

IN THE MATTER OF

FERTIG'S FIFTH AVENUE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 8186. Complaint, Nov. 28, 1960—Decision, May 26, 1961*

Consent order requiring a New York City retailer to cease making such deceptive pricing and savings claims in newspapers and otherwise as that "Reg." \$30, \$33, \$55, and \$60 bedspreads were "Now" \$19.95, \$22.95, \$37.50, and \$39.95, respectively, when the higher prices were fictitious; and that many items available at the advertised prices for several periods during the year were offered at "EXTRAORDINARY ONCE-A-YEAR SAVINGS!".

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Fertig's Fifth Avenue, Inc., a corporation, and Saul B. Fertig, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Fertig's Fifth Avenue, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 417 Fifth Avenue, New York, New York.

Respondent Saul B. Fertig is an officer of the corporate respondent. He formulates, directs and controls the policies, practices and acts of said corporate respondent, including the practices and acts hereinafter referred to. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of various household items, including linens, sheets, towels, pillows, comforts and bedspreads.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their products when sold to be shipped from their place of business in the State of New York to purchasers thereof located in various other states, and maintain, and at all times relevant herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

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PAR. 4. In the course and conduct of their business, respondents are engaged in substantial competition in commerce with corporations, firms and individuals likewise engaged in the advertising, offering for sale, sale and distribution of various household items, including linens, sheets, towels, pillows, comforts and bedspreads.

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the sale of their household items, respondents have made statements in newspapers and other media, typical of which, but not all inclusive, are the following:

Magnificent Trapunto Quilted DECORATOR BEDSPREADS in Rich Antique "Punja" Satin with a Soft Muted-Tone Finish

Twin Size -----	Reg. 30.00	Now 19.95
Double Size -----	Reg. 33.00	Now 22.95
60 in. Queen Size -----	Reg. 55.00	Now 37.50
78 in. Hollywood Size -----	Reg. 60.00	Now 39.95

Wonderful Washable EMBROIDERED NYLON RUFFLED
ACRILAN-FILLED COMFORTS

Hollywood Size, 108" X 90"-----	Reg. 30.00	Now 19.95
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EXTRAORDINARY ONCE-A-YEAR SAVINGS!

[Following this phrase are listed various items of merchandise offered at certain prices]

PAR. 6. By means of the aforesaid statements, acts and practices, respondents represented, directly, or by implication that the amount designated as "Reg." in the advertisements were respondents' usual and customary retail prices for the advertised merchandise and that the differences between said prices and the lower prices represented savings from respondents' usual and customary retail prices; and that the merchandise listed under the statement "EXTRAORDINARY ONCE-A-YEAR SAVINGS!" was available at the listed prices only once a year.

PAR. 7. Said statements and representations were false, misleading and deceptive. In truth and in fact, the prices designated as "Reg." were not respondents' usual and customary retail prices for the advertised merchandise, but were in excess of such prices and the differences between such prices and the lower prices did not represent savings from respondents' usual and customary retail prices. Many, if not all, of the items of merchandise listed under the statement "EXTRAORDINARY ONCE-A-YEAR SAVINGS!" were available and offered for sale at the designated prices for several periods during the year. Respondents' method of merchandising, as aforesaid, was a deceptive plan or scheme designed to establish fictitious retail prices for use in promoting the sale of the advertised items at lesser prices. While respondents did sell the

various items of merchandise at the prices designated as "Reg." at various times, such sales were so limited in number that they did not, in fact, establish respondents' customary and usual retail prices, and were fictitious prices.

PAR. 8. The use by respondents of the foregoing false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead members of the purchasing public into the mistaken and erroneous belief that such statements and representations were, and are, true and into the purchase of substantial quantities of respondents' products by reason of said mistaken and erroneous belief. As a consequence thereof, substantial trade in commerce has been, and is being, unfairly diverted to respondents from their competitors and substantial injury has thereby been, and is being, done to competition in commerce.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now 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.

Mr. Alan R. Lyness for the Commission.

Rosenberg, Stone & Notkins, by *Mr. Morton G. Rosenberg*, for respondents.

INITIAL DECISION BY HERMAN TOCKER, HEARING EXAMINER

The complaint in this proceeding, issued November 28, 1960, charged the respondents, Fertig's Fifth Avenue, Inc., a New York corporation, and Saul B. Fertig, individually and as President thereof, both located at 417 Fifth Avenue, New York, New York, with violation of the provisions of the Federal Trade Commission Act, by misrepresenting the usual and customary prices of household goods advertised for sale, sold and distributed by them in commerce.

After the issuance of the complaint, respondents (with the advice of their attorney), and counsel supporting the complaint entered into an agreement, containing consent order to cease and desist, thus disposing of all the issues as to all parties to this proceeding.

It was expressly provided in said agreement that the signing thereof is for settlement purposes only and does not constitute an admission by respondents that they have violated the law as alleged in the complaint.

By the terms of said agreement, the respondents admitted all the jurisdictional facts alleged in the complaint and agreed that the

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record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance with the allegations.

By said agreement, the parties expressly waived any further procedural steps before the hearing examiner and the Commission; the making of findings of fact or conclusions of law; and all rights they may have to challenge or contest the validity of the order to cease and desist entered in accordance therewith.

Respondents agreed further that the order to cease and desist, issued in accordance with said agreement, shall have the same force and effect as if made after a full hearing.

It was further provided that said agreement, together with the complaint, shall constitute the entire record herein; that the complaint herein may be used in construing the terms of the order issued pursuant to said agreement; and that said order may be altered, modified or set aside in the manner prescribed by the statute for orders of the Commission.

The hearing examiner has considered such agreement and the order therein contained, and, it appearing that said agreement and order provide for an appropriate disposition of this proceeding, the same is hereby accepted and, upon becoming part of the Commission's decision in accordance with Sections 3.21 and 3.25 of the Rules of Practice, shall be filed; and, in consonance with the terms thereof, the hearing examiner finds that the Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents named herein, and that this proceeding is in the interest of the public, and issues the following order:

ORDER

It is ordered, That respondent Fertig's Fifth Avenue, Inc., a corporation, and its officers, and Saul B. Fertig, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of bedspreads, comforts, or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or indirectly, that any amount is respondents' usual and customary retail price of merchandise when such amount is in excess of the price at which said merchandise is usually and customarily sold at retail by respondents in the normal course of business.

2. Representing, directly or indirectly, that any savings are afforded in the purchase of respondents' merchandise unless the prices at which it is offered constitute a reduction from respondents' usual and customary retail prices.

3. Misrepresenting in any manner the amount of savings available to purchasers of respondents' merchandise or the amount by which the price has been reduced from the price at which it is usually and customarily sold by respondents.

4. Using the word "Reg." or any other word of the same import to designate prices of merchandise, unless they are the usual and customary prices charged by respondents for said merchandise in the recent, regular course of business.

5. Using any merchandising plan or scheme to promote the sale of merchandise which involves the use of a fictitious price which is represented to be the respondents' usual and customary retail price.

6. Representing, directly or indirectly, that merchandise is offered at certain prices only once a year or any other number of times a year, or during any other period, unless such is the fact.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

Pursuant to Section 3.21 of the Commission's Rules of Practice, the initial decision of the hearing examiner shall, on the 26th day of May, 1961, become the decision of the Commission; and, accordingly:

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

IN THE MATTER OF

GIANT FOOD, INC. (FORMERLY KNOWN AS GIANT FOOD SHOPPING CENTER, INC.)

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

*Docket 6459. Complaint, Nov. 21, 1955 *—Decision, June 1, 1961*

Order requiring a large supermarket chain with retail outlets in Maryland, Virginia, and the District of Columbia, to cease soliciting and accepting as compensation for advertising and promotional services, discriminatory payments from its suppliers which it knew or should have known were not

* Amended and Supplemental Complaint, May 8, 1957

made available on proportionally equal terms to all its competitors, such as contributions of \$37,875 made by some 150 suppliers for its chain-wide 19th Anniversary Sale in return for advertising and promoting the suppliers' products.

Mr. Andrew C. Goodhope, Mr. Fredric T. Suss and Mr. Alvin D. Edelson for the Commission.

Mr. Joseph B. Danzansky; Mr. Raymond R. Dickey; Mr. Bernard Gordon; and Mr. Robert F. Rolnick, all of *Danzansky and Dickey*, of Washington, D.C., for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER¹

This proceeding has been submitted for initial decision on evidence adduced by the Commission under the amended and supplemental complaint, as amended, and respondent's answer to the amended and supplemental complaint which also incorporates and re-alleges all matters set forth in its answer to the original complaint. The evidence presented under the issues as framed by these pleadings, in substance, involves determinations of whether the Commission's two basic charges have been sustained. The proceeding is premised upon alleged violations of Section 5 of the Federal Trade Commission Act (15 U.S.C.A. §45), hereinafter generally referred to as the Act, which violations are alleged to be unfair competition and unfair acts and practices in interstate commerce. The first charge (charges hereinafter referred to are as made in the amended and supplemental complaint), Paragraphs Five to Nine, inclusive, in substance, is that respondent knowingly induced or received payment from its suppliers in connection with various sales such as its 19th Anniversary sale in 1955, which payments by suppliers for advertising said sale amounted to \$37,875.00,² many of such suppliers not offering or making available similar payments on proportionally equal terms to those granted by them to respondent in connection with advertising and promoting its sales. The second charge, Paragraphs Ten and Eleven, alleges a different, although

¹ During the course of the litigation the respondent changed its corporate name to Giant Food, Inc., and the hearing examiner on March 24, 1958, ordered the complaint and proceedings amended in accordance therewith. (R. 447-448) The title of this case, however, has not been formally changed following the Commission's regular practice in such regard (R. 575) and uniformly followed by it and counsel for the parties in all filings made herein after March 24, 1958.

² The total of the amounts paid by the respondent's several contributing suppliers was alleged to be \$31,825 (Pars. Six and Ten of the Amended and Supplemental Complaint). The proof showed it to be \$37,875, and on motion of counsel supporting the complaint, by formal order issued February 8, 1960, the figures were changed in the Amended and Supplemental Complaint to conform to the evidence. The original answer and answer to the amended and supplemental complaint are considered herein as joining issue on said amended total amount.

related, violation of §5 of the Act by respondent in that the amounts of money solicited and received from its suppliers in the course of its advertising of its several anniversary and candy carnival sales in 1954, 1955, and 1956, are alleged to have been diverted in substantial amounts from such suppliers to respondent's own use.

The case was submitted for decision upon the evidence presented in the Commission's case-in-chief, the respondent waiving the introduction of evidence. Upon the whole record, it is herein found and determined that each of the two said charges are sustained, and an order to cease and desist from such acts and practices is issued accordingly.

The history of this case is somewhat involved, tortuous, and confused although when the procedural and jurisdictional questions are cleared away the basic facts upon which this initial decision is based are comparatively clear and simple. There were a considerable number of appeals to the Commission from various orders and decisions of the hearing examiner. Both sides were represented by their respective able and resourceful counsel. And as a result of strong contests on all issues and the several interlocutory and other appeals taken, the Commission has settled the basic law of this particular proceeding. This initial decision will therefore be devoted chiefly to findings of fact. At this point a brief recitation of the important matters in the procedural record made will aid in a succinct application of the law to the facts hereinafter found.

The original complaint consisting of nine paragraphs charging the unfair solicitation and procurement of financial contributions by respondent from its suppliers was filed November 21, 1955. Hearing Examiner Frank Hier was designated to hear the proceeding on January 6, 1956. On January 20, 1956, respondent filed a motion to dismiss the complaint upon the ground, in substance, that the proceeding was illegally brought under the Federal Trade Commission Act rather than under the Clayton Act. On February 10, 1956, the examiner ordered this motion denied and granted leave to answer. No appeal was taken from this order. Answer was filed March 5, 1956. On March 9, 1956, respondent filed a motion to consolidate its hearings (but not its case) with hearings in cases against seven of its suppliers in Commission Dockets Nos. 6460 to 6466, inclusive. This motion was denied by the examiner March 15, 1956. Thereafter, respondent perfected an interlocutory appeal to the Commission from such ruling and on April 25, 1956, the Commission denied such appeal.

Hearings were then held in Washington, D.C., on August 6 and 7, 1956 (R. 1-123). On December 27, 1956, counsel supporting the

complaint filed their motion to amend the complaint by adding certain language charging diversion to respondent's own use of some of the funds solicited by it and received from its various suppliers for advertising their products during respondent's said sales, which matter had developed from certain evidence received during such hearings. This motion was denied by the examiner January 4, 1957, for want of jurisdiction only, his ground being that the amendment alleged an entirely different charge from the one contained in the original complaint, which amendment was not within his authority to grant, not being "reasonably within the scope of the proceeding initiated by the original complaint" as provided in §3.19 of the Commission's Rules of Practice. Counsel supporting the complaint appealed from this denial on January 17, 1957. The Commission disposed of the appeal on May 8, 1957, by dismissing it but at the same time ordering and issuing its own Amended and Supplemental Complaint containing the said proposed amendatory matter as a new and additional charge in Paragraphs Ten and Eleven thereof. It did this in the exercise of its own responsibility as required in the public interest. In its said order the Commission further ruled that evidence already of record would be considered and have the same force and effect as though received at hearings under the complaint as amended and supplemented but without prejudice to the examiner's authority and duty to rule appropriately on any application by respondent for further cross-examination, or to take such further action as might be appropriate to protect respondent's rights. Respondent did not request any such action, however, and is therefore deemed to have waived the exercise of such rights on its part.

Further hearings were then held in Washington, D.C., on January 7 and 8 (R. 124-290), and in New York City on January 9, 1957 (R. 291-343-A), and again in Washington, D.C., on January 24, 1957 (R. 344-411). On this last date, pending disposition by the Commission of the appeal then pending before it from the examiner's denial of the motion to amend the complaint, counsel supporting the complaint conditionally rested, and respondent was put on notice by the examiner that it should be ready to proceed with its evidence (R. 411).

Subsequent, however, to the issuance of the Amended and Supplemental Complaint on May 8, 1957, and prior to the case-in-chief having been rested, respondent filed its motion, supported by an ex parte showing, on June 18, 1957, to dismiss the complaint on the ground of lack of jurisdiction over respondent, claiming itself to be a "packer" subject to the Packers & Stockyards Act of 1951, 7

U.S.C. 181, *et seq.*, and as such "packer" exempted from the Commission's jurisdiction under §5 of the Federal Trade Commission Act. This motion was sustained by the examiner who issued his first initial decision dismissing the proceeding on August 7, 1957. On appeal from this final order and decision of the examiner, the Commission, however, on December 19, 1957, ordered said initial decision vacated and remanded the case to the examiner for further proceedings.

Respondent, after filing its answer to the amended complaint on February 24, 1958, filed its second motion to dismiss on the ground of jurisdiction on March 24, 1958, renewing its prior motion to that effect but setting forth an additional *ex parte* showing that it had on March 21, 1958, acquired 100 shares of stock in Armour & Company, claiming this definitely made it a packer, which fact had not existed and therefore had not been considered on the prior appeal. The examiner in due course granted this motion and again by his initial decision dated April 17, 1958, dismissed the proceeding for lack of jurisdiction. An appeal was again taken from this second initial decision, and, on February 10, 1959, the Commission vacated it and remanded the case for further proceedings.

Further hearings were then held in Washington, D.C., on February 24, March 24, and April 6, 1959 (R. 412-559), in order for counsel supporting the complaint to complete their evidence upon the second charge of the complaint. On the last of said dates counsel supporting the complaint finally rested the case-in-chief, indicating appeal to the Commission, however, from a certain ruling of the examiner striking certain exhibits offered by them but stated that such alleged error would be reserved and appealed in connection with the final presentation of the case to the Commission rather than by interlocutory appeal (R. 556, 558-559). Hearing of respondent's evidence was then set for May 25, 1959, but prior to said date respondent filed its motion to strike the testimony of the Commission's witness William H. England, an accountant, which the examiner denied on May 14, 1959, at the same time resetting the hearing of respondent's evidence for June 30, 1959.

Before the date last fixed for hearing the defense, Hearing Examiner Frank Hier died on June 10, 1959, and on June 15, the proceeding was duly assigned to the undersigned hearing examiner to complete the hearings and initially dispose of the litigation in the place of said Examiner Hier, deceased.

Hearing was thereupon held on July 13, 1959, at which time it was most fairly stipulated by counsel for the parties that the present examiner might further hear and complete the case, and

any objections by them to his passing on questions of credibility or otherwise in the record made before Examiner Hier were waived by the parties (R. 561). At that time respondent then moved for a dismissal of the action on the ground that there was a failure of evidence of probative force to support the principal allegations of the complaint on the two charges thereof (R. 564-565), which motion, after argument, was denied without prejudice to its renewal at the close of all evidence in the case (R. 569-570). This motion was later renewed in respondent's proposals and its counsel's oral argument. Thereupon, respondent rested, waiving the introduction of evidence on its behalf (R. 571).

On July 17, 1959, the examiner issued his order closing the case for the taking of evidence, fixing time for the submission of the parties' respective proposed findings of fact, conclusions of law, and order and reserving a time for oral argument thereon. On September 28, 1959, each of the parties filed such proposals, and oral arguments thereon by the respective counsel were heard in Washington, D.C., on October 26, 1959, after which the entire case was taken under advisement. During this oral argument, counsel supporting the complaint moved to amend the complaint with respect to setting forth the correct amount of money shown by the proof to have been contributed to respondent by its suppliers in connection with its 19th Anniversary sale held in 1955 (R. 607-609), which motion was granted over objection on February 8, 1960.

In referring to the highlights of the history of this case no mention has been made of the numerous other procedural matters which appear on the record, such as necessary settings, resettings, and continuances, and the numerous and extensive motions, briefs and arguments before Hearing Examiner Hier and the Commission which make up the bulk of the procedural record.

The present examiner repeatedly announced upon the record that he would make no attempt to revise any of the rulings of his predecessor, but would accept the record as already made (R. 562, 601, 617, 653). Counsel for neither of the parties have filed any motion or requested any such action on the part of the examiner. The present examiner, after carefully reviewing the record, does not believe that any error has been committed. But if error there be in the proceedings had before the preceding examiner, it has been inherited, and any possible error committed by either examiner who has heard this case can be justly corrected by the Commission upon appeal or review from this initial decision. It is the present examiner's position, of course, that to attempt *ex proprio motu* the correction of any possible error that might have been committed

by his eminent predecessor would only further delay the final disposition of this already extensive and strongly contested proceeding. This initial decision is therefore premised upon the record as made before this examiner's predecessor, except, of course, as to those few matters already recited which transpired after the death of Examiner Hier.

Inasmuch as the primary law of the case has been settled by the orders and opinions of the Commission on appeals from the examiner's rulings, they merit brief discussion insofar as material to the issues now raised in the proposals of the respective parties presently before this examiner. In justification of the various rulings made by the preceding examiner in this case, it must be said that many of the questions presented in the instant case at the time they were presented were somewhat novel and without any precisely clear precedents. During the course of this litigation many of such matters were clarified by the said rulings as well as by certain collateral decisions of the Commission, its examiners, and the courts in similar or related proceedings. It is therefore not necessary to recite all the reasoning and authority upon which such several rulings have been premised.

Prior to answer, the respondent attacked the original complaint by motion to dismiss it upon the grounds that it failed to state a cause of action upon which relief could be granted within the meaning and intent of §5 of the Federal Trade Commission Act. Respondent's counsel argued extensively upon the history of the enactment of the Act as well as that of the Clayton Act and contended that the complaint was drafted in an effort to circumvent the restrictions of the Clayton Act and particularly the decision in *Automatic Canteen Co. of America v. FTC* (1953), 346 U.S. 61, with special reference to page 72 thereof. It was urged that the history of the two Acts showed that they were mutually exclusive, and it was concluded, therefore, that if any matter were touched upon or deliberately excluded by Congress from the Clayton Act no proceeding might be brought under the Federal Trade Commission Act. The examiner, however, followed the law cited and reasoning of counsel supporting the complaint and ruled, in substance, that under the decisions the Federal Trade Commission Act was a supplement to the Clayton Act as well as to the Sherman Act, citing and discussing the leading cases of *FTC v. Cement Institute* (1948), 333 U.S. 683, *rehearing denied* 334 U.S. 839; *FTC v. R. F. Keppel & Bro., Inc.* (1934), 291 U.S. 304; *FTC v. Motion Picture Advertising Service Co.* (1952), 344 U.S. 392; and *Carter Carburetor Corp. v. FTC* (C.C.A. 8, 1940), 112 F.2d 722. While this order was not

appealed from, related questions permeated some of the further appeals as well as being succinctly posed in the present proposals of respondent (p. 9, 64, Conclusions of Law 42-44).

Since the said ruling of Examiner Hier on February 10, 1956, several other cases, however, have been adjudicated within the Commission and the same conclusions reached as arrived at by Examiner Hier. See Initial Decisions of Examiner John Lewis, now pending on appeal before the Commission, in Docket No. 6927, *Swanee Paper Corp.*, and Docket No. 6973, *The Grand Union Co.*, mimeographed copy of initial decision, pages 34-35. It appears to the undersigned examiner that there can be no question but that the intent of Congress was to provide language in the Act sufficiently broad to cover all unfair methods of competition, and, since the original Act was not disturbed in this respect by any subsequent amendments to it or to the collateral Clayton Act, the complaint as originally framed in this case covering what is now Charge I, paragraphs Five to Nine, definitely states a proper cause for complaint under the Act. This language of the complaint will be hereinafter quoted in connection with the findings on the evidence supporting the first charge.

Little need be said with respect to the Commission's order and opinion sustaining the hearing examiner's refusal to consolidate respondent's hearings in this case with those of its suppliers in Dockets Nos. 6460 to 6466, inclusive, as it is more than evident that to have consolidated these hearings would have entailed an undue burden on all concerned with reference to time, effort, and expense. While this refusal is not now definitely urged as a ground of reversal in the respondent's proposals, nevertheless the thread of this argument runs through all of its contentions that because of this refusal to consolidate, the decisions of the Commission and the other cases alluded to have no bearing upon respondent's acts herein and can be considered for no purpose in deciding this proceeding. The fallacy of this position is, of course, clear. Respondent did not request that its case be consolidated with those of the respondents in the other cases above referred to which involve a number of its suppliers and the general factual subject matter which is also in issue here. Had it been joined in all the hearings in those proceedings it would still have claimed there was no *res adjudicata* as to it in any of the other cases. And certainly the record would have been so inextricably intermingled with all the other cases that it would challenge more than the judgment of a Solomon to untangle the evidence. Actually what respondent asked for was a consolidation of hearings. And as hereinafter shown, the only decisions of

the foregoing suppliers' cases which are given consideration are those which were contested, Docket No. 6463, decided May 8, 1958, by the Commission and affirmed by the Court of Appeals for the Fourth Circuit, January 5, 1959, in *Crosse & Blackwell v. FTC*, 262 F.2d 600, Docket No. 6464, decided December 20, 1956, by the Commission and reversed by the Court of Appeals for the Second Circuit, July 28, 1958, in *Atalanta Trading Corporation v. FTC*, 258 F.2d 365, and Docket 6465, *Chestnut Farms Chevy Chase Dairy*, decided by the Commission May 21, 1957. Each of these three cases is hereinafter appropriately discussed.

On December 27, 1956, counsel supporting the complaint filed their motion to amend the complaint by adding what are now Paragraphs Ten and Eleven in the amended and supplemental complaint. The hearing examiner on January 4, 1957, denied the motion on the ground that he had no jurisdiction since the new charges although growing out of the same transactions would require somewhat different evidence and would stand upon a different legal basis and therefore were not within his authority under the Commission's Rules. The Commission sustained his position on appeal, but following its earlier order dated March 12, 1957, in *Food Fair Stores, Inc.*, Docket No. 6458, on May 8, 1957, issued an amended and supplemental complaint in this present proceeding including similar language. At this point it may be said briefly that, under the principles related to the breadth of the Commission's jurisdiction and discretion relating to issuing complaints under §5 of the Act, there can be no doubt that it appropriately exercised its administrative responsibility in the public interest correctly in charging that moneys solicited and received from its suppliers in connection with its several sales were not used for such services but were diverted in substantial amounts for its own use. As urged by counsel supporting the complaint it is quite evident that if large buyers of merchandise can be permitted to induce their suppliers to pay for part or all of their advertising or other sales costs in connection with such sales, the Commission would be derelict in its duty of preventing monopoly and unfair practices in their very incipency. This is true because of the economic influence exerted by a very large buyer, such as this respondent is, upon its suppliers. It is immaterial that such contributing suppliers may be complacently indifferent to what happens to the money they paid for advertising their own products. This matter will be discussed more fully in connection with the findings relating to the second charge.

The two motions of respondent to dismiss the complaint because it is a "packer" subject to the Packers & Stockyards Act, and ex-

empted under the Federal Trade Commission Act, will be considered together as the second substantially duplicates the first, adding only one new factor, respondent's recent purchase of a few shares of Armour & Co. stock. On June 18, 1957, respondent filed its first motion, supported by affidavits, photographs, and an extensive brief which the Commission in due course denied on December 19, 1957. The appeal was largely premised on the Commission's decision of September 27, 1957, in *Food Fair Stores, supra*. This opinion distinguished that case from the one at bar by showing that respondent here was not engaged in "the slaughtering and meat-packing industry" as was Food Fair but was engaged only in minor and supplemental operations such as grinding and seasoning of already manufactured meat food products. It followed its own later opinion in *Crosse & Blackwell, supra*. Thereafter the Court of Appeals of the Fourth Circuit denied the petition to review the Commission's decision in this latter case and held said respondent therein was subject to the jurisdiction of the Federal Trade Commission.

In respondent's second motion to dismiss for lack of jurisdiction, filed March 24, 1958, the same grounds, in substance, were alleged as in its prior motion, but an additional showing was made that Giant had, three days previously, purchased 100 shares of stock in Armour & Co., which latter matter it was contended clearly brought Giant within the statutory exemption as a packer as found by the Commission in *Food Fair Stores, supra*. In again reversing the examiner, the Commission, on February 10, 1959, not only held that the Court of Appeals had sustained the Commission's jurisdiction in *Crosse & Blackwell, supra*, but also noted that Congress had meanwhile enacted Public Law 85-909, which amended both the Packers & Stockyards Act and the Federal Trade Commission Act, which law became effective September 2, 1958, and clarified the Commission's jurisdiction in this case and others instituted by it prior to the said date of enactment of said law. The Commission therefore found that it had full jurisdiction over the unfair trade practices in connection with the packers transactions involving retail sales and other matters which form the basis for this proceeding. It further ruled that the purchase of 100 shares of Armour common stock by Giant made it the owner of only .002137 of one percent of Armour's common stock for which it paid only \$1,450, and that this infinitesimal ownership of Armour stock made Giant's contention that it had thereby become a packer free from the Commission's jurisdiction an absurdity.

It is of special importance moreover that in these several appellate proceedings before the Commission relating to the respondent's al-

leged claim of exemption as a packer in this proceeding its presentations of supporting evidence were made ex parte and were not opposed as such by counsel supporting the complaint for the special purposes of those appeals. But these ex parte facts thus presented are not before the hearing examiner for decision upon the record of evidence in this case and no waiver of such proof by counsel supporting the complaint has been made. While this case must be decided upon the whole record, it is obvious that there is a clear distinction between the pleading and procedural docket of the Commission and its record of evidence in a litigated proceeding. No evidence has been offered upon the trial record by respondent relating to its alleged activities as a packer or its purchase of any stock in Armour & Company. In fact it has not offered any evidence in its own behalf, as hereinbefore stated. While the Administrative Procedure Act provides in Section 7(c) that "any oral or documentary evidence may be received," this does not mean that the trial record may be encumbered with ex parte briefs, affidavits or other documents not offered and received in the regular course of the hearings. In fact said section (c) insures the right of "Every party . . . to conduct such cross-examination as may be required for a full and true disclosure of the facts." The Commission's Rules also provide with respect to "all hearings in adjudicative proceedings" that "Every party . . . shall have the right of . . . cross-examination, presentation of evidence, objection, motion, argument, and all other fundamental rights. . . ." And also this section and the Commission's Rule 3.21(b) provide that decisions "shall be based upon a consideration of the whole record and supported by reliable, probative, and substantial evidence." It is therefore clear that even in administrative proceedings ex parte affidavits and other showings in support of interlocutory motions are not matters to be considered on decisions which must be made upon the evidence presented on the merits of the case. It is, of course, elementary in judicial procedure that affidavits for attachment, garnishment, injunctions and restraining orders, for example, are not evidence in a trial on the merits unless received in evidence in accordance with appropriate rules of evidence long grounded in our jurisprudence. They are received in such ancillary proceedings only for their specific purposes. Since the respondent introduced no evidence, there is none before the examiner on which to make a finding upon the proposals with reference to the respondent's status as a "packer" and that question having been heretofore disposed of by the Commission as already stated has now become final and is not properly presented on any appeal upon the trial record upon which this decision is rendered. Even if the respond-

ent's ex parte showings should be considered herein, the result would be the same. Nevertheless, respondent still urges in its brief and findings that it is a packer. Its argument on that point is not extensive and was not presented in the oral argument. Although not presenting any such evidence on the trial record, in its proposals (pp. 25-26, affidavits, etc., 61-62, Proposed Findings Nos. 25-28), respondent refers to the said matters it had theretofore presented to the Commission ex parte in the two said appeals on this subject. And as the question is inherent, respondent's proposed findings on this issue are specifically rejected.

Passing to the merits of this case, although counsel agreed that the examiner might pass upon all questions of credibility and otherwise as though he had personally presided throughout the entire case, since he did not see and hear the witnesses he has examined with special care all the testimony to determine the weight and credibility thereof. From this examination he does not believe there is any real or substantial dispute as to the facts involved in such testimony. Such differences as do exist are as to what proper inferences should be derived from the testimony as well as from the documentary exhibits. It is, of course, now fundamental in federal administrative law that Government agencies have the right to draw fair and reasonable inferences from proven facts in the record. See *Republic Aviation Corp. v. NLRB* (1945), 324 U.S. 793, 798, 800; and *Radio Officers Union, etc. v. NLRB* (1954), 347 U.S. 17, 48-52. In such connection the examiner has not only carefully considered the testimony of each witness and carefully examined each exhibit separately for its own worth but has also considered each of such matters in connection with all other evidence in the record.

The trial record itself is not extensive. Stripped of numerous arguments and discussions relating to various motions and other procedural matters, and stricken testimony also subtracted therefrom, it consists of approximately 300 pages of testimony and identification and receipt of exhibits. A total of 168 Commission's exhibits were received in evidence. The testimony of two witnesses (Thomas, R. 174-232, 392, and Anderson, R. 204-217) who were employees of Safeway Stores, Inc., was stricken by the examiner (R. 407-410) and 37 proffered exhibits (Commission Exhibits 169 through 204) were rejected. These were tabulations by the Commission's accountant of his measurements of advertising lineages, etc., which are subsequently referred to herein. The documents received in evidence consist of respondent's contracts with, and letters and other communications to and from, its suppliers, in which re-

spondent urged their financial support in advertising respondent's several sales involved herein; the suppliers' replies thereto, some rejecting and some complying with respondent's letters; tear-sheets of the Washington newspaper advertisements of respondent's sales; and certain computations and listings prepared by respondent at the request of Commission's counsel relating to the name of suppliers, the amounts and names of the contributing suppliers and related data.

The examiner closed the case for the taking of evidence on July 17, 1959. The parties on September 28, 1959, duly and respectively submitted their proposed findings of fact, conclusions of law and order, together with extensive briefs thereon upon which oral arguments were heard on October 26, 1959.

In reaching the findings of fact, full and careful consideration has been given to all proposed findings of fact, conclusions of law, and the orders presented by the respective parties and insofar as they have been adopted they are incorporated in this initial decision. Those not specifically found or adopted either verbatim or in substance and effect have been rejected. Also all legal and factual arguments of counsel have been fully and carefully considered and the authorities cited or referred to by counsel, as well as other cited herein by the examiner, studied in their full context and application to the established facts.

The evidence stricken by Examiner Hier is, of course, not considered in making the following findings. In determining the facts in this proceeding upon the whole record as required by law, the examiner has given full, careful and impartial consideration to all the evidence properly presented on the record and to the fair and reasonable inferences arising therefrom. He has carefully examined the pleadings and found as true those facts alleged in the complaint as amended which are admitted by the answer. Therefore, upon consideration of the whole record, the examiner makes the following

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The question of respondent's claim of exemption from the Commission's jurisdiction by reason of being a "packer" has already been discussed. The examiner finds no probative evidence received upon the record made in the course of the trial of this proceeding from which it can be found or inferred that the respondent was a "packer." While the Commission determined the question adversely to respondent on its ex parte evidence upon each of the two appeals from the examiner's two dismissals on such ground, there can be no finding

on this issue based on the evidence before this examiner which has been received strictly in accordance with the Administrative Procedure Act and the Commission's own Rules of Practice of the Commission for Adjudicative Proceedings. The examiner consequently must find that this issue of jurisdiction is abandoned by respondent, particularly inasmuch as it specially raised this issue collaterally and elected on the trial not to present any evidence in its own behalf on this or any other issue.

As already noted, there are two different charges in this case. Most of the evidence relates to both charges. While that relating to the second charge is comprehended within that pertaining to the first charge and is not subject to distinct separation therefrom, in the subsequent determination of the facts pertaining to each it will be more logical and clear to treat the two charges separately and in order. Before such matters are passed upon, however, there are a substantial number of facts in the case, including those admitted by the pleadings, concerning which there is no dispute as to their actual existence. And there is but little difference between the parties as to the inferences arising therefrom. Such facts are as follows:

Respondent Giant Food Shopping Center, Inc., was organized under the corporation laws of the State of Delaware in 1936. Its principal office and place of business is now at 6900 Sheriff Road, Landover, Maryland, although its prior office address was 1845 Bladensburg Road, N.E., Washington, D.C. During the course of the litigation respondent's corporate name was changed to Giant Food, Inc.

Respondent is now and during its entire existence has been engaged in the retail sale of groceries. It has shown remarkable growth from small beginnings, and while respondent raises a minor issue as to whether it can properly be called a large food chain, the evidence shows that at some times material hereto the respondent had a total of 32 retail stores—14 in the District of Columbia, 8 in the Commonwealth of Virginia, and 10 in the State of Maryland. Actually it had just 28 retail stores in the area at the time of its 1955 or 19th Anniversary Sale, and two more were added during the taking of evidence herein. The total sales from such stores in the fiscal year ended April 30, 1955, was approximately \$60 million, with a total weekly customer traffic in the stores of 235,000. This certainly characterizes it as it actually represents itself by its very name, a "Giant". Any contention that it is smaller than chain groceries operating throughout practically all of the United States

disregards the fact that it is a colossal business when compared to most of the small retail groceries operating within its own trade area.

Respondent purchases all types of canned foods, fresh vegetables, meats, dairy products, and numerous other food items and household and other articles in general use, which it resells at retail to the consuming public. Respondent buys such products from approximately 500 different manufacturers, processors, and handlers of such products whose places of business are located at various points throughout the United States. It advertises those products of its suppliers extensively throughout its trade area in the Washington Metropolitan newspapers and otherwise in order to create a consumer demand and acceptance of its products.

Respondent in the course and conduct of its business has engaged and is now engaging in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent for many years has been purchasing the products which it sells in its various chain stores from a large number of suppliers located throughout the United States and the District of Columbia and respondent causes these products when purchased by it to be transported from the place of manufacture and purchase without the States of Maryland and Virginia or the District of Columbia to stores or warehouses located in the States of Maryland and Virginia and the District of Columbia for resale to the consuming public. There is now, and has been for many years, a constant current of trade in commerce in said products between and among the various States of the United States and in the District of Columbia.

In the course and conduct of its business, respondent has been for many years in competition in the sale and distribution of food and grocery products in commerce between and among the various States of the United States and in the District of Columbia with other corporations, persons, firms and partnerships. There is substantial evidence in the record that there are a great multitude of stores in respondent's said trade area engaged in the sale of food and related products. There were in the District of Columbia, according to Commission's Exhibit 106, Preliminary Report 1954 Census of Business Retail Trade (dated Nov. 1955), issued by the Department of Commerce, Bureau of the Census (p. 4), 1,484 food store establishments with annual gross sales in that year of approximately \$225 million. There were 1,397 other food-selling competitors in the eating and drinking places in the District of Columbia in that year with gross sales of about \$110 million (id.). The witness Abel considered them competitive to some degree with Giant.

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Commission's Exhibits 107 and 108 (similar reports covering the same period for Maryland and Virginia) disclose large numbers of all such establishments throughout those states. But there is no breakdown from which the approximate number thereof in respondent's particular trade area in the two states can be determined. That there is very substantial competition in this basic business of selling foods in said area, however, is actually not in dispute.

The first charge in the amended and supplemental complaint (Paragraphs Five to Nine inclusive), insofar as material to the following discussion, states:

In the course and conduct of its business in commerce, respondent has knowingly induced or received the payment or contracted for the payment of something of value to respondent or for respondent's benefit as compensation or in consideration for services and facilities furnished by or through respondent in connection with respondent's offering for sale or sale of products sold to respondent by many of its suppliers, and which payments were not made available by such suppliers on proportionally equal terms to all other customers of such suppliers competing with respondent in the sale and distribution of such suppliers' products.

Many of respondent's suppliers . . . did not offer or otherwise make available similar compensation or things of value or allowance for advertising or other service or facility on proportionally equal terms to those granted the respondent to all other of their customers which were competing with respondent in the sale and distribution of the same supplier's products. Respondent knew or should have known that it was inducing or receiving a payment or allowance for advertising or other service or facility from its suppliers which its suppliers were not offering or otherwise making available on proportionally equal terms to other of such supplier's customers who were competing with respondent in the sale and distribution of such supplier's products.

The genesis of this case is that in conducting certain so-called "Anniversary" sales and special "Candy Carnival" sales in the years 1954 to 1956, inclusive, Giant prepared a large number of so-called "contracts of participation" which it distributed to its some 500 suppliers. Both by letter and wire Giant urged such suppliers to execute and return such contracts and join respondent's said sales by contributing money to promote and advertise such suppliers' own particular products during the course of such sales. These contracts called for different amounts of payments by such suppliers, the sort of contract submitted apparently being at the discretion of Giant and in view of the amount of business such supplier did with it. While many of the suppliers utterly failed or neglected to answer these letters, others definitely refused to comply for various reasons. Nevertheless, about 150 of such contracts were executed by suppliers throughout the country, as a result of which, during its 19th Anniversary Sale in 1955, the respondent received a total of \$37,875 from

such contributing suppliers. These contracts (Commission's Exhibits 16-A to -E, inclusive) followed in general the form used the previous year in connection with Giant's 18th Anniversary Sale (Commission's Exhibit 6). These 1955 contracts were all substantially the same, varying only in that the advertising and services purported to be provided by respondent to such suppliers during said 1955 Anniversary Sale were somewhat increased as the amount of contribution was increased in the respective forms. Commission's Exhibit 16-A called for the supplier to pay \$100; 16-B, \$250; 16-C, \$500; 16-D, \$750; and 16-E, \$1,000, respectively. The supplier was to pay such sum upon receipt of invoice from Giant with supporting proof of its performance of the contract. It would serve no useful purpose to recite these contracts in detail, inasmuch as the major features of this identical type of contract were thoroughly considered in the Commission's opinion of May 21, 1957, in Docket 6465, *Chestnut Farms Chevy Chase Dairy, supra*, from which a substantial quotation will hereinafter be made.

The record is replete with varying responses of certain numerous suppliers to whom the proposed contracts were sent in 1955, as well as some pertaining to its similar sales in prior years. These letters are included within Commission's Exhibits 23-A through 105. In examining the answers received from those suppliers who rejected the proposed contracts, it will be noted that they varied from easy, noncommittal refusals to those which explained in full why such supplier could not accept the proposed contract. A number of them definitely advised respondent that they could not proportionalize their advertising to other buyers, while some went so far as to tell respondent that their attorneys would not permit them to enter into such contracts because to do so would violate the Robinson-Patman Act. Nevertheless, it is urged that there is no evidence that respondent knew or should have known that the inducement of these contracts by it would cause its suppliers to violate that Act. Of course, the fundamental presumption is that all men know the law. This presumption may be somewhat drastic if it extends to grocery dealers understanding the Robinson-Patman Act since few, if any, of most eminent anti-trust lawyers in the United States can claim that high distinction! Nevertheless, the respondent, its officers and other officials must be presumed to know the existence of that statute. Knowledge of the facts, however, is a different thing. Such knowledge cannot be presumed, but must be proved.

Upon the record made here, the examiner cannot believe the Giant's President N. M. Cohen and his other colleagues in this vast

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and growing enterprise³ did not know that the contract they offered to the suppliers was, upon its very face, impossible to proportionize. The Commission's decision in *Chestnut Farms, supra*, is not binding on this respondent as findings of fact. But it definitely states the law applicable to this case. The facts in that case arose, in part at least, out of Chestnut Farms' transactions with this respondent Giant during the period in question. The Commission in its opinion held relevantly to the contentions of respondent here that its supplier, Chestnut Farms, had violated subsection (d) of §2 of the Clayton Act as amended by the Robinson-Patman Act. A considerable part of the opinion is so relevant upon the facts and so binding as to the law that it may be appropriately quoted:

On this appeal, respondent contends in the main that under Section 2 (d) a supplier is not obliged in the first instance to affirmatively offer an advertising allowance, but that even if such is a valid requirement, the evidence is insufficient as a matter of law to sustain a 2 (d) violation finding on the ground either that respondent breached the affirmative offer requirement or that the advertising allowances granted to respondent's customers were paid to them on proportionally unequal terms.

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

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

This is exemplified, perhaps, in the arrangements made with Giant Food Shopping Center, Inc. An official of the respondent testified that the amount

³ Giant Food, Inc. has shown substantial growth since the period covered by the evidence in this case. As of October 14, 1959, it operated a chain of 49 supermarkets, 40 of them in the Washington, D.C. metropolitan area, and was grossing an average of \$2,650,000 per store annually, with total sales in the last fiscal year of \$116,617,056. These facts appear in a registration with the Securities and Exchange Commission for a public "offering of stock". See article in the Washington, D.C. Evening Star, October 14, 1959, page C-22. The examiner takes official notice of these facts, but if they are in question by either party to this proceeding, opportunity to disprove such facts will be granted upon timely motion therefor, in accordance with §7(d) of the Administrative Procedure Act and §3.14(c) of the Commission's Rules of Practice for Adjudicative Proceedings.

paid under the contract with Giant was not in excess of that which the customer could have collected on the basis of $1\frac{1}{4}\%$ of purchases, and that it was, therefore, a payment under an agreement the same as that available to other customers. Such an interpretation strains all reason. The contract itself provides that it is not to alter or replace currently existing advertising or merchandising or merchandising agreements between that customer and the respondent. Thus, it cannot be construed on its face as being within whatever regular policy on advertising allowances the respondent might have had. Furthermore, there is no provision in the contract that payment is to be based on purchases as in the case of the plan which respondent claims it employs. Clearly it was an arrangement negotiated with a customer on the customer's terms. The resulting payment was an allowance for services or facilities which was not available on proportionally equal terms or on any terms to customers competing in the distribution of the products, since it involved a separate and individual arrangement, and it is surely within the proscription of the statute. Such individualized and preferential treatment was the very thing Section 2(d) was designed to prevent.

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

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

In the case at bar there are also other considerations which emphasize the impossibility of any supplier proportionalizing the Giant type of contracts and offering them at large to all its buyers. While respondent's stores may in the main follow the same general exterior and interior arrangements, there is no evidence that any two of them are exactly alike in size or arrangement, and in the said contracts of participation provisions relating to feature, mass, window, and other displays would naturally differ from store to store. The contributing seller could not break down such special services and then reapply them realistically to its small store cus-

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tomers. As so many of the suppliers who rejected the contracts stated, it would be an impossibility for them to proportionalize such matters with other buyers. The Giant "contracts of participation" were prepared for the peculiar and unusual needs of Giant in utter disregard of the ability of Giant's small competitors to receive proportionalized payments from the suppliers. The owners of Giant have done a tremendous job of empire-building by wise merchandising, location and building planning and action to fit such planning. This company has become a great institution in the Washington metropolitan area and those connected therewith deserve high compliment. But like many other immense corporations it has now become somewhat disdainful toward its small competitors. The testimony of Leonard I. Abel, its grocery buyer and director of frozen food operations, who was a witness for the Commission, nevertheless spoke for respondent's management in this case, shows (R. 100-102) that they watched "most closely" their large chain store competitors "Safeway Stores, the Atlantic & Pacific Tea Company, the Grand Union-Food Fair Stores, a subsidiary of Grand Union, and the American Stores, in their merchandising activities." As to the small independent grocers in the area, he said, "I would say that I have enumerated the majority of the stores with which we compete. There may be some [independent groceries] that you, by definition, extend into that group . . . I don't know how to describe how lightly we regard their material [activities and advertisements] as opposed to the extent to which we regard that of the other stores," and further stated that he did not shop such small stores for prices or make a traffic count and the like. Giant, he said, did not even watch their prices advertised in newspapers "except on a very cursory basis." Nevertheless, the law considers these small stores in the light of competitors to Giant and fully entitled to all the protection afforded to them and the public by the Robinson-Patman Act.

There is abundant evidence that these small stores were not offered contracts by their suppliers on a proportionally equal basis to those which Giant obtained from such suppliers. Respondent contends that those particular small competitors who testified were not in fact competitors of Giant. The witness Al Kaufman testified that he operated a Federal Super Market in the District but that each of the Federal Super Markets are individually owned and are sponsored by Union Wholesale Grocery Company, through which concern each market buys all its merchandise. Hence, Giant argues they are not buying direct from the suppliers as Giant does and therefore could not be offered proportionalized con-

tracts by the sellers. Respondent also contends that Bernard Brager testified that as a wholesaler he sold the products of some of Giant's suppliers to a number of individually owned stores which operate under the over-all name of Garden Food Stores in the District. He also ran joint newspaper ads of such small grocers under the name of Garden Food Stores which were paid for through cooperative allowances from the suppliers. It is contended by respondent that since Brager does the buying as a wholesaler for these small independent retail grocery businesses he cannot be Giant's competitor and therefore the suppliers were not obligated to offer him or the Garden Food Stores any proportionalized contracts. These contentions disregard the fundamentals. Through whatever plan these independent merchants may use to buy from the same suppliers that Giant does, such plan is merely a cooperative means of buying groceries from such suppliers which does not change the facts that they are actually competitors of Giant which the suppliers know, but still fail to offer contracts proportionalized to the Giant "participation" contracts.

The examiner gathers that the main contention of respondent is that it has no responsibility for knowing how its suppliers' businesses are run, as the law does not impose a duty upon it to inquire into or understand such suppliers' internal business operations or to know whether they proportionalize among their customers who compete with Giant by contracts like the Giant "participation" contracts. It is therefore urged that this would require speculative inferences upon inferences contrary to fundamental principles of adjudication. But there is no need to pile such inferences upon inferences in this case. As has already been found Giant's officials prepared their own contract of participation which by its very terms did not alter nor replace the currently existing advertising or merchandising agreements between it and its suppliers. They had to know from this that they were endeavoring to change the entire advertising program of such of their suppliers who executed such contract. Giant's officials therefore knew that would leave the competitors operating only under the usual type of cooperative advertising contract customarily based upon the amount of merchandise purchased and which could be determined by each to an equitable degree in advance of allocating and distributing such funds as it chose to grant its customers for advertising and other promotional costs during the course of any given fiscal year or other fiscal period. Now when the letters began to come back from numerous suppliers telling Giant in no uncertain terms that they could not proportionalize with other buyers and that to enter into this special

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contract with Giant would render them liable to violation of the Robinson-Patman Act, most certainly these smart businessmen, who have built up Giant to its present terrific proportions, knew that they were asking for something unlawful to be done by their suppliers.

Giant's officials must have known that many of its suppliers executed the contracts and paid the requested amounts in due course only because of the tremendous buying power of Giant. It requires no great seer to know that a concern doing even \$60 million worth of business can exert an economic pressure upon its sellers, large and small, to obtain concessions that no small competitor could possibly attain. For every supplier who contributed anywhere from \$250 to \$1,000 to Giant's 1955 Anniversary Sale, Giant well knew that in the cost accounting of such supplier that expense item would have to be considered and reflected at some time in the cost of the merchandise bought by other grocers. Such amounts, even though infinitesimal, would ultimately not only increase the cost to other grocers but would add to the consumers' cost. These subtle attempts of this very large buyer to obtain special concessions amount to improper and undue pressures upon its suppliers. Such conduct is one of the monopolistic types the Robinson-Patman Act is intended to prevent. If the big chain competitors of Giant were all permitted to follow the same practices as Giant with the tacit or express approval of the Federal Trade Commission, the small grocery competitors in this area of competition that were not instantly throttled would surely suffer a slow and painful death.

Giant's officials also knew that it would be impossible for any of its suppliers to proportionalize similar contracts with retail competitors of Giant who were also customers of such suppliers because of the infinitesimally small amounts that would be involved in such proportionalization, and, as a number of suppliers wrote, in substance, that in any event it would entail a terrific burden upon them to work out such matters and for which they did not have funds. For example, take a fairly small corner grocery doing approximately \$100,000 worth of business per year. In 1955 this would have been 1/60 of the size of Giant business. Taking a \$100 contributor among the suppliers and dividing this by 60 would leave an allowance of \$1.67 which would hardly pay the postage entailed in working out such a transaction. And, of course, there are many small grocers doing far less business than that where the transaction would become even more ridiculous. This points up the fact that while cooperative contracts pertaining to advertising may be proper no retail buyer is in a position to insist upon a contract

by reason of its great buying power that could not be accepted by any supplier and applied to its trade at large in the area of competition involved. To put it plainly, Giant's officials not only should have known but in the opinion of this examiner from the evidence actually did know that their suppliers could not apply the Giant contracts to Giant's competitors in the Washington metropolitan area.

In addition to the Commission's decision in *Chestnut Farms, supra*, the Commission approved the examiner's decision to like effect in Docket No. 6463, *Crosse & Blackwell, supra*, which concern was also a supplier who executed Giant's contract and favored it over other competitive buyers. While the Commission in the *Atalanta Trading* case, *supra*, also decided this precise point with respect to that respondent's dealings with Giant, its order was reversed by the court on the ground that Giant was the only customer of Atalanta in the Washington area during the time involved and Atalanta therefore could not proportionalize advertising allowances to nonexistent customers. That case is therefore no authority in the case at bar. Those decisions on their particular facts do not bind the respondent on the facts. But they are so applicable and arise out of the entire state of facts presented on the record in this case that to unduly lengthen this decision by further outlining the evidence would therefore serve no useful purpose.

The second charge, Paragraphs Ten and Eleven, of the amended and supplemental complaint is as follows:

The amounts of money solicited and received by the respondent from each of its suppliers were paid by such suppliers for advertising to be done by respondent in promoting each such supplier's products during respondent's anniversary sales and candy carnival sales in the years 1954, 1955 and 1956 and prior thereto. However, it has been the regular and continuous practice of respondent not to use the entire amounts of money received from its suppliers to advertise such suppliers' products during such sales but to divert substantial amounts of such payments to its own use.

For example, during the year 1955, respondent solicited its suppliers and 134 paid respondent substantial amounts of money totalling \$31,825 for advertising which respondent was to do on such suppliers' products during its anniversary sale beginning April 18, 1955, and lasting two weeks. However, respondent did not expend the entire amount of money received from each of its suppliers as an advertising allowance in advertising each such supplier's products during such sales, but diverted substantial amounts of such payments from its suppliers to its own use.

The aforesaid acts and practices of respondent as herein alleged of inducing and receiving advertising allowances from its suppliers and not expending the entire amount of money received from each such supplier as an advertising allowance in actual advertising of such suppliers' products and of diverting substantial amounts of such money to its own use are all to the prejudice and

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injury of such suppliers and of competitors of respondent and the public and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of and in violation of Section 5 of the Federal Trade Commission Act.

While an order requiring respondent to cease and desist issued pursuant to the first charge would also prohibit the specific type of activities Giant engaged in in its said sales in connection with the use of any contract of participation offered to suppliers by Giant, such as those used in the instant case, other situations differing from those so presented in this case might arise whereby restraint of respondent from any other diversions of suppliers' monies would become necessary. Both the former hearing examiner and the Commission in their respective orders, as well as the brief of counsel supporting the complaint, state the reason why this charge is entirely distinct from the first charge. Such reasons will not now be repeated. The first charge would be maintainable even though there had not been any diversion of the funds contributed by its suppliers during the 1955 Anniversary Sale to Giant's own personal purposes but there could be diversions of suppliers' monies to respondent's own use under the regular type of proportionalized cooperative advertising contracts many of such suppliers employ.

The record clearly demonstrates that of the \$37,875 so contributed by the suppliers in 1955 Giant used a substantial portion for advertisements which could not directly benefit any of the suppliers, such as its radio and television spot advertisements which cost \$6,872. The names and products of these suppliers were not even mentioned in such broadcasts although a fair construction of the contracts indicates Giant would provide such. Upon Giant's own computations made by the witness Abel (R. 460-481), the various advertisements of its anniversary sale which appeared daily throughout the two-week sale, April 18 to 30, 1955, inclusive, in the three Washington daily newspapers show that of the total cost thereof—\$26,132.58, only \$15,072.19 went to the contributing suppliers while Giant obtained \$11,060.38 worth of space for itself (Com. Ex. 162-A and -B). The record contains considerable controversy over these figures but the former examiner struck from the record all evidence relating to the Commission's effort to establish the fact that actually Giant received a much larger proportion of the space than the foregoing admitted figures indicate. This examiner was urged in oral argument by counsel supporting the complaint to personally make measurement of the numerous ads, although the evidence indicates there are a number of ways to measure such ads, and there is no agreement between the parties as to how they should be measured. This examiner then refused and still refuses to attempt to

make such measurements. It is not his duty to do so any more than it is the duty of a trial judge in a controversy over boundary lines to go personally with rod and transit and survey the metes and bounds of the contested land area involved therein. After all such specific determination is entirely unnecessary since this is not a private proceeding to recover money for any individual but a proceeding brought in the public interest and the wishes of the contributing suppliers and the amounts they might possibly recover should they in some most unlikely event press civil actions against Giant therefor are wholly immaterial here. The definite fact remains that of this \$37,875, these suppliers contributed to Giant, at most \$15,072.19 was spent in their behalf. It is of special note that Giant used a substantial part of these contributing suppliers' money to advertise products of other suppliers who had not contributed to Giant's 1955 Anniversary Sale, an incongruous situation to say the least. The amount of such advertising is immaterial but an examination of a number of the Commission's exhibits, between Nos. 131 and 161, reveals that many of these noncontributing firms received some substantial advertising of their name and products at the expense of the contributing suppliers. It may be remarked that this is but another evidence of the looseness of respondent's sales methods in its 1955 Anniversary Sale. Just how Giant expected the contributing suppliers to proportionalize to their other customers the amounts to be spent for competitive non-contributing suppliers is not explainable.

Furthermore, as between the contributing suppliers, while exact or even approximate lineage of their advertisements has not been attempted by the examiner, from an inspection of the advertising it is clear that for the \$1,000 contributed by a number of suppliers, a very disproportionate amount of space went to advertise Swift & Company's products as against all the others. The total space given to Armour, Atalanta Trading Co., Briggs, Chestnut Farms, Fulham Bros., Inc., and George Hormel, all packers, appears to be only approximately half of that space which advertised Swift's meats and other products but each paid the same amount, \$1,000. It may be added that not only does this show an unfairness to these contributors but also demonstrates that Giant had no definite fixed plan for its advertising from which any supplier could legitimately learn just how he could proportionalize such a contract among Giant's competitors, which has to do with the first charge herein.

Giant, in a *post hoc* attempted justification of the expenditure of monies during its sale, contends that the actual cost of exterior and interior decorations in its stores, interior displays, and special em-

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ployee caps should be taken into account in determining whether there has been any misuse by it of the funds contributed by its suppliers. These various items of expense are: \$2,240 for exterior decorations of 28 stores at an estimated cost of \$80 per store; interior displays totaling \$2,661.85, and \$199.23 for caps as shown by Commission's Exhibit 162-B and also testified to by the witness Abel. It is further contended there should be taken into account the estimated value of mass end displays in various stores made on behalf of various suppliers. As already stated, respondent presented no evidence and the examiner therefore has not had the benefit of the testimony of the executives and other officials of the store who planned this sale aside from Mr. Abel who was called as a Commission witness. Since these figures are apparent after-thoughts and respondent has produced no accounting, the use of and intermingling of contributed funds with Giant's own funds during the sale leaves the matter subject to the reasonable and fair inference that there was no accounting and no explicit planning with respect to the allocation of charges to its suppliers either in the newspaper ads or otherwise. Giant contends that according to its own figures including the estimates of substantial portions thereof the total cost of the sale was \$46,043.08. Of this largely speculative cost however, there is a precise figure of \$37,875 contributed by various suppliers. This amounts to approximately 82 percent of the costs of the sale on Giant's said figures. This seems scarcely equitable to the contributing suppliers since Giant according to its own figures got the benefit of approximately 54 percent of the advertising cost although loosely contending that the suppliers got the general benefit of all the money they paid because of the intangible benefits of such a sale and the publicity given to the products of each contributor. This reasoning is not appealing to the examiner particularly in view of the failure of respondent to come forward with precise accounting figures demonstrating the truth of its estimated figures.

Respondent set this entire proceeding in motion; no one else had anything to do with its inception. Its officers conceived the whole plan of the special anniversary and candy carnival sales including the contracts of participation which it promulgated to all of its suppliers and which many of them executed. The essence of the defense in this case is that Giant's officers had no way of knowing the effects of these acts. There is a basic principle of law that every man is presumed to know the reasonable and probable consequences of his acts. This, of course, applies to an incorporeal statutory creature such as Giant because the knowledge of its officers and

agents is attributable to it. It is charged in the complaint that respondent "knowingly induced or received the payment" of the contributions it received in connection with its participation contracts, and upon the whole record the examiner specifically finds that respondent did know that the result of its obtaining and using payments made as contributions to its said sales would produce those matters which have already been fully recited herein. These acts produced an avalanche of procedures and orders against respondent's suppliers for violation of §2(d) of the Clayton Act as amended by the Robinson-Patman Act. It adversely affected respondent's competition and the buying public has also been hurt to some degree. Since the orders of the Commission look to the future, it is necessary that respondent be required to cease and desist henceforth from any such acts.

It is therefore found as to the first charge that in the course and conduct of its business in commerce, respondent has knowingly induced or received the payment or contracted for the payment of something of value to respondent or for respondent's benefit as compensation or in consideration for services and facilities furnished by or through respondent in connection with respondent's offering for sale or sale of products sold to respondent by many of its suppliers, and which payments were not made available by such suppliers on proportionally equal terms to all other customers of such suppliers competing with respondent in the sale and distribution of such suppliers' products.

It is further found with respect to the second charge that the respondent in connection with its 1955 Anniversary Sale diverted substantial amounts of money paid by its suppliers for promotion of their own products during such sale to its own use in the advertising of its own products and its own business generally.

The evidence having sustained the material allegations of the complaint on both the first and second charges, upon such evidence as hereinbefore found the examiner draws the following conclusions of law:

1. The Commission has jurisdiction of the subject matter of this proceeding and of the person of the respondent corporation.
2. There is substantial and specific public interest in this proceeding.
3. That as to the first charge the respondent's knowledgeable inducement of its various suppliers, in getting these suppliers to grant special allowances which were not to be and, in fact, were not offered to the competitors of the respondent dealing in the same goods as the respondent, is all to the prejudice and injury of competitors of

respondent, and the public, and has the tendency and effect of obstructing and preventing competition in the sale and distribution of food and grocery products, and has the tendency to obstruct and restrain and has obstructed and restrained commerce in such merchandise and constitutes unfair methods of competition in commerce and unfair acts and practices within the intent and meaning and in violation of Section 5 of the Federal Trade Commission Act.

4. That as to the second charge the acts and practices of the respondent of inducing and receiving advertising allowances from its suppliers and not expending the entire amount of such monies received from each such supplier as an advertising allowance in actual advertising of such supplier's products, and of diverting substantial amounts of such money to its own use, are all to the prejudice and injury of such suppliers and of competitors of respondent and the public and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of and in violation of Section 5 of the Federal Trade Commission Act.

The following order is therefore entered:

It is ordered, That Giant Food, Inc., a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device in connection with the sale to them of products or merchandise distributed or resold by them in the normal course of their business in commerce, as "commerce" is defined in the Federal Trade Commission Act, or in connection with any other transactions between respondent and its various suppliers or dealers involving or pertaining to the regular business of the respondent in distributing and selling commodities and products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Offering to enter or entering into any contract, agreement, understanding or arrangement or in any other way formulating, creating or adopting any scheme or method which has for its purpose the inducing of, or actually does induce, any persons to grant payment of anything of value to or for the benefit of respondent as compensation or in consideration for any services or facilities furnished by or through respondent in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such persons, unless such payment or consideration is available on proportionally equal terms to all other customers competing with respondent in the distribution of such products or commodities;

2. Receiving payment of value for promotion or advertising of commodities and products of its suppliers or others and failing to

expend the full value received for the promotion and advertising of such commodities and products.

OPINION OF THE COMMISSION

By KERN, *Commissioner*:

The hearing examiner in his initial decision found that the allegations of the amended and supplemental complaint were sustained. His order directs respondent to cease and desist from the acts and practices found to be unlawful. Respondent has appealed from that decision.

The respondent operates a chain of supermarkets in the District of Columbia, Virginia, and Maryland for the retailing of fresh and canned vegetables, meats, and other foods and household articles to the consuming public. In 1955, when this proceeding began, it had 28 stores and its sales were approximately \$60,000,000.

Respondent purchases its merchandise from approximately 500 manufacturers and suppliers located throughout the United States. In 1954, 1955 and 1956 it conducted various promotions called Anniversary Sales or Candy Carnival Sales. Respondent's program for these sales included the soliciting of its suppliers to enter into participation contracts calling for payments to it of \$100, \$250, \$500, \$750, or \$1,000 in return for advertising and promoting of the suppliers' products. Typifying those promotions was its chain-wide 19th Anniversary Sale held from April 18 through April 30, 1955, for which approximately 150 Giant suppliers contributed a total of \$37,875. The amended and supplemental complaint alleged that respondent engaged in unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act in that it (1) induced and received payments or allowances from the suppliers which it knew, or should have known, were not offered or made available by the suppliers to all of their customers competing with respondent in the resale of the suppliers' products, and that it (2) failed to expend the entire amount of money received from each supplier for advertising to be done in promoting his products and diverted substantial amounts of such payments to its own use.

In contending that the hearing examiner erred in finding the first of the above charges to be sustained, respondent argues that there was a failure of proof that its suppliers neglected to make like proportional payments to its competitors in violation of the public policy expressed in Section 2(d) of the Clayton Act, as amended. The evidence received, however, includes the testimony of a representative of one of the suppliers participating in the 1955 Anniver-

sary Sale who reported that his company marketed coffee and tea to approximately 30 accounts in the Washington metropolitan area and that no contract similar to that entered into with Giant was offered to any of its other customers. Another witness testified that his company paid \$100 in 1954 and again in 1955 to participate in Giant's sales. Even though this concern's customers in the Washington area included various food retail chains and voluntary cooperative organizations, the allowances to respondent were the only ones which it granted there during those years.

The record also contains testimony by representatives of five other companies participating in the 1955 Anniversary Sale and evidence of the participation of another supplier was stipulated into the record. Granting that certain of those suppliers participated in special promotions conducted by one or more other retail chains and voluntary cooperative grocery organizations when so solicited, it does not follow that such suppliers were offering their Washington area customers generally opportunities to participate in payments of the type granted to Giant. There accordingly is sound record support for the hearing examiner's conclusions that many of respondent's suppliers failed to offer like payments or make them available on proportionally equal terms to their other customers who competed with respondent.

The evidence we have just discussed, without more, provides adequate basis for the conclusion that many of respondent's suppliers violated Section 2(d) of the Clayton Act. The initial decision, however, also stated that two groups of wholesaler sponsored grocers, found by the hearing examiner to be competitors of Giant, had not been granted the same type of allowances as Giant. A witness testifying about one of these groups, who was president of Federal Supermarkets, Inc., a voluntary chain of eight independent grocery stores, also operated his own grocery in Washington, D.C. He bought some of the products resold by him through his wholesaler and purchased others directly from the manufacturers or suppliers, some of which contributed to Giant's 1955 Anniversary Sale. He further testified in effect that none of the suppliers whose products he handled offered him advertising or promotional allowances kindred to those provided in the Giant contract. The record fully supports the conclusion that this retailer was a customer, within the meaning of Section 2(d) of the Clayton Act, of certain of the suppliers who contributed to the Anniversary Sale and was duly entitled to participate in their promotional payments.

As to the other group of retail grocers, namely, the fifty or more independently owned outlets doing business as Garden Food Stores,

a representative of their sponsoring wholesaler stated that the only advertising contracts made available to his company and the stores were the regular standard cooperative advertising contracts. The record contains indications that some of the suppliers whose products were resold by the member stores participated in a special promotion conducted by another voluntary organization of independent stores operating in the Washington area. This circumstance notwithstanding, we do not believe that the record is adequate to show whether the proprietors of the Garden Food Stores were customers within the meaning of Section 2(d) of the Clayton Act of participating suppliers. To the extent that the initial decision may imply the contrary, it is hereby modified.

Respondent further argues that the conclusion that its suppliers had a legal duty to proportionalize their payments to Giant is precluded inasmuch as there is no evidence that disfavored competitors bought wares of like grade and quality to those advertised in the Anniversary Sale. The articles and brands advertised by Giant patently included many whose names are household bywords throughout the country. Moreover, as previously noted, representatives of certain of the suppliers attested that their respective products were sold to both chain organizations and other retailers in the area where the sale was held. Hence, it is reasonable to infer that products of grade and quality similar to those respondent promoted in the sales were also being resold by its competitors not sharing in the allowances. Furthermore, the services outlined in Giant's contracts included both media advertising and in-store advertising services. The contracts implied that one of the latter, a supervisory service, would extend to all products being handled for the suppliers. Respondent's contracts contained no blanks or spaces for identifying the grade or quality of products to be advertised and other wording in them clearly indicates that wide discretion respecting products to be promoted was vested in Giant. Respondent's contention relative to inadequacy of proof respecting like grade and quality of products is rejected.

Respondent further argues that the hearing examiner should have found that no knowledge could be imputed to respondent that the payments which it induced constituted violations by the payor-suppliers of Section 2(d) of the Clayton Act, as amended. True, respondent may have believed that one or several of its competitors had received payments from suppliers for conducting special promotions, particularly Food Fair, Inc., whose contracts respondent used when preparing its own participation contracts. But this is no excuse. Respondent solicited all of its suppliers for payments, not

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merely those suspected of having contributed to competitors' retailer promotions. The heart of respondent's argument on this phase, however, is that payments made to it would ripen into or become legal violations by the paying sellers only if they later failed to grant like proportional payments to respondent's competitors and that respondent would have no way of knowing if defaults in that respect occurred. To discuss all record matters leading to the conclusion of actual or constructive knowledge by respondent that such payments were and would be withheld from its competitors would unduly lengthen this opinion. A few salient record facts will suffice on this issue.

At the time its 19th Anniversary Sale was planned, respondent already had promotional agreements in effect with many of its suppliers. Many of those were standard types of cooperative advertising agreements instituted by the sellers which contained statements that they were available on proportionally equal terms to their other customers. The provision in respondent's participation contracts that they were not to alter or replace currently existing advertising or merchandising agreements between respondent and the contributing manufacturers thus clearly placed the solicited suppliers on notice that individual and preferential treatment was requested by respondent.

That preferred treatment was expected must have been further evident to the trade from companion provisions of the contracts. Thus, the \$100 contract provided for advertising of one product in two newspapers but specified no lineage; and it called for supervised display of merchandise and requests for orders but was likewise silent as to kind or amount. The other contracts were similarly vague, except that they specified lineages for newspaper advertising.

The hearing examiner also correctly found that respondent and the trade were aware that it would be impossible or prohibitive for the suppliers to duly proportionalize those payments among their other customers competing with Giant. Evidence stressed by respondent as showing the contrary is unpersuasive and does not seriously detract from the hearing examiner's conclusions. For example, the witness referred to in respondent's brief did not by any means outline bases for fairly proportionalizing his payments to Giant among his other customers. After testifying that his company had not offered a contract similar to the Giant contract to others, he conceded "a possibility" that an equitable alternative could have been worked out for the others and "also the possibility that it could not." We think the evidence is clear and conclusive that the respondent knew or should have known that the payments which it induced

and received were made by its suppliers in violation of Section 2(d) of the Clayton Act, as amended.

The exceptions to the conclusion of law in the initial decision that respondent's knowing receipt of the advertising allowances constituted unfair acts and practices within the purview of the Federal Trade Commission Act also are denied. Its arguments are similar to those discussed and rejected by us in our decisions in the *Grand Union* and *American News* cases.*

Next to be considered are respondent's exceptions to the findings by the hearing examiner which sustained the second charge of the amended and supplemental complaint. Under this charge, it is alleged that the moneys solicited and received by the respondent from each of its suppliers were paid for advertising to be done by it in promoting each such supplier's products during the sales. Such complaint further alleges that the respondent did not expend the entire amount of money received from each in advertising his particular products, but unlawfully diverted substantial amounts thereof to its own use. It is undisputed that respondent took in \$37,875.00 from the suppliers for the 1955 anniversary promotion and that expenditures for newspaper advertising totaled \$26,132.58; and the cost of its radio and television advertising was \$6,872.00, but such advertising was limited to spot announcements publicizing Giant's name and sale, no products of participating suppliers being mentioned.

To these outlays, respondent also would add, among other things, \$5,100.00 for costs of store decorations, and argues that total sale expenditures exceeded \$38,000.00. However, there can be no doubt but that only \$15,072.19 at most of the \$26,132.58 worth of space purchased for newspaper advertising was used in featuring the products of the contributing suppliers. Other space in such advertisements publicized Giant and its own trade-marked products and a substantial amount featured the products of suppliers who did not contribute.

All of respondent's various participation contracts, however, made provision for in-store promotion or advertising by the respondent in addition to the promised media advertising. For example, the \$100 contracts called for, among other matters, supervisory services for assuring prominent display of the suppliers' wares and bulletins publicizing the merits of their products among Giant's personnel. In addition, various of the other contracts, particularly the \$750 and \$1000 contracts, provided for signs featuring the products or

* *The Grand Union Company*, Docket 6973, decided August 12, 1960; and *The American News Company et al.*, Docket 7396, decided January 10, 1961.

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mass displays or other special store displays for them; and the record also includes evidence suggestive of steps taken or expenses incurred by the respondent for furnishing certain of the in-store services integral to the contracts.

Although Section 2(d) of the amended Clayton Act does not authorize payments for services grossly in excess of their cost or value, neither does it prohibit a seller from compensating his buyers for any type of service provided its other standards are met, including a reasonable relationship between the payments and the services being rendered. Cf. *Lever Brothers Company*, 50 F.T.C. 494, 511-12 (1953). The record in this proceeding, however, affords no criteria for evaluating, separately from the media advertising services performed, the relationship which existed between the payments induced by the respondent and the benefits or values conferred on the suppliers by the in-store facilities and services furnished. For that reason, we are unable to say that the combined value of the in-store services and the aforementioned media advertising was not reasonably related to the amount of the suppliers' payments. There is, therefore a failure of proof of the allegation that a part of such funds was diverted for respondent's own use. Hence, we think that respondent's appeal from the ruling sustaining this charge should be granted and the findings and conclusions reversed.

Respondent's contentions that it is a packer subject to regulation under the Packers & Stockyards Act of 1921 and exempted from the Federal Trade Commission Act were rejected by the Commission in two previous rulings for reasons there stated. See Commission's order issued December 19, 1957, vacating initial decision dismissing proceeding for lack of jurisdiction, and Commission's order issued February 10, 1959, vacating a subsequent initial decision which also dismissed for lack of jurisdiction. Those rulings are controlling here.

Respondent excepts to the order to cease and desist contained in the initial decision as unusually broad and argues that such order prohibits conduct wholly unrelated to the practices found unlawful. We think that the first prohibition of the order should be modified to make it clear that its target is the inducing of the discriminatory allowances with actual or constructive knowledge by respondent that they are discriminatory. Respondent's exceptions to the first paragraph of the order are to that extent granted. The second paragraph of the order contained in the initial decision relates to the aforementioned diversion charge. Since such paragraph is being set

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aside in conformity with our dismissal of that charge for failure of proof, discussion of respondent's exceptions on this aspect would be an act of supererogation.

The appeal of the respondent is denied in part and granted in part as noted hereinbefore, and the initial decision modified in conformity with this opinion is being adopted as the decision of the Commission.

Chairman Dixon and Commissioner Elman did not participate in the decision of this matter.

FINAL ORDER

This matter having been heard by the Commission upon the respondent's appeal from the initial decision of the hearing examiner; and the Commission having rendered its decision denying the appeal in part and granting it in part, and having determined, for reasons stated in the accompanying opinion, that the initial decision should be modified:

It is ordered, That the findings of fact and conclusions of law contained in the initial decision whereby the hearing examiner held that the allegations of law violation contained in paragraphs ten and eleven of the amended and supplemental complaint have been sustained by the record be, and they hereby are, reversed.

It is further ordered, That the initial decision of the hearing examiner be, and it hereby is, modified by substituting the following order for the order contained in the initial decision:

"It is ordered, That Giant Food, Inc., a corporation, and its officers, and respondent's representatives, agents and employees, directly or through any corporate or other device, in or in connection with the purchase in commerce, as 'commerce' is defined in the Federal Trade Commission Act, of products for resale by the respondent, or in connection with any other transactions between respondent and its various suppliers involving or pertaining to the regular business of the respondent in distributing and selling commodities and products in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Inducing, receiving or contracting for the receipt of anything of value from any supplier as compensation or in consideration for services or facilities furnished by or through respondent in connection with the processing, handling, sale or offering for sale of products purchased from such supplier, when respondent knows or

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should know that such compensation or consideration is not affirmatively offered or otherwise made available by such supplier on proportionally equal terms to all of its other customers competing with respondent in the sale and distribution of such supplier's products.

It is further ordered, That the allegations contained in paragraphs ten and eleven of the amended and supplemental complaint be, and they hereby are, dismissed."

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

It is further ordered, That the respondent Giant Food, Inc., 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 as modified.

Chairman Dixon and Commissioner Elman not participating.

IN THE MATTER OF

COLUMBIA RECORD SALES CORP. ET AL.

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

Docket 7968. Complaint, June 23, 1960—Order, June 1, 1961

Order dismissing without prejudice—the public interest considered to be fully protected by recent amendment to the Communications Act of 1934—complaint charging illegal payment of "payola" to radio and television disc jockeys.

Mr. Harold A. Kennedy and *Mr. Arthur Wolter, Jr.* for the Commission.

Rosenman Colin Kaye Petschek & Freund, by *Mr. Ralph F. Colin*, *Mr. Walter R. Yetnikoff* and *Mr. Asa D. Sokolow*, of New York, N.Y., for respondents.

INITIAL DECISION BY ABNER E. LIPSCOMB, HEARING EXAMINER

On June 23, 1960, the Commission issued its complaint herein, charging the Respondents, which are engaged in the distribution, offering for sale, and sale of phonograph records to distributors and various retail outlets, with violation of the Federal Trade Commission Act, in that Respondents, alone or with certain unnamed

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record distributors, have negotiated for and disbursed "payola", which consists of the payment of money or other valuable consideration to disk jockeys of musical programs on radio and TV stations, to induce the disc jockeys to select, broadcast, "expose" and promote certain records, in which the Respondents are financially interested, on the express or implied understanding that the disc jockeys will conceal the fact of such payment from the listening public.

On March 27, 1961, prior to the offering of any evidence herein, counsel supporting the complaint submitted a motion requesting that the complaint be dismissed without prejudice. In support of their request counsel supporting the complaint state that the Communications Act of 1934 has been amended in several particulars, and that, as a result of those amendments, they consider "the continued prosecution of this matter an unnecessary expenditure of time, effort and funds in determining the legality of the alleged practice, since the protection of the public interest is now fully assured by specific statute". Counsel for the Respondents offers no objection to the granting of this motion.

After considering the motion to dismiss, the law and amendments referred to therein, and the oral reply thereto of counsel for the Respondents, the Hearing Examiner accepts the reasons offered in support of the motion, and concurs in the opinion of counsel supporting the complaint that the dismissal without prejudice of the complaint herein will be in the public interest. Therefore,

It is ordered, That the complaint herein be, and the same hereby is, dismissed without prejudice to the right of the Commission to initiate further proceedings against the Respondents, should future events so warrant.

FINAL ORDER

By its order of May 9, 1961, the Commission extended until further order the date on which the initial decision of the hearing examiner herein would become the decision of the Commission; and

The Commission now having concluded that said initial decision dismissing the complaint without prejudice constitutes an appropriate and adequate disposition of this proceeding:

It is ordered, That the initial decision of the hearing examiner filed April 5, 1961, be, and it hereby is, adopted as the decision of the Commission.

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IN THE MATTER OF

INTERSTATE ELECTRIC COMPANY ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 8023. Complaint, June 27, 1960—Order, June 1, 1961*

Order dismissing without prejudice—the public interest considered to be fully protected by recent amendment to the Communications Act of 1934—complaint charging illegal payment of “payola” to radio and television disc jockeys.

Mr. Harold A. Kennedy and *Mr. Arthur Wolter, Jr.* for the Commission.

Lemle & Kelleher, by *Mr. Murphy Moss*, of New Orleans, La., for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

In the complaint dated June 27, 1960, the respondents are charged with violating the provisions of the Federal Trade Commission Act in connection with the sale of phonograph records to various retail outlets. The respondents filed answer to the complaint in the nature of a general denial. No hearings have been held in this proceeding.

On March 27, 1961, counsel supporting the complaint filed a motion requesting that the complaint be dismissed without prejudice, stating:

“... as a result of specific Congressional action, counsel supporting the complaint considers the continued prosecution of this matter an unnecessary expenditure of time, effort and funds in determining the legality of the alleged practice since the protection of the public interest is now fully assured by specific statute.”

Upon consideration, the hearing examiner is of the opinion that the motion to dismiss should be granted.

It is ordered, That the complaint in this proceeding be, and it hereby is, dismissed, without prejudice, however, to the right of the Commission to issue a new complaint against the respondents at any time in the future as may be warranted by the then existing circumstances.

FINAL ORDER

By its order of May 15, 1961, the Commission extended until further order the date on which the initial decision of the hearing examiner herein would become the decision of the Commission; and