

Decision

IN THE MATTER OF

THE PROCTER & GAMBLE COMPANY ET AL.

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

Docket 7542. Complaint, July 14, 1959—Decision, June 30, 1960

Consent order requiring a manufacturer and its wholly owned subsidiary, together constituting the leading producer in the United States of soap and detergent products, among other things, to cease entering into unlimited exclusive "free sampling" contracts with manufacturers of automatic washing and dishwashing machines to pack samples of its soaps, detergents, or bleaches in the appliances, and entering into similar free sampling agreements with distributors, demonstrators, and dealers, to whom they paid 75¢ or \$1.00 for using their products in a demonstration and for recommending only such product to the prospective purchaser; and to cease representing falsely in advertising that manufacturers of aforesaid appliances recommended and inserted free samples of respondents' detergents in their machines because they were better than competitive products, that they desired respondents' said products to be used exclusively in their machines, recommended them as the best in the market, and voluntarily selected them to be placed in their respective machines.

Mr. William J. Boyd, Jr. and Mr. Martin F. Connor for the Commission.

Mr. Frederick W. P. Lorenzen and Mr. Richard W. Barrett, of Royall, Koegel, Harris & Caskey, of New York, N.Y., for respondents.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

The Federal Trade Commission (sometimes also hereinafter referred to as the Commission) on July 14, 1959, issued its complaint herein, charging the respondents The Procter & Gamble Company and The Procter & Gamble Distributing Company, corporations, with having violated the provisions of the Federal Trade Commission Act, and respondents were duly served with process.

On April 12, 1960, there was submitted to the undersigned hearing examiner of the Commission for his consideration and approval an "Agreement Containing Consent Order To Cease And Desist," which had been entered into by respondents, their counsel, and counsel supporting the complaint, under date of April 12, 1960, subject to the approval of the Bureau of Litigation of the Commission, which had subsequently duly approved the same.

On due consideration of such agreement, the hearing examiner finds that said agreement, both in form and in content, is in ac-

cord with §3.25 of the Commission's Rules of Practice for adjudicative Proceedings, and that by said agreement the parties have specifically agreed to the following matters:

1. Respondents The Procter & Gamble Company and The Procter & Gamble Distributing Company are corporations existing and doing business under and by virtue of the laws of the State of Ohio, with their offices and principal place of business located at 301 East Sixth Street, Cincinnati, Ohio.

2. 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.

3. This agreement disposes of all of this proceeding as to all parties.

4. Respondents waive:

(a) Any further procedural steps before the hearing examiner and the Commission;

(b) The making of findings of fact or conclusions of law; and

(c) All the rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance with this agreement.

5. The record on which the initial decision and the decision of the Commission shall be based shall consist solely of the complaint and this agreement.

6. This agreement shall not become a part of the official record unless and until it becomes a part of the decision of the Commission.

7. This agreement is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

8. The following order to cease and desist may be entered in this proceeding by the Commission without further notice to respondents. When so entered it shall have the same force and effect as if entered after a full hearing. It may be altered, modified or set aside in the manner provided for other orders. The complaint may be used in construing the terms of the order.

Upon due consideration of the complaint filed herein and the said "Agreement Containing Consent Order To Cease And Desist," the latter is hereby approved, accepted and ordered filed. The hearing examiner finds from the complaint and the said "Agreement Containing Consent Order To Cease And Desist" that the Commission has jurisdiction of the subject-matter of this proceeding and of the respondents herein; that the complaint states a legal cause for complaint under the Federal Trade Commission Act against

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Order

the respondents, both generally and in each of the particulars alleged therein; that this proceeding is in the interest of the public; that the following order as proposed in said agreement is appropriate for the just disposition of all of the issues in this proceeding as to all of the parties hereto; and that said order therefore should be, and hereby is, entered as follows:

It is ordered, That respondents, The Procter & Gamble Company and The Procter & Gamble Distributing Company, corporations, and their officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, distribution or sampling of soap, detergent or bleach products, including the detergent products known as Tide, Dash and Cascade, in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Entering into contracts, agreements, or understandings with manufacturers or marketers of appliances for washing clothes or dishes, whereby the right is acquired, directly or by implication, to pack or have packed respondents' soap, detergent or bleach products in said appliances to the exclusion of the products of other soap, detergent or bleach manufacturers, except that with respect to a new product and to a single product in each product classification (e.g., high sudser, low sudser, light duty, dishwasher and bleach) respondent may have a single commitment of exclusivity within a calendar year when the duration of such commitment is ninety days or less;

2. Representing, or causing the representation to be made, in any advertisement or commercial in any medium that any manufacturer or marketer of appliances for washing clothes or dishes packs any of respondents' soap, detergent, or bleach products in its appliances unless said advertisement or commercial also includes, clearly and conspicuously, an explicit disclosure that the product samples and/or the advertisement or commercial, as the case may be, are supplied by respondents, pursuant to an agreement with the appliance manufacturer or marketer, in every instance in which there is an agreement, express or implied, to feature or mention said appliances in advertisements or commercials or to provide cash consideration in lieu thereof;

3. Failing to reveal plainly on the packages of respondents' soap, detergent or bleach products placed in appliances for washing clothes or dishes that such products are supplied free for such placing by and at the initiative of respondents in cooperation with the manufacturer or marketer of such appliances, if such is the fact;

4. Paying or agreeing to pay any party for using or recommend-

ing the use of respondents' soap, detergent or bleach products in demonstrations of appliances for washing clothes or dishes, unless the party so demonstrating said appliances discloses at the time of said demonstration that it was made by said party in cooperation with respondents.

The term "respondents" as used herein is intended to include either or both The Procter & Gamble Company and The Procter & Gamble Distributing Company, whether acting separately or jointly.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

The hearing examiner, on April 14, 1960, having filed an initial decision wherein he accepted an agreement containing a consent order to cease and desist, theretofore executed by the respondents and counsel in support of the complaint, and issued his order in conformity with the provisions of said agreement; and

The respondents, by motion filed May 6, 1960, having requested (1) an extension of time within which to appeal from said initial decision, and (2) a remand of the proceeding to the hearing examiner, which motion was withdrawn and superseded by another motion, filed June 24, 1960, wherein the Commission was requested to modify the initial decision by deleting therefrom the following language which the respondents state was not included in the agreement of the parties:

"That the complaint states a legal cause for complaint under the Federal Trade Commission Act against the respondents, both generally and in each of the particulars alleged therein"; and

The Commission having considered the matter and having concluded that the complained-of statement, while not found *in haec verba* in the agreement, represents a conclusion which is fully justified by the other statements and admissions included therein, and thus does not constitute a departure from the agreement for consent order; and, accordingly:

It is ordered, That the respondents' motion for modification of the initial decision be, and it hereby is, denied.

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

It is further ordered, That the respondents, The Procter & Gamble Company and The Procter & Gamble Distributing Company, corporations, 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 aforesaid initial decision.

INTERLOCUTORY ORDERS, ETC.

P. LORILLARD COMPANY

Docket 4922. Order, July 15, 1959

Order reopening case and directing hearing examiner, upon completion of hearings, to certify record to Commission with his recommendation.

Respondent having filed a petition seeking to modify the order to cease and desist heretofore entered in this proceeding, and counsel supporting the complaint having filed an answer thereto wherein he does not oppose the granting of said petition; and

The Commission being of the opinion, on the basis of the showing made in respondent's petition and supporting affidavit, that the proceeding should be reopened to determine whether conditions of law or fact have so changed as to require modification of the order or if the public interest so requires:

It is ordered, That this proceeding be, and it hereby is, reopened.

It is further ordered, That a hearing examiner be designated for the purpose of receiving such evidence as may be offered by the respondent with respect to the aforesaid question.

It is further ordered, That the hearings shall be conducted in accordance with the Commission's Rules of Practice for Adjudicative Proceedings insofar as such Rules are applicable; that the hearing examiner shall have all the powers and duties as provided for in said Rules, except that of making and filing an initial decision; and that counsel supporting the complaint shall have the usual rights of due notice, cross-examination and the presentation of evidence in rebuttal.

It is further ordered, That upon completion of the hearings the hearing examiner shall certify the record to the Commission with his report and recommendation thereon.

ADMIRAL CORPORATION

Docket 7094. Order and Opinion, July 15, 1959

Interlocutory order upholding hearing examiner's denial of respondent's motion for issuance of subpoenas duces tecum to 26 competitors, as lacking specificity.

OPINION OF THE COMMISSION

The complaint in this proceeding, in two counts, charges respondent with violation of subsections (a) and (d) of Section 2 of the

Clayton Act, as amended, in its sales as a distributor of Admiral televisions, radios and appliances to dealers who re-sell them to the general public. Counsel in support of the complaint completed their case-in-chief and thereafter respondent applied to the hearing examiner for issuance of subpoenas duces tecum which would have required 26 of its competitors in three competitive areas to produce documents assertedly relating to respondent's defenses to both counts of the complaint.

As to the 2(a) count, respondent sought this evidence with respect to the following issues:

1. The issues as to injury to competition.
2. The issues as to respondent's defense of meeting competition in good faith.
3. Issues with respect to the lack of injury to the public interest.
4. Issues raised by respondent's answer based upon the decision in *Moog Industries, Inc. v. F.T.C.*, 355 U.S. 411.

As to the 2(d) count, respondent asserted the same reasons except for those dealing with injury to competition.

On March 3, 1959, the hearing examiner granted in part and denied in part respondent's motion for subpoenas. The part denied was that part seeking documentary material to show, in connection with the 2(d) count, that respondent was "meeting competition." Upon respondent's interlocutory appeal from that ruling, the Commission, on May 29, 1959, affirmed the hearing examiner.

In due course the subpoenas duces tecum were served upon respondent's competitors and thereafter, on April 7, 1959, the hearing examiner granted motions to quash the subpoenas on the ground that the subpoenas lacked the degree of specificity required under controlling case law. The April 7, 1959, order stated, however:

If respondent's counsel will present new subpoenas narrowed and defined as indicated, consideration of their issuance will be given * * *.

Respondent did not appeal from the April 7, 1959, ruling and, on April 17, 1959, moved for issuance of 22 subpoenas duces tecum, advancing the same grounds in support thereof as had been relied upon in its original motion for subpoenas.

On April 27, 1959, the hearing examiner denied respondent's motion of April 17, 1959, stating in his order that it "* * * does not comply in specificity with this Hearing Examiner's order of April 7, 1959."

Respondent is entitled to the production of the documents sought if their relevance and the reasonableness of the scope of the subpoenas are established. As to respondent's 2(b) defense particularly, the hearing examiner in his order of April 7, 1959, stated in pertinent part that:

Section 2(b) reads in the singular; it is concerned with individual competitive situations, particular prices on particular sales by particular competitors at particular times on specified products—not with meeting competition in general.¹ Respondent cannot fish around in the files of nonparties to locate prices which in time, product, and source, fit or seem to fit, prices which it has been shown to have itself charged. Here the case against it has been completed. Respondent knows from the record by now and from its own files also, the prices or sales which it claims to have been “made in good faith to meet an equally low price of a competitor.” I see no reason why these subpoenas should not so specify.

In his order of April 27, 1959, the subject of this appeal, the hearing examiner denied respondent's motion to issue subpoenas “because such motion does not comply in specificity” with his order of April 7, 1959, quoted above. The Commission agrees with this ruling and has determined that respondent's motion of April 17, 1959, patently failed to comply with the hearing examiner's order of April 7, 1959. The specifications therein failed to describe with reasonable particularity the documents sought. Any subpoena duces tecum based upon such specifications would be entirely unreasonable in scope in that documents sought are related to competition generally and are not identified with specific offers by respondent's competitors to customers to whom respondent gave the lower prices which are the basis for the price discrimination charges in the complaint. The Commission holds, therefore, that the hearing examiner's ruling of April 27, 1959, insofar as it went to documents sought to aid respondent to establish its asserted 2(b) defense to the charges of price discrimination under Section 2(a) of the Act, was correct; that it was made in the exercise of his sound discretion; and that there has been no showing of abuse of that discretion. In fact, the discretion of the hearing examiner as to that ruling has been unquestioned.²

Respondent also asserts in this appeal that the documents sought are material and relevant to the so-called “Moog Issue” of what should be the effective date of any cease and desist order that might be entered, which issue was set forth as a prayer for relief in respondent's answer in this proceeding. In effect, respondent contends that the documents sought under the subpoenas are relevant to establish the validity of its request for postponement of the effective date of any order to cease and desist that might be entered until similar orders are issued against its competitors. Such

¹ *U.S. v. A. E. Staley Co.*, 324 U.S. 746, 753; *Standard Oil Co. of Indiana v. F.T.C.*, 340 U.S. 231; *F.T.C. v. C. E. Niehoff*, 241 F. 2d 37; *Standard Motor Products, Inc.*, 50 F.T.C. 624.

² The Commission by its order of May 29, 1959, denying respondent's earlier interlocutory appeal determined that the defense afforded in Section 2(b) of the Act is not available as a defense to charges under Section 2(d) of the Act and we do not here reconsider or revise that ruling in any respect insofar as respondent's present interlocutory appeal might be intended or construed to re-raise that issue.

a contention is, of course, no defense to the charges contained in the complaint in this case, and it has no relevancy or materiality to any of the issues raised in this proceeding. It is true that the Supreme Court has held it to be within the Commission's "discretionary determination" to set the effective date of its orders to cease and desist, *Moog Industries, Inc. v. F.T.C.*, 355 U.S. 411. The exercise of that discretion, however, should speak as of the time of issuance of an order to cease and desist. Such an order has not yet been issued against respondent, and until a violation of law as either proved or admitted no useful purpose would be served in considering the effect of a hypothetical order upon the relationship of respondent to its competitors. At the present stage of this case, the question of the effective date of any order that might be issued against respondent is completely speculative.

For the foregoing reasons, and particularly since respondent's contention in this regard has no relevancy or materiality to the issues in this proceeding, the hearing examiner's ruling denying respondent's motion for the issuance of the subpoenas in question here was proper.

Respondent's interlocutory appeal from the hearing examiner's order of April 27, 1959, is, therefore, denied. In view of the foregoing, respondent's request for oral argument also is denied. An appropriate order will issue.

ORDER

Respondent having filed an interlocutory appeal from the hearing examiner's order of April 27, 1959, denying respondent's motion for issuance of subpoenas duces tecum; and

The Commission having considered said appeal, briefs of counsel, and pertinent portions of the record herein, and being of the opinion, for the reasons appearing in the accompanying opinion, that said appeal should be denied, and being of the further opinion that the oral argument requested by respondent is unnecessary:

It is ordered, That the aforesaid interlocutory appeal and the request for oral argument be, and they hereby are, denied.

THE ATLANTIC REFINING COMPANY, INC.

Docket 7471. Order, July 15, 1959

Denial of respondent's motion to dismiss Counts I and II of the complaint, stating that it should have been directed to the hearing examiner.

Respondent having, on June 30, 1959, filed with the Commission a motion to dismiss Counts I and II of the complaint in this proceeding for lack of jurisdiction and having requested oral argument before the Commission thereon; and

The Commission being of the opinion that any jurisdictional issue can best be determined upon the basis of relevant facts developed on the record in the course of hearings herein and that said motion to dismiss properly should have been directed to the hearing examiner pursuant to §3.8 of the Commission's Rules of Practice:

It is ordered, That respondent's motion to dismiss and its request for oral argument be, and they hereby are, denied.

NELS IRWIN TRADING AS SCREEN-PRINT PRODUCTS
COMPANY

Docket 6924. Order, July 17, 1959

Order modifying desist order by adding qualifying clause.

It appearing that respondent Nels Irwin, individually and trading as Screen-Print Products Company, and respondent's counsel entered into an agreement with counsel supporting the complaint for a consent order which was accepted by the hearing examiner and which became the decision of the Commission on March 21, 1958, 54 F.T.C. 1209; and

Respondent on June 12, 1959, having filed a motion seeking in effect to reopen this proceeding and to have modified the order to cease and desist heretofore entered against said respondent by inserting at the end of Paragraphs 8 and 9 of said order the additional words "unless such is the fact"; and

It appearing further that counsel supporting the complaint does not oppose the granting of said motion; and

The Commission having concluded that the modifications sought are warranted:

It is ordered, That this proceeding be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist heretofore entered herein be, and it hereby is, modified by inserting at the end of each of Paragraphs 8 and 9 thereof the additional words "unless such is the fact," so that said paragraphs now will read as follows:

"8. Prospective customers may examine respondent's course and kits at home without any cost to said prospective customers unless such is the fact.

"9. On the payment of a deposit or down payment the entire course and kit will be sent to the prospective customers unless such is the fact."

ASHEVILLE TOBACCO BOARD OF TRADE, INC., ET AL.

Docket 6490. Order, July 20, 1959

Order—following remand of the case by the Court of Appeals for the Fourth Circuit—reopening proceeding and remanding case for evidence re the current situation on the Asheville tobacco market.

The Commission on March 19, 1959, having issued and thereafter served upon the respondents an order granting the respondents leave to file an appropriate memorandum or brief setting forth any objections they may have to the tentative action of the Commission on remand of this case from the United States Court of Appeals for the Fourth Circuit, a copy of which tentative action was issued and served with said order; and

The respondents on June 2, 1959, having filed their objections to the aforesaid tentative action of the Commission, and having requested that the case be reopened for the receipt of evidence concerning developments on the Asheville tobacco market subsequent to the date on which the record was closed, which the respondents contend will demonstrate the inappropriateness of the Commission's tentative action; and

The Commission having considered said request and the answer filed by counsel in support of the complaint, and having concluded that the evidence to which the respondents refer may have a material bearing on the form of order to cease and desist which would best serve the public interest in this matter:

It is ordered, That this proceeding be, and it hereby is, reopened.

It is further ordered, That the case be, and it hereby is, remanded to the hearing examiner for the purpose of receiving such evidence as the respondents may offer tending to prove by facts subsequent to the closing of the record the current competitive situation on the Asheville tobacco market.

It is further ordered, That counsel in support of the complaint shall have the usual rights of due notice, cross-examination and the presentation of evidence in rebuttal.

It is further ordered, That after the receipt of such evidence, the hearing examiner shall file with the Commission a report thereon.

LESTER B. PATTERSON ET AL. TRADING AS
SKIL-WEAVE CO. ET AL.

Docket 7318. Order, July 24, 1959

Order vacating initial decision and remanding case to develop a record for disposal of the matter as to certain respondents.

The Commission having considered the hearing examiner's initial decision, filed June 9, 1959, wherein it was ordered that the complaint be dismissed as to the respondents Grant, Schwenck & Baker, Inc., a corporation, and Paul Grant, individually and as an officer of said corporation, service of which was completed on June 26, 1959; and

It appearing that said initial decision was based on a motion to dismiss as to said respondents, filed by counsel in support of the

complaint, in which it was alleged that the Commission has entered a final order against the respondents, Lester B. Patterson and Edythe F. Patterson, copartners trading as Skil-Weave Co., and that the complained of practices have all been proscribed by said order and are effectively eliminated; and

The Commission being of the opinion that the aforesaid allegations do not constitute adequate grounds for dismissal as to the other respondents named in the complaint:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, vacated and set aside.

It is further ordered, That the case be, and it hereby is remanded to the hearing examiner for the development of a record on the basis of which the matter may be disposed of on the merits as to the respondents Grant, Schwenck & Baker, Inc., and Paul Grant, individually and as an officer of said corporation.

ART NATIONAL MANUFACTURERS DISTRIBUTING
COMPANY, INC., ET AL.

Docket 7286. Order, July 28, 1959

Interlocutory order denying respondents' motion to vacate order designating a substitute hearing examiner to replace one deceased.

Counsel for respondents having filed a motion to vacate an order designating a substitute hearing examiner to replace Examiner Joseph Callaway, deceased, together with a motion for interlocutory appeal and stay of proceedings pending disposition thereof; and

The Commission being of the opinion that respondents have made no showing that they are prejudiced in any respect by the substitution or that the newly designated hearing examiner will not protect respondents' rights to a full and fair hearing on the merits of this case and in the procedural aspects of the proceeding:

It is ordered, That the aforesaid motions of respondents, and their request for oral argument thereon, be, and they hereby are, denied.

FORSTER MFG. CO., INC., ET AL.

Docket 7207. Order, Sept. 10, 1959

Interlocutory order upholding hearing examiner's granting of motion to amend complaint and denying respondents' motion for bill of particulars.

This matter having come on to be heard by the Commission upon respondents' interlocutory appeal from the hearing examiner's ruling granting the motion of counsel supporting the complaint to amend the complaint and the hearing examiner's ruling denying respondents' motion for a bill of particulars, and the answer of counsel supporting the complaint in opposition to the appeal; and

It appearing that the amendment allowed by the hearing examiner serves to clarify the complaint and that such amendment is within the scope of the proceeding initiated by the complaint and does not in any way change the original cause of action stated in the complaint; and

It further appearing that the complaint sufficiently informs the respondents as to the nature of the statutory violation with which they are charged and that the hearing examiner properly denied respondents' motion for further particulars:

It is ordered, That respondents' appeal be, and it hereby is, denied.

It is further ordered, That respondents may, within thirty (30) days after service upon them of this order, file answer to the complaint herein, as amended by the hearing examiner's order of June 30, 1959.

SPERRY RAND CORPORATION

Docket 6701. Order, Sept. 11, 1959

Order denying motion to reopen Clayton Act proceeding—disposed of by a consent order on Nov. 3, 1958, 55 F.T.C. 655—following amendment of the Act to provide for more expeditious enforcement of orders and imposition of penalties for violations.

Respondent, Sperry Rand Corporation, having filed a motion requesting the Commission to reopen this proceeding for the purpose of modifying (in a manner not specified) the order to cease and desist entered herein on November 3, 1958; and

Said respondent having alleged in support of its motion (1) that certain bona fide questions exist as to the propriety of the respondent's pricing practices under the terms of the order, (2) that since the entry of said order, the Clayton Act has been amended by the enactment of Public Law 86-107, approved July 23, 1959, to provide for the more expeditious enforcement of orders issued under said Act, and (3) that it would be inequitable for the legality of the respondent's pricing practices to be determined under the procedures set forth in said Public Law 86-107, providing for the imposition of civil penalties of not more than \$5,000 for each violation of an order issued under the Clayton Act which has become final, rather than under the procedures in effect prior to the amendment, whereunder there were no such penalty provisions; and

It appearing that the order to cease and desist was entered in disposition of this proceeding pursuant to and in strict conformity with a voluntary agreement theretofore executed by the respondent and counsel in support of the complaint expressly providing for the entry thereof, and in which agreement the respondent, among other things, expressly waived all of the rights it may have had to challenge or contest the validity of the order; and

The Commission being of the opinion that the changes in the procedures for the enforcement of orders to cease and desist issued under the Clayton Act brought about by the enactment of Public Law 86-107 afford no basis for the modification of a previously entered order and that the respondent has not otherwise demonstrated a reasonable probability that the order entered herein should be modified:

It is ordered, That the respondent's motion to reopen this proceeding be, and it hereby is, denied.

Commissioner Kern not participating.

PREMIER KNITTING CO., INC., ET AL.

Docket 7366. Order, Sept. 11, 1959

Interlocutory order upholding hearing examiner's granting of complaint counsel's motion for permission to withdraw two orlon sweaters, entered as exhibits, for testing.

Respondents, Premier Knitting Co., Inc., a corporation, and Arnold A. Saltzman, Sanford Forster and Irving Saltzman, having filed an interlocutory appeal from the hearing examiner's ruling of May 27, 1959, granting a motion of counsel in support of the complaint for permission to withdraw two orlon sweaters entered in evidence as Commission Exhibits 3 and 6 for the purpose of having the sweaters subjected to certain tests; and

No showing having been made that said ruling involves substantial rights or that it will materially affect the final decision of the case; and

The Commission being of the opinion that the appeal is not one to be granted under the provisions of §3.20 of the Commission's Rules of Practice:

It is ordered, That the aforesaid appeal be, and it hereby is, denied.

SCHICK INCORPORATED ET AL.

Docket 6892. Order, Sept. 14, 1959

Order denying motion to reopen Clayton Act proceeding—disposed of by a consent order on Nov. 3, 1958, 55 F.T.C. 665—following amendment of Act to provide for more expeditious enforcement of orders and imposition of penalties for violations.

Respondents, Schick Incorporated and Schick Service, Inc., having filed a motion requesting the Commission to set aside the order to cease and desist entered herein on November 3, 1958; and

Said respondents having alleged in support of their motion (1) that since the entry of the order, Section 11 of the Clayton Act has been amended by the enactment of Public Law 86-107, approved July 23, 1959, to provide for the automatic "finalization" of orders

issued under the Clayton Act and for the imposition of civil penalties of not more than \$5,000 for each violation of an order which has become final, and (2) that the procedures thus established for the enforcement of orders issued under the Clayton Act deprive the respondents of the "warning feature" and the "protective system" inherent in the enforcement procedures available under the statute prior to the amendment, whereunder a respondent could not be penalized until after the Government had, on two successive occasions, satisfied a Court of Appeals that the respondent had violated or was about to violate the order; and

It appearing that the order to cease and desist was entered in disposition of this proceeding pursuant to and in strict conformity with a voluntary agreement theretofore executed by the respondents and counsel in support of the complaint expressly providing for the entry thereof, and in which agreement the respondents, among other things, expressly waived all of the rights they may have had to challenge or contest the validity of the order; and

The Commission being of the opinion that the changes in the procedures for the enforcement of orders to cease and desist issued under the Clayton Act brought about by the enactment of Public Law 86-107 afford no basis for the Commission to set aside a previously entered order.

It is ordered, That the respondents' motion be, and it hereby is, denied.

BAKERS FRANCHISE CORPORATION ET AL.

Docket 7472. Order and Opinion, Sept. 14, 1959

Interlocutory order denying respondents' application for release of questionnaires and investigators' reports of interviews in the Commission's files.

By the COMMISSION:

Respondents have made application under §1.134 of the Commission's Rules of Practice for the release of certain documents allegedly contained in the files of the Federal Trade Commission. Alternatively, they request the Commission to declare that such documents do not constitute or contain confidential materials.

The documents sought, it appears, are (1) the printed forms, questionnaires and written instructions to an investigating attorney of the Commission, relating to interviews to be conducted by him with members of the public in this case, and (2) the written reports of said attorney upon his interviews with said members of the public. Respondents, while indicating that they desire the documents in connection with their defense, do not state precisely how they propose to use them. The inference is, however, that they hope to show that

the testimony of the members of the public who appeared as witnesses in support of the complaint may have been influenced by the kind and sequence of questions they were asked during the previous interviews.

Under the Commission's Rules of Practice (§1.333), adopted for the protection of material and information coming into the possession of the Commission, or within the knowledge of any of its officers or employees in the performance of their official duties, the documents in question are clearly confidential. Moreover, and more importantly, such documents consist of questionnaires prepared and reports of interviews recorded by Commission attorneys in the preparation of this case for trial. The documents thus constitute the "work-product of the lawyer" and as such are privileged. (*Hickman v. Taylor*, 329 U.S. 495 (1947)).

Respondents' application for release of the documents in question was filed on August 3, 1959, after the case in support of the complaint had been closed. The public witnesses whose interview statements respondents desire had appeared and testified at hearings held on June 24 and 25, 1959. These witnesses at that time testified under oath as to their understanding and interpretation of certain of respondents' advertisements. Each of them was subjected to such cross-examination as respondents' counsel cared to make. No contention was then made, and none is now asserted, that the cross-examination was impaired in any way by the absence of the interview reports. On June 25, also, pursuant to a request of counsel for respondents, said counsel was given the name of the investigating attorney who had interviewed these witnesses, and over the objection of counsel in support of the complaint, the attorney was called as a witness for respondents. In response to questions by respondents' counsel this witness described in full his interviews, including the substance of the questions asked of the interviewees and the answers he received.

In the circumstances, it is difficult to understand what more respondents could hope to accomplish by an examination of the interview reports. In any event, the public policy underlying the privacy of the attorney's files and work papers precludes their production.

An appropriate order denying respondents' application will be entered.

ORDER

Respondents having made application for the release of certain documents allegedly contained in the files of the Federal Trade Commission and having further requested as an alternative that the Commission declare that any such documents do not constitute or contain confidential materials; and

The Commission, for the reasons stated in the accompanying opinion, having directed that an appropriate order denying respondents' application for the release of the aforesaid documents be entered:

It is ordered, That respondents' application for the release of certain documents and the alternative request for the Commission to declare that such documents do not constitute or contain confidential materials be, and they hereby are, denied.

GULF OIL CORPORATION

Docket 6689. Order, Sept. 15, 1959

Order denying—as an attack upon the weight and probative value of new evidence allegedly sought by complaint counsel through an economic survey—respondent's motion for rehearing and reconsideration of the Commission's order vacating the hearing examiner's ruling fixing final date for presentation of evidence in support of complaint.

This matter having come on to be heard upon respondent's motion for rehearing and reconsideration of the Commission's order of December 14, 1958, which, among other things, vacates the examiner's ruling fixing December 31, 1958, as the final date for presentation of evidence in support of the complaint, and upon the motion of counsel in support of the complaint to strike the aforesaid motion or, in the alternative, for an extension of time in which to answer the motion; and

It appearing that respondent's motion is, in substantial part, an attack upon the weight and probative value of certain new evidence allegedly sought by counsel in support of the complaint through the conduct of a proposed economic survey, rather than a demonstration of the incorrectness of the order of December 14, 1958; and

It further appearing that the events and circumstances cited by respondent as having occurred since the issuance of the order of December 14, 1958, have no substantial bearing on the propriety of said order when issued:

It is ordered, That respondent's motion for rehearing and reconsideration be, and it hereby is, denied.

It is further ordered, That the motion of counsel in support of the complaint to strike respondent's aforementioned motion and the alternative motion to extend the time for said counsel to answer respondent's motion be, and they hereby are, denied.

THE PURE OIL COMPANY

Docket 6640. Order, Sept. 25, 1959

Order remanding price discrimination case for additional evidence re respondent's prices to dealers in areas other than Birmingham, Ala.

This case having come on for hearing upon the cross-appeals filed by the respondent and counsel supporting the complaint from the

initial decision of the hearing examiner in which he held that the respondent had engaged in territorial price discrimination in violation of Section 2(a) of the Clayton Act, as amended, and wherein he dismissed the complaint's additional charges alleging an unlawful combination and planned common course of action between the respondent and its retail dealers to fix resale prices; and

It appearing that the evidence introduced is insufficient for informed determinations of whether the prices charged by the respondent in the area of Birmingham, Alabama, were lower than those charged by the respondent to dealers elsewhere, and the Commission having determined that the proceeding should be reopened for the reception of additional evidence respecting respondent's prices to dealers:

It is ordered, That this proceeding be, and it hereby is, remanded to the hearing examiner for the reception of additional evidence relating to prices charged by the respondent in areas other than Birmingham during the period to which the charges relate.

It is further ordered, That after the receipt of such additional evidence, the hearing examiner indicate any changes he may wish to make in the initial decision in the light thereof.

B. D. RITHOLZ ET AL.

Docket 1554. Order, Sept. 30, 1959

Order denying motion to vacate desist order of Feb. 15, 1930, 13 F.T.C. 240, prohibiting false advertising in the sale of spectacles.

This matter having come on to be heard upon respondents' motion to vacate and set aside an order to cease and desist entered by the Commission in this proceeding on February 15, 1930, and upon the answer in opposition to said motion filed by counsel supporting the complaint; and

The Commission having fully considered said motion and supporting affidavit and the answer in opposition thereto and having concluded that respondents have made no adequate showing that changed conditions of fact or of law justify reopening the proceeding looking towards modification or the setting aside of the afore-said order to cease and desist, or that the public interest so requires:

Accordingly, it is ordered, That the motion, filed on behalf of respondents on September 3, 1959, seeking to vacate the order to cease and desist heretofore entered against respondents be, and the same hereby is, denied.

B. D. RITHOLZ ET AL.

Docket 2069. Order, Sept. 30, 1959

Order denying motion to vacate desist order of Apr. 6, 1934, 18 F.T.C. 348, prohibiting false advertising in the sale of spectacles.

This matter having come on to be heard upon respondents' motion to vacate and set aside an order to cease and desist entered by the Commission in this proceeding on April 6, 1934, and upon the answer in opposition to said motion filed by counsel supporting the complaint; and

The Commission having fully considered said motion and supporting affidavit and the answer in opposition thereto and having concluded that respondents have made no adequate showing that changed conditions of fact or of law justify reopening the proceeding looking towards modification or the setting aside of the aforesaid order to cease and desist, or that the public interest so requires:

Accordingly, it is ordered, That the motion, filed on behalf of respondents on September 3, 1959, seeking to vacate the order to cease and desist heretofore entered against respondents be, and the same hereby is denied.