a half a card. All other costs involved in the mailing of these cards are to be absorbed by your store. These are the costs involved: The addressing of the cards and the actual cost of giving the cards to the post office for mailing. Our expense, therefore, will be the \$3000 to cover the postage and \$1600 which we are spending to print the 200,000 cards.

10. The corporate respondents from time to time advertised Lanvin and Oleg Cassini hosiery in magazines having national circulation, and in local newspapers in cooperation with their retailer customers, in which advertisements the price of said Lanvin hosiery was listed at \$1.65 for the 60 gauge, \$1.95 for the 66 gauge, and \$2.50 for the 75 gauge hosiery per pair; and the Oleg Cassini hosiery at \$1.50 per pair. The wholesale price charged by the respondents for said hosiery was \$10.50, \$13.50 and \$15.00 per dozen pair for Lanvin, and \$10.50 per dozen pair for Cassini hosiery.

11. As a general practice it was understood by the corporate respondents and their retailer customers that such customers would conduct one or two sales a year on such hosiery, at 33 1/3 to 50 percent off advertised price, the sale period lasting from two to four weeks. During the sale period, said corporate respondents sold said hosiery to their retailer customers at a substantially reduced price of from \$7.00 to \$7.50 per dozen pair. At times other than the sale periods respondents' retailer customers purchased at the regular wholesale price and sold said branded hosiery at the advertised price.

CONCLUSIONS

1. The charge in the complaint that the respondents used fictitious prices in connection with the sale of their hosiery has not been sustained. The holding of annual or semi-annual sales by retail stores

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and the allowance of a lower wholesale price during the sale period by the manufacturer is a customary practice in the hosiery industry. During the period when respondents' hosiery was not on sale by the retailers, such hosiery was sold at the advertised retail price. During the sales held by retailer customers of the respondents, the hosiery was actually sold at a discount off the advertised retail price.

2. Respondents have falsely represented that certain of their hosiery was created, designed or fashioned by famous fashion designers, both in advertising disseminated by the respondents in magazines of national circulation and in circulars, mailers and other advertising material furnished by the respondents to their retailer customers.

3. The plan of respondents of giving a box of Cassini stockings free on condition that the recipient purchase three additional boxes of said stockings was not in violation of the Federal Trade Commission Act. All the conditions, obligations and other prerequisites to the receipt and retention of the free or gift article of merchandise was clearly explained in the circular, by which said offer was made so as to leave no reasonable probability that the terms of the advertisement or offer might be misunderstood.¹ In the circular it was clearly stated—

When you mail to us the enclosed subscription form, you will receive OLEG CASSINI'S *gift box* of three pairs of nylons at once. Beginning one month later, you will receive 1 box of three (3) pairs each month for the next three months, and you will be billed on your regular charge account in the amount of \$4.50 for each box of three pairs. If you cancel your three box subscription before its completion, it will be necessary for us to charge you for the *gift box*.

4. The record fails to show that Mildred Kreiss participated in any of the acts and practices of the corporate respondents and the complaint should be dismissed as to this respondent.

5. The acts and practices of the respondents, consisting of representations that the hosiery sold under the brand names of Lanvin and Oleg Cassini were created, designed, fashioned or manufactured by famous fashion designers, and the placing in the hands of others a means or opportunity to make such representations as herein found, are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER

It is ordered, That respondents Sidney J. Kreiss, Inc., a corporation, and Picturesque Hosiery Company, Inc., a corporation, and

¹ Walter J. Black, Inc., et al., Docket No. 5571.

their respective officers, and respondent Sidney J. Kreiss, individually and as officer of said corporations, and their respective agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of hosiery or other similar products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, directly or by implication, that respondents' hosiery or any other similar product has been created, designed, styled or manufactured by anyone other than the respondents or the person who actually did create, design, style or manufacture such hosiery or other similar products.

(2) Placing in the hands of others a means or opportunity of representing to purchasers or prospective purchasers that the hosiery or other products supplied by the respondents were created, designed, styled or manufactured by famous fashion designers or any other person who did not actually create, design, style or manufacture such hosiery or other product.

It is further ordered, That the complaint be, and the same is hereby, dismissed as to the respondent Mildred Kreiss.

It is further ordered, That all charges of the complaint not prohibited by this order be dismissed.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

The complaint in this matter charges respondents with violation of Section 5 of the Federal Trade Commission Act in three respects. The hearing examiner held that one of the allegations of the complaint was sustained by the evidence and ordered respondents (except for an individual as to whom the complaint was dismissed) to cease and desist the practice found to be illegal. He ordered that the remaining two allegations be dismissed. Both sides have appealed from this decision.

We consider first the appeal of counsel supporting the complaint from the dismissal of the charge that respondents used fictitious retail prices to promote the sale of their hosiery at lesser prices. The record shows that during the years 1956 and 1957 respondents sold their Lanvin and Cassini brands of hosiery under the following plan. Retailers were required to purchase a basic stock of hosiery at wholesale prices ranging from \$10.50 to \$15.00 per dozen pairs and offer it to the public at retail prices ranging from \$1.50 to \$2.50 per pair. Respondents permitted these retailers to sell the hosiery

at about one-half of that retail price on special sales for which the retailers could purchase the hosiery at wholesale prices ranging from \$6.50 to \$8.50 per dozen pairs. As a result, approximately 95% of all sales, totalling about 70,436 dozen pairs, were made by respondents during 1956 and 1957 at the lower wholesale price. In substance, counsel supporting the complaint argues that the evidence supports a finding that sales at the higher retail prices did not establish the customary and usual prices of respondents' hosiery and therefore such prices were fictitious.

We have carefully considered the points presented and we are not convinced that the higher retail price is fictitious as alleged. Respondents sold their hosiery to retailers located in cities throughout the country. The special sales conducted by those retailers who elected to conduct them lasted from two to four weeks each, with a maximum of two such sales annually. The testimony of the three retailers called in this proceeding discloses that it is the usual practice for suppliers of branded hosiery, such as respondents', to allow their customers to conduct one or two sales a year for which the hosiery may be purchased at reduced wholesale prices. Except for the special sales periods, those retailers who purchased respondents' hosiery, stocked, displayed, offered for sale and sold such hosiery at the higher retail prices. Thus, for a period of from ten to eleven months of the year, respondents' hosiery was available to consumers only at the higher retail price. The record shows that at least 3,729 dozen pairs were sold at the higher retail prices by a total of 34 different retailers during 1956 and 1957 and a proportionate amount was sold at those prices in 1958.

In our opinion, there are other significant facts of record which militate against the position of counsel supporting the complaint. For the two-year period covered by the documentary evidence, there were nine retailers located in all parts of the country who made purchases of respondents' hosiery only at the higher wholesale prices. There is undisputed testimony that these nine retailers sold this hosiery only at the higher retail prices and at no time did they conduct special sales or offer the hosiery at a reduced price. In addition, there is evidence that retailers who did conduct sales purchased at the higher wholesale prices between sales periods to maintain their stock. The record also shows that hosiery purchased at the lower wholesale price was marked up to the higher retail price after the sale period.

On the basis of the entire record, we are of the opinion that the evidence fails to sustain the allegation that the higher retail prices

of respondents' hosiery are fictitious. Accordingly, the appeal of counsel supporting the complaint on this issue must be denied.

Counsel supporting the complaint also contends that the hearing examiner erred in failing to find that certain of respondents' hosiery was not free of charge as represented. The record shows that this free offer was made only in connection with a so-called subscription plan for the sale of respondents' Cassini line of hosiery. Retailers using this plan offered their customers a box of three pairs of Cassini hosiery without charge on the condition that the customers accept a box of three pairs for each of the next three months which would be billed to their account in the amount of \$4.50 per box. If the customer cancelled the subscription before its completion, he was charged for the "gift" box. From the evidence, it appears that retailers when using the subscription plan did not sell or offer for sale Cassini hosiery in any other manner. Retailers who did not use the plan purchased Cassini hosiery from respondents at different wholesale prices as previously described. These retailers sold the hosiery at a retail price of \$1.50 per pair except for a reduction in price during the two special sale periods.

The hearing examiner found that all of the terms and conditions of the free offer were fully explained in the promotional material disseminated to consumers by retailers. Counsel supporting the complaint does not dispute this finding. However, he contends that the offer is deceptive for the reason that the price of the "free" box is included in the price of the other boxes sold under the plan, citing the Commission's decision *In the Matter of Walter J. Black, Inc., et al.*, Docket 5571 (1953). In support of his position, he relies on evidence that in some instances, respondents sold Cassini hosiery to retailers under the plan at a lower wholesale price than it sold to those retailers not under the plan whose retail price, as we have stated, was \$1.50 per pair. He argues that those retailers under the plan paying the lower wholesale price, by charging \$1.50 per pair (\$4.50 for a box of three pairs) were getting more than the customary mark-up on this hosiery. He contends that this additional mark-up constituted the difference between a retail price of \$1.50 per pair and \$1.00 per pair and thus these retailers were including the price of the gift box in the price charged for the hosiery they sold under the plan.

The "free" representation was made to consumers by respondents' retailers. Those consumers who did not complete their subscriptions were required to pay \$1.50 per pair. It is clear that those consumers who completed their subscriptions did in fact receive three pairs of Cassini hosiery which were otherwise available to them

only at a price of \$1.50 per pair from any source. Under these circumstances, the fact that certain retailers using the plan were able to purchase this hosiery at a low wholesale price is not controlling. We must conclude that the evidence fails to sustain the allegation pertaining to the free offer. The argument of counsel supporting the complaint on this point is also rejected.

Respondents have appealed from the hearing examiner's holding that they falsely represented that certain of their hosiery was created, designed or fashioned by famous fashion designers. The first point presented is whether respondents are responsible for the representations. The hearing examiner quoted at length from the documentary evidence of record in support of his conclusion that circulars, mailers and other advertising material containing the representations were furnished by respondents to their retail customers. Moreover, there is undisputed testimony that the mailer used by one retailer was prepared and paid for by respondents. There can be no doubt that the representations in question were made by the respondents.

The next question is whether the hosiery was in fact created, designed or fashioned by famous fashion designers. Although respondents were granted the right to use the names of two fashion designers, Jeanne Lanvin and Oleg Cassini, in their sale of hosiery, the record clearly establishes that neither of these at any time created, designed or styled the hosiery carrying their names. As shown by the hearing examiner, this hosiery was either purchased by respondents as greige goods and sent to a mill for dyeing and finishing or was purchased in finished form from the mill. In addition, the admission by respondent Sidney J. Kreiss, that identical hosiery was sold under both the Lanvin and Cassini names would of itself warrant a finding that the representations in question were false. Accordingly, the appeal of respondents on this point is denied.

Respondents also contend that the order is too broad. Specifically, they object to that part of the order which requires them to cease placing in the hands of others a means or opportunity for deceiving purchasers as to the identity of the person who created, designed or styled their hosiery. As previously shown, respondents did provide their retail customers with the means and opportunity for such deception. It is obvious that this part of the order is necessary to prevent such a practice in the future. Respondents' argument on this point is rejected on the authority of *Consumer Sales Corp. v. Federal Trade Commission*, 198 F. 2d 404, and *Herzfeld et al. v. Federal Trade Commission*, 140 F. 2d 207. See also *Federal Trade*

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Commission v. Winsted Hosiery Co., 258 U.S. 483, and *C. Howard Hunt Pen Co. v. Federal Trade Commission*, 197 F. 2d 273.

The order dismisses the complaint as to respondent Mildred Kreiss by name, presumably in both her individual and official capacities. Although we believe there is sufficient grounds to justify dismissal in her individual capacity, no showing has been made to justify the dismissal as to her in her official capacity. The order should therefore be modified to dismiss the complaint as to respondent Mildred Kreiss as an individual but not as an officer of the corporations. As so modified, the initial decision is adopted as the decision of the Commission. An appropriate order will be entered.

Chairman Kintner and Commissioner Secrest dissent in part.

OPINION OF COMMISSIONER SECREST DISSENTING IN PART

In my opinion the price at which 95% of respondents' merchandise is sold is the regular price as indicated by this record. The respondents have engaged in fictitious pricing and an order should issue.

Chairman Kintner joins in this partial dissent.

FINAL ORDER

This matter having been heard by the Commission upon cross-appeals from the hearing examiner's initial decision, filed by respondents and counsel in support of the complaint; and

The Commission having rendered its decision denying both appeals and directing modification of the initial decision:

It is ordered, That the order to cease and desist contained in the initial decision be, and it hereby is, modified by adding to the preamble thereof the words "and respondent Mildred Kreiss as an officer of said corporations" immediately following the words "and their respective officers" and by striking therefrom the next to last paragraph and substituting therefor the paragraph:

It is further ordered, That the complaint be, and the same hereby is, dismissed as to respondent Mildred Kreiss in her individual capacity but not in her capacity as an officer of respondent corporations.

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

Chairman Kintner and Commissioner Secrest dissenting in part.

IN THE MATTER OF

M. S. DISTRIBUTING COMPANY ET AL.

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

Docket 7745. Complaint, Jan. 12, 1960—Decision, May 19, 1960

Consent order requiring Chicago distributors of phonograph records to cease giving concealed "payola" to television and radio disc jockeys to induce playing their records in order to increase sales.

Mr. John T. Walker and Mr. James H. Kelley for the Commission.

Rothschild, Hart, Stevens & Barry by Mr. Edward I. Rothschild, of Chicago, Ill., for respondents.

INITIAL DECISION BY J. EARL COX, HEARING EXAMINER

The complaint charges respondents, who are engaged in the offering for sale, sale and distribution of phonograph records as an independent distributor for several record manufacturers to retail outlets and jukebox operators in various states of the United States, with violation of the Federal Trade Commission Act, in that respondents, alone or with certain unnamed record manufacturers, have negotiated for and disbursed "payola," i.e., the payment of money or other valuable consideration to disk jockeys of musical programs on radio and television stations, to induce, stimulate or motivate the disk jockeys to select, broadcast, "expose" and promote certain records, in which respondents are financially interested, on the express or implied understanding that the disk jockeys will conceal, withhold or camouflage the fact of such payment from the listening public.

After the issuance of the complaint, respondents, their counsel, and counsel supporting the complaint entered into an agreement containing consent order to cease and desist, which was approved by the Director, the Associate Director and the Assistant Director of the Commission's Bureau of Litigation, and thereafter transmitted to the hearing examiner for consideration.

The agreement states that respondent M. S. Distributing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 1700 South Michigan Avenue, Chicago, Illinois, and that individual respondents Milton T. Salstone and M. G. McDermott are president and vice president, respec-