

Complaint

IN THE MATTER OF

STEIN BROTHERS FUR COMPANY, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-156. Complaint, June 28, 1962—Decision, June 28, 1962

Consent order requiring furriers with places of business in Wichita, Kans., and Kansas City, Mo., to cease violating the Fur Products Labeling Act by labeling fur products with fictitious prices represented thereby as the usual retail prices, and by advertising in newspapers which failed to describe fur products as "natural" when such was the fact, and which represented fur products falsely as stock of a business of a recently deceased individual or as being sold for the benefit of the estate of a late owner of a business, or as distress merchandise or products unclaimed from storage.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Stein Brothers Fur Company, Inc., a corporation, and Morris S. Lavin, individually and as an officer of said corporation and also trading as A. Keller Fur Company, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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 Stein Brothers Fur Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas. Morris S. Lavin is president of the corporate respondent and formulates, directs and controls its policies, acts and practices. Respondent Morris S. Lavin also trades as A. Keller Fur Company. The office and address of the respondents is at 201 South Main Street, Wichita, Kansas, although the address of A. Keller Fur Company is at 218 East 11th Street, Kansas City, Mo. The respondents are engaged in the retail sale of fur products.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents have been and are now engaged in the introduction into commerce, and in the sale, advertising and offering for sale, in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered

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for sale, transported and distributed fur products which have been made in whole or in part of fur which had been shipped and received in commerce, as the terms "commerce", "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that labels affixed thereto contained fictitious prices and misrepresented the regular retail selling prices of such products in that prices represented on such labels as the regular prices of the fur products were in excess of the retail prices at which respondents usually and regularly sold such fur products in the recent regular course of business, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that labels affixed thereto contained a purported sale price which was in fact, fictitious in that such price was in excess of the price at which respondents actually sold such fur products during the period such products were represented as being on sale, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 5. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that respondents caused the dissemination in commerce, as "commerce" is defined in said Act, of certain newspaper advertisements concerning said products, which were not in accordance with the provisions of Section 5(a) of the said Act and the Rules and Regulations promulgated thereunder; and which advertisements were intended to aid, promote and assist, directly or indirectly, in the sale and offering for sale of said fur products.

PAR. 6. Among and included in the advertisements as aforesaid, but not limited thereto, were advertisements of the respondents which appeared in issues of The Kansas City Times, a newspaper published in the city of Kansas City, State of Missouri, and having a wide circulation in said State and various other States of the United States.

By means of said advertisements and others of similar import and meaning, not specifically referred to herein, respondents falsely and deceptively advertised fur products in that said advertisements:

(a) Failed to describe as natural, fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(b) Represented fur products as being from the stock of a business of an individual who had recently died, when such fur products were not, in fact, a part of the stock of such business, in violation of Rule 44(g) of said Rules and Regulations.

(c) Represented that fur products were being sold for the benefit of the estate of the late owner of a business, when such was not the fact, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

(d) Represented, contrary to fact, that fur products were distress merchandise, or were fur products uncalled for or unclaimed from storage or were from a business or estate in the process of liquidation, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 7. Respondents falsely and deceptively advertised fur products, in violation of Section 5(a)(5) of the Fur Products Labeling Act, by affixing labels to such fur products which contained fictitious prices and misrepresented the regular retail selling prices of such fur products in that the prices represented on such labels as the regular prices of the fur products were in excess of the retail prices at which respondents usually and regularly sold such products in the recent regular course of business.

PAR. 8. Respondents falsely and deceptively advertised fur products in violation of Section 5(a)(5) of the Fur Products Labeling Act, by affixing labels to such fur products which contained a purported sales price which was, in fact, fictitious in that such price was in excess of the price at which respondents actually sold such fur products during the period such products were represented as being on sale.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Stein Brothers Fur Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its office and principal place of business located at 201 South Main Street, in the city of Wichita, State of Kansas.

Respondent Morris S. Lavin is an officer of the aforesaid corporation and his address is the same as that of the said corporation. He further trades as A. Keller Fur Company with his address at 218 East 11th Street, in the city of Kansas City, State of Missouri.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Stein Brothers Fur Company, Inc., and its officers, and respondent Morris S. Lavin, individually and as an officer of said corporation and also trading as A. Keller Fur Company or under any other trade name, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction into commerce, or the sale, advertising, or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation, or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

1. Misbranding fur products by:

A. Falsely or deceptively labeling or otherwise identifying such products by any representation, directly or by implication:

(1) That the regular or usual prices of such products are any amount in excess of the prices at which respondents have usually and customarily sold such products in the recent regular course of business.

(2) That the prices of such products are reduced from the prices at which respondents have usually or customarily sold such products, when such is not the case.

(3) That any amount is the sale price of any fur product, when such amount is in excess of the price at which such fur product is actually

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sold during the period such product is labeled or otherwise represented as being on sale.

(4) That savings are available to purchasers of respondents' fur products, when such is not the case.

2. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement, or notice which is intended to aid, promote or assist, directly or indirectly, in the sale, or offering for sale of fur products and which :

A. Fails to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, as natural.

B. Represents directly or by implication, contrary to fact, that any such products are the regular stock of a business.

C. Represents in any manner, contrary to fact, that fur products are being sold for the benefit of any one other than the owners of such business.

D. Represents in any manner, contrary to fact, directly or by implication, that fur products are distress merchandise, or are fur products uncalled for or unclaimed from storage or are fur products from a business or estate in the process of liquidation.

E. Represents in any manner, contrary to fact, directly or by implication, that prices of such products are reduced from the prices at which respondents have usually or customarily sold such products in the recent regular course of business.

F. Represents in any manner, directly or by implication, that any amount is the sale price of any fur product, when such amount is in excess of the price at which such fur product is actually sold during the period the fur product is represented as being on sale.

G. Represents in any manner that savings are available to purchasers of respondents' products, when such is not the fact.

It is further ordered, That the 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 this order.

INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

LIGGETT & MYERS TOBACCO COMPANY, INC.

Docket 6642. Order, Jan. 22, 1962

Order vacating prior order reopening proceeding.

The Commission, on August 4, 1961, upon motion of counsel supporting the complaint, having reopened this proceeding for reconsideration of its disposition of the issue concerning certain promotional payments made by respondent to cigarette vending machine operators, and having heard the matter on the brief and oral argument of counsel supporting the complaint requesting that the Commission vacate its conclusion on this issue in its opinion and hold that Section 2(d) of the amended Clayton Act was violated in connection with the making of the aforementioned payments, and the opposing brief and oral argument of the respondent; and

The Commission having determined that there has been no showing of any change in conditions of law or fact or showing of any other circumstance requiring the action sought in the public interest and, therefore, that modification of the Commission's opinion in the manner requested has not been justified:

It is ordered, That the order of August 4, 1961, reopening this proceeding be, and it hereby is, vacated, without implying any views as to the merits of its prior opinion dated September 9, 1959, and without prejudice to the statutory right and duty of the Commission to take such further action, if any, as may be appropriate, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require.

Commissioner Kern not participating and Commissioner MacIntyre dissenting.

AMERICAN CYANAMID COMPANY ET AL.

Docket 7211. Order, Feb. 5, 1962

Order denying motions to reconsider the Commission's order of December 20, 1961, denying motions to disqualify.

MEMORANDUM OF CHAIRMAN DIXON IN REGARD TO RESPONDENTS' MOTIONS THAT HE BE DISQUALIFIED

By separate motions supported by affidavits the respondents herein have requested that I be disqualified from participating in this pro-

ceeding. All of the motions were filed pursuant to Section 7(a) of the Administrative Procedure Act and allege in substance that my prior position and duties as Counsel and Staff Director of the Antitrust and Monopoly Subcommittee of the Committee on the Judiciary of the United States Senate disqualify me from further participation in this matter.

As the motions disclose, the Subcommittee for which I acted as Counsel and Staff Director did, during 1959 and 1960, conduct an investigation, including public hearings, into certain pricing and other practices of the ethical drug industry. As leading members of that industry, the respondents herein were requested to, and did, furnish documents and other information to the Subcommittee. As counsel, I played an active role in the accumulation and presentation of this factual data to the members of the Subcommittee.

While the motions inaccurately describe the role I played in the aforesaid investigation as "advocacy," it should be unnecessary for me to point out that hearings before Congressional committees are *ex parte* and in no sense adversary in nature. Further, they cannot be said to be adjudicative, since they have as their sole purpose the amassing of facts in order that the Congress may be adequately informed concerning the desirability or need for legislation. The entire extent of my participation in the Subcommittee's investigation of the ethical drug industry is a matter of public record. I stand on that record but, of course, do not consider myself bound by the writings or statements of others who participated in that investigation, including Subcommittee members or employees.

My duties with the Subcommittee staff definitely did not involve the making of decisions or judgments on the facts accumulated. It was my duty to assist in adducing all of the facts with respect to the subject being investigated and to refrain from presenting only one side of controversial subjects.

Respondents' motions refer to the phrasing of questions which I directed to witnesses during public hearings before the Subcommittee as indicating my advocacy of positions opposed to those of the respondents herein. It is elementary that the questions of a lawyer engaged in eliciting facts from a witness do not necessarily indicate his state of mind but are couched in terms best calculated to adduce the truth.

The points raised by the respondents against my participation in this proceeding are not unlike the charge of bias raised against the complete membership of the Commission in the case of *Federal Trade Commission v. Cement Institute, et al.*, 333 U.S. 683 (1948). In that case, after the taking of testimony had been concluded and while the proceeding was still pending before the Commission, one

of the respondents asked the Commission to disqualify itself from passing upon the issues involved, alleging that the Commission had previously prejudged the issues and was prejudiced and biased against the Portland cement industry generally. The Commission refused to disqualify itself, and the contention was subsequently presented to and rejected by both the Circuit Court of Appeals for the Seventh Circuit and the Supreme Court. Because the situation there dealt with is so analogous to the situation in which I now find myself and because the Supreme Court's consideration of this point is so clear and so complete, I quote from that opinion (pp. 700-702, *supra*):

Marquette introduced numerous exhibits intended to support its charges. In the main these exhibits were copies of the Commission's reports made to Congress or to the President, as required by §6 of the Trade Commission Act. 15 U.S.C. § 46. These reports, as well as the testimony given by members of the Commission before congressional committees make it clear that long before the filing of this complaint the members of the Commission at that time, or at least some of them, were of the opinion that the operation of the multiple basing point system as they had studied it was the equivalent of a price fixing restraint of trade in violation of the Sherman Act. We therefore decide this contention, as did the Circuit Court of Appeals, on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations. But we also agree with that court's holding that this belief did not disqualify the Commission.

In the first place, the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities.

Moreover, Marquette's position, if sustained, would to a large extent [*sic*] defeat the congressional purposes which promoted passage of the Trade Commission Act. Had the entire membership of the Commission disqualified in the proceedings against the respondents, this complaint could not have been acted upon by the Commission or by any other government agency. Congress has provided for no such contingency. It has not directed that the Commission disqualify itself under any circumstances, has not provided for substitute commissioners should any of its members disqualify, and has not authorized any other government agency to hold hearings, make findings, and issue cease and desist orders in proceedings against unfair trade practices. Yet if Marquette is right, the Commission, by making studies and filing reports in obedience to congressional command, completely immunized the practices investigated, even though they are "unfair," from any cease and desist order by the Commission or any other governmental agency.

There is no warrant in the Act for reaching a conclusion which would thus frustrate its purposes. If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade pro-

ceedings, it would appear that opinions expressed in the first basing point unfair trade proceeding would similarly disqualify them from ever passing on another. See *Morgan v. United States*, 313 U.S. 409, 421. Thus experience acquired from their work as commissioners would be a handicap instead of an advantage. Such was not the intendment of Congress. For Congress acted on a committee report stating: "It is manifestly desirable that the terms of the commissioners shall be long enough to give them an opportunity to acquire the expertness in dealing with these special questions concerning industry that comes from experience." Report of Committee on Interstate Commerce, No. 597, June 13, 1914, 63d Cong., 2d Sess. 10-11.

Marquette also seems to argue that it was a denial of due process for the Commission to act in these proceedings after having expressed the view that industry-wide use of the basing point system was illegal. A number of cases are cited as giving support to this contention. *Tumey v. Ohio*, 273 U.S. 510, is among them. But it provides no support for the contention. In that case Tumey had been convicted of a criminal offense, fined, and committed to jail by a judge who had a direct, personal, substantial, pecuniary interest in reaching his conclusion to convict. A criminal conviction by such a tribunal was held to violate procedural due process. But the Court there pointed out that most matters relating to judicial disqualification did not rise to a constitutional level. *Id.* at 523.

Neither the *Tumey* decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court.

The Commission properly refused to disqualify itself. We thus need not review the additional holding of the Circuit Court of Appeals that Marquette's objection on the ground of the alleged bias of the Commission was filed too late in the proceedings before that agency to warrant consideration.

Should I accede to the respondents' motions here, I might also find myself barred from consideration of cases in other industries investigated while I served as Counsel and Staff Director to the Senate Antitrust and Monopoly Subcommittee of the Committee on the Judiciary. These industries include, among others, the steel, automobile, milk, bread and roofing industries. I would thus find myself in the position where my experience acquired from working as a legislative counsel would be a handicap instead of an advantage. This, in my opinion, would defeat the very intendment of Congress in creating a Commission to be manned by commissioners with some degree of expertise.

Following the respondents' contentions to their ultimate conclusion, the Commission itself might be alleged to be disqualified from ultimately judging a proceeding because of the fact that, under its basic responsibilities, it reviews, prior to the issuance of a complaint, investigational records. Such investigational records are not unlike

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investigative records of legislative bodies. They are both *ex parte*. However, after the issuance of a complaint by the Commission and the joinder of issues, it is clear that the proceedings then become adversary and the record must be finally judged in this climate. I find myself in a position not greatly different from that of my fellow Commissioners.

The respondents' motions are founded upon the assumption that I have prejudged the issues here involved, and I am incapable of rendering an impartial decision. Thus, what is here involved is the present state of my mind with respect to these issues. The state of a man's mind is by the nature of things known only to him and to his Maker. I have carefully and conscientiously considered the question here presented and have concluded, and hereby state, that I have not formed a definite opinion with respect to any of the material issues involved in this proceeding and honestly believe that I have a free and open mind with respect thereto, and I am fully capable of rendering a completely impartial decision based solely upon the facts contained in the record. Accordingly, I shall not withdraw from participation in this proceeding.

In view of the nature of these motions, I am not participating in the Commission's deliberations and decision upon them.

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On December 13, 1961, all of the respondents in this proceeding filed separate motions requesting the Commission to disqualify Commissioner Dixon from participating in the appeal from the initial decision of the hearing examiner. These motions were based on an alleged prejudgment of the issues of fact and law to be presented in the appeal. On December 20, 1961, the Commission issued an order denying these motions. Assuming that it had the power to disqualify one of its members from participating in an appeal from an initial decision, the Commission found that the showing made by respondents was insufficient to warrant exercise of such power in the particular circumstances presented here. The order stated, *inter alia*:

"The inquiry called for by a motion for disqualification is necessarily subjective in nature. It is extremely difficult and delicate for a tribunal to assume the responsibility of weighing, objectively, the ability of one of its own members to make an objective judgment in a case. Further, the existence of such a power to disqualify carries with it an inherent danger of abuse, as a potential instrument for suppression of dissent.

"Under the Commission's practice, disqualification is treated as a matter primarily for determination by the individual member concerned, resting within the exercise of his sound and responsible discretion. The Commission believes this practice to be proper and consistent with the law. In the instant proceeding, no basis for departing from the normal practice has been shown."

On January 17, 1962, the respondents filed "Motions to Disqualify and to Reconsider". The full text of these motions is as follows:

"The undersigned respondents, being uncertain as to the procedural status resulting from the Commission's order of December 20, 1961 and as to the procedural steps which they may be required to take pursuant thereto, respectfully move the Honorable Chairman to disqualify himself because of the matters set forth in the affidavits attached to the respondents' motions filed on December 13, 1961; and, in the event that the Chairman should reach the decision that he is not disqualified, that the Commission reconsider its order of December 20, 1961 on the grounds that, irrespective of the applicability of the Administrative Procedure Act, the Commission has inherent power to regulate the course of proceedings before it and that the facts set forth in the said affidavits show that the Chairman is disqualified from acting in this cause, not only by virtue of said Administrative Procedure Act but also under principles of law applicable to the disqualification of judicial officers generally and to the right to a fair and impartial hearing guaranteed by the due process clause of the Constitution."

In accordance with the Commission's order of December 20, 1961, the instant motions filed by respondents are addressed primarily to Commissioner Dixon who, on this date, has filed a memorandum in regard thereto. For the reasons stated by him in that memorandum, Commissioner Dixon has determined not to withdraw from participation in this proceeding.

To the extent that respondents' motions are addressed to the Commission, they present no new grounds in support of the request to disqualify Commissioner Dixon. There is no basis or justification, therefore, for the Commission to reconsider its action of December 20, 1961.

Accordingly, it is ordered, That the motions to reconsider the Commission's order of December 20, 1961, be, and they hereby are, denied.

Commissioner Dixon not participating.

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THE TEXAS COMPANY

Docket 6898. Order and Opinion, Mar. 9, 1962

Order denying respondent's application for disclosure of confidential documents.

OPINION OF THE COMMISSION

By the COMMISSION :

Respondent, pursuant to §§ 1.131 and 1.134 of the Commission's Rules of Practice, has applied for the disclosure of certain documents and materials, and pursuant to § 3.17 of the Commission's Rules, published May 6, 1955, as amended, has applied for issuance of a subpoena to the Secretary of the Commission directing him to appear and to testify and to bring with him the documents and materials requested in this application.

The documents sought are in two general categories: (a) those having to do with "the administrative construction of the meeting competition provisions" of the amended Clayton Act or any other statute barring price fixing and (b) alleged "ex parte communications . . . made outside the regular adjudicative process" with respect to this proceeding and other "communications" between the Commission or any member or employee in the decisional process in the proceeding and any agent or employee engaged in investigative or prosecutive functions with respect to (1) any investigation of respondent's pricing activities in 1957 and 1958 in Detroit, Michigan; (2) any enlargement of the scope of the hearings herein; (3) any amendment or supplementation of the complaint; and (4) the merits of this or a factually related proceeding.

In determining the action to take on a request for the release of documents, the Commission will consider not only the confidential and privileged nature of the material, but also the purpose for which the respondent intends to use it. *Postal Life and Casualty Insurance Company*, 52 F.T.C. 651 (1956).

Here respondent contends that the decision in *Sun Oil Co. v. Federal Trade Commission*, 294 F. 2d 465 [7 S. & D. 191] (5th Cir. 1961), indicates the importance of developing facts bearing upon the administrative construction of relevant statutes. A petition to review in this case was filed with the United States Supreme Court by the Solicitor General on behalf of the Federal Trade Commission, December 22, 1961.

Respondent also asserts, on the question of relevance and materiality, that the United States Supreme Court has been persuaded to reject a statutory construction urged by the Commission, by the fact, among

others, that it was inconsistent with the interpretation previously placed upon the critical language by that body. The cases cited to support this argument are: *Federal Trade Commission v. Bunte Bros.*, 312 U.S. 349, 351-52 [3 S. & D. 337] (1941); and *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231, 246 [5 S. & D. 221] (1951). In the *Bunte Bros.* case, the want of an assertion of power by the Commission was considered in determining whether such power was actually conferred. There the court referred to the Commission's unsuccessful attempt to secure the particular authority from Congress. In the *Standard Oil* decision, the court mentioned the "widespread understanding" as to the construction of the law and said that this understanding was reflected in "actions and statements of members and counsel" of the Commission. In documenting this observation in a footnote, the court referred only to public information and, in fact, seemed to emphasize the official action of the Commission itself in issuing cease and desist orders in which were inserted "savings" clauses bearing on the construction of the statute. Compare *United States v. E. I. duPont de Nemours & Company*, 353 U.S. 586 (1957). There the court stated that the failure of the Commission to act was not a binding administrative interpretation on the issue under consideration. (Id. 590.)

The information and documents considered by the Court in *Bunte Bros.* and *Standard Oil Co.* are on a different footing from the kind of materials here sought. The former were publicly known; the latter involved the inner workings of the agency. The implication of a thoroughness of consideration could not be drawn in the case of purely internal papers as it might be for documents or statements issued or made public by the Commission or one of its members. We conclude that the confidential documents here considered would not be relevant to any issue in this proceeding. Moreover, such documents might include, among other things, correspondence or other material relating to or identifying applicants or complaining parties. Such material is treated with strict confidentiality by the Commission. See § 1.15 of the Commission's Rules of Practice.

Respondent, as to the second category of documents requested, asserts that enough has been disclosed to make it clear that there are materials which have not been made a part of the public record bearing upon the possible commingling of the adjudicative and enforcing functions and the receipt of *ex parte* communications. In the principal instance referred to, it appears that a former chairman of the Commission and a member of the Commission's staff met with certain industry members. Respondent makes no assertion that the meeting

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itself was in any way improper and states that it seeks only to ascertain the facts. We cannot open up confidential files on such vague and speculative grounds.

Moreover, respondent's contention appears to be mainly against alleged contacts involving certain third party organizations or persons. These organizations and individuals, however, are not parties to this proceeding. Information received from such sources on an *ex parte* basis does not come within § 4.27 of the Commission's Rules of Practice dealing with *ex parte* communications. The documents in the second category of the request also might involve the name of applicants or complaining persons, although we here make no reference to the individuals and organizations listed; and such information, as above indicated, is held in strict confidence.

For the above-stated reasons, we will not grant a release of the requested documents and materials. We need not discuss the application for the issuance of a subpoena directed to the Secretary of the Commission since, without the documents, the subpoena would serve no purpose.

Accordingly, respondent's application for access to documents and materials and for the issuance of a subpoena will be denied.

Commissioner Elman, being of the view that the opinion fails to deal adequately with the issues raised by respondent's application, does not concur in the Commission's disposition of the matter.

ORDER

Respondent having filed an application requesting disclosure of certain confidential documents and materials and the issuance of a subpoena directed to the Secretary of the Commission; and

The Commission having determined, for reasons stated in the accompanying opinion, that said application should be denied:

It is ordered, That the aforesaid application of the respondent for the disclosure of documents and materials and the issuance of a subpoena be, and it hereby is, denied.

Commissioner Elman not concurring.

CHATHAM RESEARCH LABORATORIES ET AL.

Docket 7609. Order, Apr. 5, 1962

Order reopening matter, vacating order, amending complaint, and remanding for further proceedings.

The Commission, by order of January 19, 1962, having given respondents opportunity to show cause, if any there be, why the public

interest does not require: (1) that this proceeding be reopened, (2) that the order to cease and desist and actions bearing on its interpretation be vacated and set aside, (3) that the complaint be amended in the manner set out in the show cause order, (4) that the amended complaint be accompanied by a proposed order in the form contained in the show cause order, and (5) that the matter be assigned for further appropriate proceedings under the complaint as so amended; and

Respondents, on March 26, 1962, having filed a paper designated Respondents' Memorandum Showing Cause; and

The Commission, after notice and opportunity for hearing as above described, having considered the matter, and having determined that the public interest requires that the proposed action as set forth in the aforementioned order to show cause be taken:

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

It is further ordered, That the order to cease and desist, issued April 8, 1960,* and subsequent actions bearing on the interpretation of such order, be, and they hereby are, vacated and set aside.

It is further ordered, That the complaint be, and it hereby is, amended by modifying paragraphs 4, 5 and 6 to read, respectively, as follows:

PAR. 4. In the course and conduct of their businesses, and for the purpose of inducing the sale of their synthetic stones, respondents have made certain statements with respect to the nature of the synthetic stones offered for sale and sold by them, in advertisements in magazines of national circulation and by other means, of which the following are typical:

"Chatham Emeralds"

"Chatham Created Emeralds"

"Chatham Cultured Emeralds"

"These stones are identical to natural emeralds in all their properties: chemically, physically, optically, with the same crystal faces, atomic arrangement, and even the same inclusions and 'gardens'."

PAR. 5. Through the use of the aforesaid statements, by positive assertion and by the failure to reveal the material fact that the products were synthetic and not natural stones, respondents variously represented that their said synthetic stones or synthetic emerald products had been cultured, were emeralds and were identical to emeralds.

PAR. 6. Said statements and representations, including the failure to disclose the material fact that the products were synthetic and not natural stones, were exaggerated, false, misleading, and deceptive. In truth and in fact, said synthetic stones or synthetic emerald products

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had not been cultured, were not emeralds and were not identical to emeralds.

It is further ordered, That the amended complaint be accompanied by a proposed order reading as follows:

ORDER

It is ordered, That respondents, Carroll F. Chatham, an individual, trading as Chatham Research Laboratories, or under any other name; Anglomex, Inc., a corporation, and its officers, and Dan E. Mayers, individually and as an officer of said corporation; Ipekjdian, Inc., a corporation, and its officers, and Cultured Gem Stones, Inc., a corporation, and its officers, and Adom Ipekjdian and Georges Ipekjdian, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of stones now known as Chatham Emeralds, Chatham Created Emeralds or Chatham Cultured Emeralds, or any other manufactured stone having essentially the same optical, physical and chemical properties, or any other manufactured stone having essentially the same optical, physical and chemical properties as a natural stone, do forthwith cease and desist from:

1. Representing, directly or by implication, that such stones have been cultured, are natural stones, or are identical to natural stones;

2. Using the word "emerald" or the name of any other precious or semi-precious stone as descriptive of such stones, unless such word or name is immediately preceded, with equal conspicuity, by the word "synthetic".

It is further ordered, That the matter be assigned to the hearing examiner for further appropriate proceedings under the complaint as so amended.

Commissioner Elman dissenting.

CHATHAM RESEARCH LABORATORIES ET AL.

Docket 7609. Order, May 29, 1962

Order denying motion to rescind order of April 5, 1962.

By motion filed April 23, 1962, the respondents have requested the Commission to reconsider and to rescind, set aside or vacate its order of April 5, 1962. The Commission in said order directed that this proceeding be reopened; that the order to cease and desist theretofore entered herein be vacated; that the complaint be amended; and

that the case be remanded to the hearing examiner for further appropriate proceedings under the complaint as amended. The ground for the motion is that the Commission was without authority to issue the order of April 5 and that such order is void and of no effect, for the stated reason that the respondents were not afforded an "opportunity for hearing."

Acting under the authority of Section 5(b) of the Federal Trade Commission Act, the Commission, on January 19, 1962, had issued and had thereafter served upon the respondents, an order in which it had recited that the then outstanding order to cease and desist was deficient in that it failed to provide clear and definite guidance to the respondents or to adequately protect the public. The order further informed the respondents of the Commission's tentative conclusion that in the circumstances the order to cease and desist should be vacated and additional proceedings conducted. And finally, the order provided that the respondents, within thirty (30) days after service thereof (which time was subsequently extended at the respondents' request to March 26), might file with the Commission a memorandum showing cause why the public interest did not require the proposed actions.

In response to this invitation, the respondents, on March 26, 1962, did file with the Commission a memorandum, twenty-three pages in length, supported by affidavits executed by respondents Carrol F. Chatham and Georges Ipekjdian and by Edward G. Coyne, an employee of the respondent corporations, and twenty-four exhibits and attachments. In these documents the respondents discussed in some detail the nature and characteristics of their product, reviewed the history of this proceeding, set forth their argument that the advertising under attack in the proposed complaint does not have the tendency or capacity to mislead or deceive prospective purchasers, and expressed the conclusion that the public interest does not require further action by the Commission.

The Commission, on April 5, 1962, after having fully considered the material submitted, determined that the public interest does require the actions proposed in its order of January 19, and, accordingly, entered the order complained of.

Section 5(b) of the Federal Trade Commission Act provides, in part, that after expiration of the time allowed for the filing in a United States Court of Appeals of a petition for review of an order of the Commission issued under said section, the Commission may at any time, "after notice and opportunity for hearing," reopen and alter, modify, or set aside, in whole or in part any such order, whenever in the opinion of the Commission conditions of fact or of law

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have so changed as to require such action or if the public interest shall so require.

In light of all of the foregoing, the Commission has concluded (1) that its authority to issue its order of April 5, 1962, is clear and specific; (2) that all of the statutory requirements preliminary to the issuance of said order, including the provision for "notice and opportunity for hearing," were fully complied with; and (3) that the respondents' motion to rescind the order is without merit.

Accordingly, it is ordered, That said motion be, and it hereby is, denied.

Commissioner Elman dissenting.

UNITED BISCUIT COMPANY OF AMERICA

Docket 7817. Order and opinion, June 28, 1962

Order vacating initial decision and remanding proceeding to hearing examiner.

OPINION OF THE COMMISSION

By ANDERSON, *Commissioner*:

This matter is before the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision as to Count I, filed November 13, 1961, dismissing the complaint as to Count I. The hearing examiner in the aforementioned initial decision sustained the respondent's motion of April 28, 1961, made at the close of the case in chief in support of the complaint, to dismiss Count I, stating that the ground for his action was the failure of the evidence to prove the competitive injury required to be shown under Section 2(a) of the amended Clayton Act.¹

Counsel in support of the complaint appeals, averring (1) that the examiner erred in failing specifically to find that respondent discriminated in price between competing customers, and (2) that he erred in failing to find that the price discriminations charged had the adverse effects proscribed by the statute and that a *prima facie* case had been proved. Said counsel requests that the initial decision be reversed and the case be remanded.

The complaint alleges in part that respondent discriminated in price between different purchasers of its biscuit products of like grade and quality and that such discriminations have been effectuated through the use of respondent's cumulative discount systems based on

¹ The hearing examiner refers to the filing of his initial decision as to Count II, under which decision, subject to Commission review, Count II would be disposed of pursuant to §§ 3.21 and 3.25 of the Commission's Rules of Practice, published May 6, 1955.

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the dollar volume of the customer's monthly purchases. Respondent's answer does not challenge the fact that its Sawyer Division used in the designated periods the several discount schedules set out in the complaint. These schedules provided graduated discounts up to 6% for varying amounts of monthly purchases. They are as follows:

For the Period July 1, 1958, to June 30, 1959:

<i>Monthly purchases</i>	<i>Discount percent</i>
\$00.00 to \$24.99-----	0
\$25.00 to \$39.99-----	2
\$40.00 to \$69.99-----	3
\$70.00 to \$99.99-----	4
\$100.00 to \$124.99-----	5
\$125.00 and over-----	6

*For the Period July 1, 1959, to Date of Issuance of Complaint
March 10, 1960:*

<i>Monthly purchases</i>	<i>Discount percent</i>
\$00.00 to \$24.99-----	0
\$25.00 to \$44.99-----	1½
\$45.00 to \$59.99-----	2
\$60.00 to \$74.99-----	2½
\$75.00 to \$89.99-----	3
\$90.00 to \$109.99-----	3½
\$110.00 to \$129.99-----	4
\$130.00 to \$149.99-----	5
\$150.00 and over-----	6

In the case of a purchaser with more than one store, such as a corporate chain with multiple retail outlets, the discount to such purchaser under these schedules was calculated on the basis of the aggregated purchases of all the stores operated by the purchaser. The discounts under these schedules will be referred to hereinafter as "volume" discounts.

The hearing examiner failed to make a specific finding that, as a result of such volume discounts, some customers were charged higher prices for like goods than others competing with such customers and that this constituted price discrimination under Section 2(a) of the amended Clayton Act. However, he clearly assumed such to be the fact; otherwise he would not have reached the injury question.

The present record amply supports a finding that respondent did discriminate in price as charged.² The evidence, while not limited to a single division of respondent, largely concerns the Sawyer Biscuit Company Division of United Biscuit Company of America (Sawyer

² A price discrimination within the meaning of the phrase "discriminate in price" in Section 2(a) is merely a price difference. *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960) [6 S. & D. 817].

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Division), and so the following references are generally to the activities of that division. Sawyer Division's net sales for 1959 amounted to \$12,215,665. In January of that year, Sawyer Division sold to 21,773 customers operating 23,664 outlets. It should be noted that the number of customers and outlets varies from month to month. During January 1959, 8,057 Sawyer Division customers earned a volume discount, i.e., the amount was credited to them which they also received at that time or later, and 13,716 neither earned nor received such a discount. Of those receiving volume discounts, many received less than 6%. For instance, in January 1959, retail grocery customers of respondent earned and, either then or later, received volume discount payments as follows:

<i>Customers</i>	<i>Percent</i>
3,718-----	2
2,287-----	3
704-----	4
310-----	5
1,038-----	6

Certain of the customers receiving no volume discount or less than 6% discount were in competition with one or more customers receiving the full 6%. These favored customers included chain store organizations such as The Kroger Company (Kroger), The Great Atlantic & Pacific Tea Co. (A & P), and National Food Stores (National).³

The evidence of record includes a showing as to price discriminations between and among competing customers in the trading areas of Gary, Indiana; South Bend, Indiana; and Burlington, Wisconsin. Specific examples for two of the areas will be discussed below.

In Gary, Indiana, one customer paying a higher price for respondent's products was Wally's Fifth Avenue Mart. The record shows that Wally's earned, i.e., it was credited with, and then or later received, the following volume discounts in various months in 1959: 3.0% in January and February, 2.0% in March, 0% in October, 1.5% in November, and 2.0% in December. There is no specific evi-

³ Counsel supporting the complaint has included with his brief an appendix showing a comparison of purchase volumes and discounts of individual chain stores and independent grocery stores. Respondent apparently does not contest the accuracy of the figures in the appendix although it does contend that the schedule is not complete.

The record shows that of the 43 chain group purchasers listed in Commission Exhibit 120-A, including Kroger, A & P and National, all received 6% volume discounts for 1959 purchases except that for certain months—January, April, May, August, November and December—one corporate chain, not identified, did not receive the full 6% discount. Accordingly, the record will sustain a finding that, for 1959 purchases, all chains so listed in the months other than those mentioned received 6%; for the remaining months all chains so listed other than one received the 6%.

dence as to the other months of 1959, although the owner of the store, Walter Pall, testified, in effect, that Wally's earned only low volume discounts. Other stores in Gary, Indiana, receiving discounts under 6% included Better Foods, Inc. (e.g., 1.5%, earned October 1959), Gene's Super Market (e.g., 3.5%, earned December 1959), and Tobe's Super Market (e.g., 3.5%, earned November 1959). These stores were each competing with one or more of respondent's customers receiving 6% discounts for purchases made at the same time, which favored customers included Kroger and A & P.

In South Bend, Indiana, in 1959, certain independent store customers of the respondent failed to earn any volume discounts or earned and received discounts of less than 6%. Such customers and the volume discounts earned in January 1959, if any, included the following:

	Percent
Horvath's Self Service.....	3
Vince's Super Saver.....	3
Food Center.....	2
A & J Market.....	0
K & F Food Market.....	4

Those who earned also received payments. Discounts under 6% or no discounts are also shown for other months in 1959 for these customers. Each competed with one or more customers of respondent receiving 6% volume discounts for purchases made at the same time, which favored customers included Kroger and National.

In many instances, the grocery stores receiving the smaller discounts purchased more goods from respondent in a particular month than did the individual competing chain store outlet receiving 6%. For example, in October 1959, Gene's Super Market in Gary, Indiana, received a 2½% volume discount on biscuit purchases from respondent of \$66.63, while A & P received a 6% volume discount on smaller purchases of \$26.28 delivered to one of its outlets competing with Gene's. As another example, in October 1959, Food Center in South Bend, Indiana, received no discount on biscuit purchases from respondent of \$24.05, while National received a 6% discount on purchases of \$3.00 delivered to National Store #44 competing with Food Center. This inequality in payments was due to the fact that the chains were given volume discounts based on the aggregated purchases of their multiple outlets.

As a result of the aforementioned differences in volume discounts, respondent charged some customers a higher price for like goods than it charged a competing customer or competing customers.

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The hearing examiner, in his consideration of whether the price discriminations so disclosed resulted in the competitive effect defined in the Act, erred in failing to apply the proper test to make this determination. He first cites *Anheuser-Busch, Inc. v. Federal Trade Commission*, 289 F. 2d 835 (7th Cir. 1961) [7 S. & D. 19], and *General Foods Corp.*, 50 F.T.C. 885 (1954), to support his decision, but in light of the specifically applicable judicial authority to be mentioned hereafter, these cases are not controlling for this proceeding. While the hearing examiner refers to *Corn Products Refining Company, et al. v. Federal Trade Commission*, 324 U.S. 726 (1945) [4 S. & D. 331], and *Federal Trade Commission v. Morton Salt Company*, 334 U.S. 37 (1948) [4 S. & D. 716], as well as *P. Sorensen Mfg. Co., Inc.*, 52 F.T.C. 1659 (1952), *aff'd per curiam*, *P. Sorensen Mfg. Co., Inc. v. Federal Trade Commission*, 246 F. 2d 687 (D.C. Cir. 1957) [6 S. & D. 332], he does not apply the principles set forth in these cases and, in effect, rejects the holdings.

Section 2(a) of the amended Clayton Act does not require a finding that price discriminations have in fact had an adverse effect on competition (there is no need, for instance, to show that a competitor has suffered financial losses or has been forced out of business); it is enough that they may have the prescribed effect. *Federal Trade Commission v. Morton Salt Company, supra*. The "gone out of business" test is not a part of Section 2(a). To insist on any such requirement would be contrary to the purposes and intention of Congress in passing this legislation. A showing in the *Morton Salt* case that certain merchants had to pay the respondent therein substantially more for like goods than their competitors justified a finding of competitive injury within the meaning of the Act. In *Moog Industries, Inc. v. Federal Trade Commission*, 238 F. 2d 43 (8th Cir. 1956) [6 S. & D. 91], the court in considering the question of injury to competition held in part as follows:

With competition so keen, margins so small and over-all net profits so low, it was clearly open to the Commission to find that rebates denied to some purchasers (well more than half in all lines) but granted to others, ranging up to 19%, may probably result in substantial injury to competition. (Id. 51)

See also *E. Edelmänn & Co. v. Federal Trade Commission*, 239 F. 2d 152 (7th Cir. 1956) [6 S. & D. 113]; *Whitaker Cable Corp. v. Federal Trade Commission*, 239 F. 2d 253 (7th Cir. 1956) [6 S. & D. 107]; *Standard Motor Products, Inc. v. Federal Trade Commission*, 265 F. 2d 674 (2nd Cir. 1959) [6 S. & D. 553]; *P. Sorensen Mfg. Co., Inc. v. Federal Trade Commission, supra*. Recently in *Tri-Valley Packing Association*, Docket Nos. 7225 and 7496 (1962) [60 F.T.C.

1134], we held that in any case involving the effect of a price discrimination on competition between buyers, the requisite injury may be inferred from a showing that a purchaser paid substantially less than its competitor for goods of like grade and quality sold by the respondent and that the question of substantiality must be determined from the facts in each case.

Fred Bronner Corporation, et al., Docket No. 7068 (1960) [57 F.T.C. 771], a Section 2(a) matter dismissed by the Commission for lack of a showing of competitive injury, differs from the secondary line injury cases cited above because the evidence in that matter was not such as to warrant a finding that the price differential was substantial or competitively significant in the market.

Clearly, the test for competitive injury set forth in *Morton Salt* and applied in the automotive cases above mentioned should govern this proceeding.

We turn now to the facts shown in the present record. The majority of respondent's customers received no volume discount. Independent store owners testified generally as to the highly competitive nature of the retail food business. Net profits are low and cash discounts and other allowances are important. One store owner witness testified: ". . . we have to fight not only for pennies but for fractions." There are a number of examples of low net profits shown in the record, such as 2%, 3 to 5% and 4 to 5%. A number of independent store witnesses testified that price was a very important, if not the most important, factor in enabling them to compete. There is testimony from such witnesses to the effect that if they could buy cheaper they could sell for less, and that customers will, in the over-all picture, buy where the prices are lower. Considering the highly competitive nature of the market and the other factors mentioned, a volume discount of 6%, tantamount to a difference in price of 6%, was clearly substantial. Likewise substantial were the lesser discounts shown ranging up to 6%.

On the basis of these facts, there is in the present record sufficient evidence to find that the competitive opportunities of certain purchasers were injured when they had to pay respondent substantially more than their competitors had to pay and that the effect may be substantially to injure, destroy or prevent competition with the purchasers receiving the benefit of such discriminations. We believe that the examiner's failure to so find was clearly erroneous. Unless the showing in the record is rebutted or justified, the evidence is sufficient to support an order against respondent to cease and desist the price discrimination practice charged.

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The appeal of counsel supporting the complaint is granted. It is directed that the initial decision as to Count I be vacated and set aside and that the matter be remanded to the hearing examiner for further proceedings in conformity with the views herein expressed. An appropriate order will be entered.

Commissioner Elman concurred in the result of the decision of this matter.

ORDER VACATING INITIAL DECISION AND REMANDING CASE TO HEARING
EXAMINER

This matter having been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision as to Count I, filed November 13, 1961, and upon the briefs and oral argument in support thereof and in opposition thereto; and

The Commission, for the reasons appearing in the accompanying opinion, having granted the appeal, and having directed that the initial decision as to Count I be vacated and set aside and that the matter be remanded to the hearing examiner for further proceedings in conformity with the views expressed in the opinion:

It is ordered, That the initial decision as to Count I, filed November 13, 1961, be, and it hereby is, vacated and set aside.

It is further ordered, That the matter be, and it hereby is, remanded to the hearing examiner for further proceedings in conformity with the views expressed in the Commission's opinion.

Commissioner Elman concurring in the result.