

when he was sworn into office.

IN THE MATTER OF
REVLON, INC., ET AL.

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

Docket 7175. Complaint, June 16, 1958—Decision, Mar. 22, 1963

Order requiring Revlon, Inc., three competing cosmetic companies and two manufacturers of lipstick containers, to cease conspiring to fix and maintain prices and conditions of sale of lipstick containers and refills, but excluding from such prohibition agreements independently arrived at between sellers of such products and their customers, intra-corporate agreements between officers or employees of a respondent's separate business or between a corporate respondent and its subsidiaries, and resale price maintenance contracts lawful under the McGuire Act.

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 the parties named in the caption and hereinafter referred to as respondents, have violated the provisions of Section 5 of the said Federal Trade Commission 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 Revlon, Inc., is a corporation, organized and existing under the laws of the State of Delaware with its principal office and place of business located at 745 Fifth Avenue, New York 22, New York.

Respondent The Eyelet Specialty Company, is a corporation, organized and existing under the laws of the State of Connecticut with its principal office and place of business located at 50 State Street, Waterbury, Connecticut.

Respondent The Plume & Atwood Manufacturing Company, is a corporation, organized and existing under the laws of the State of Connecticut with its principal office and place of business located at Thomaston, Connecticut.

Respondent The Risdon Manufacturing Company, is a corporation, organized and existing under the laws of the State of Connecticut with its principal office and place of business located at Naugatuck, Connecticut.

Respondent Scovill Manufacturing Company, is a corporation, organized and existing under the laws of the State of Connecticut with its principal office and place of business located at 99 Mill Street, Waterbury, Connecticut.

Respondents Jack B. Nethercutt and Dorothy Nethercutt, are individuals trading as copartners under the firm name and style of Nethercutt Laboratories with their principal office and place of business located at 9130 Bellanca Avenue, Los Angeles 45, California.

Respondent Merle Norman Cosmetics, Inc., is a corporation, organized and existing under the laws of the State of Nevada with its principal office and place of business located at 9130 Bellanca Avenue, Los Angeles 45, California.

Respondent Helena Rubinstein, Inc., is a corporation, organized and existing under the laws of the State of New York with its principal office and place of business located at 655 Fifth Avenue, New York 22, New York.

PAR. 2. Respondent Revlon has been engaged for many years in the business of manufacturing and selling cosmetics, beauty aids and toilet preparations, referred to as cosmetic products. Said respondent is the successor to the business of Revlon Products Corporation, which was organized under the laws of the State of New York, with the

respondent Revlon, Inc., being incorporated in 1955 in the State of Delaware and carrying on the business formerly conducted under the name of Revlon Products Corporation.

Respondents The Eyelet Specialty Company, The Plume & Atwood Manufacturing Company, The Risdon Manufacturing Company and Scovill Manufacturing Company are and have been severally engaged, in addition to other things, in the manufacture and sale of lipstick and other cosmetic containers. These four respondents are sometimes hereinafter referred to collectively as respondent "container manufacturers."

Respondents Jack B. Nethercutt and Dorothy Nethercutt, trading under the firm name and style of Nethercutt Laboratories, are individuals engaged as a partnership in the business of producing cosmetics for sale and distribution, through and under the name of Merle Norman Cosmetics, Inc. The said respondents Jack B. Nethercutt and Dorothy Nethercutt, trading under the firm name of Nethercutt Laboratories, are affiliated with respondent Merle Norman Cosmetics, Inc.

Respondent Merle Norman Cosmetics, Inc., is now and has been engaged in the business of the sale and distribution of cosmetics, beauty aids and toilet preparations, referred to as cosmetic products.

Respondent Helena Rubinstein, Inc., is now and has been engaged in the business of the manufacture, sale and distribution of cosmetics, beauty aids and toilet preparations, referred to as cosmetic products.

Respondents Jack B. Nethercutt and Dorothy Nethercutt, trading as Nethercutt Laboratories, Merle Norman Cosmetics, Inc., and Helena Rubinstein, Inc., are sometimes hereinafter referred to collectively as respondent "licensees".

PAR. 3. Respondents Revlon, Merle Norman Cosmetics, Inc., and Helena Rubinstein, Inc., are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that they ship, or cause to be shipped, cosmetic products from their respective places of business to customers located in states other than the state of origin of shipment and there is now and has been a constant course and current of trade and commerce in such products throughout the United States.

Respondents Jack B. Nethercutt and Dorothy Nethercutt, trading under the firm name and style Nethercutt Laboratories, are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act in that they produce cosmetic products for sale and distribution through respondent Merle Norman Cosmetics, Inc., and such products are shipped from the state of origin to customers located in states other than the state of origin of shipment and there is now

and has been a constant course and current of trade and commerce in such products throughout the United States.

Respondents The Eyelet Specialty Company, The Plume & Atwood Manufacturing Company, The Risdon Manufacturing Company and Scovill Manufacturing Company are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in that they ship, or cause to be shipped, various products including lipstick containers from their respective places of business in the states where each is located to customers located in states other than the state of origin of shipment and there is now and has been a constant course and current of trade and commerce in such products throughout the United States.

PAR. 4. Respondents in the course and conduct of their said businesses are now, and have been in competition with other corporations, partnerships and individuals in the production, sale and distribution of lipstick containers and cosmetic products.

PAR. 5. In 1954 respondent Revlon acquired ownership of United States Letters Patent Numbers 2,565,346 and 2,609,092, sometimes called the Braselton patents and which purport to cover cosmetic applicators and cartridge-type lipstick containers.

Since in or about the latter part of 1955 or early 1956, respondent Revlon and the respondent container manufacturers have entered into a combination, conspiracy, understandings and agreements to restrain trade and eliminate competition in the production, sale and distribution of refillable lipstick containers or cases and the nonpatented cosmetic lipstick paste.

PAR. 6. Pursuant to the combination, conspiracy, understandings, and agreements referred to in Paragraph 5 hereof, respondent Revlon and the respondent container manufacturers have done, among others, the following acts or things:

(1) They have entered into agreements whereby each of the container manufacturers has been appointed an "agent-manufacturer" of respondent Revlon and is thereby authorized to manufacture refillable lipstick containers or cases and refills purportedly in accordance with the claims of the aforesaid Braselton patents held by respondent Revlon.

(2) They have discussed and negotiated among themselves and with others not parties hereto and have agreed upon the provisions of the written agreements and have made suggestions which have been adopted into such agreements, which were executed in 1956 as formal agreements by each of the respondent container manufacturers and respondent Revlon.

(3) They have agreed that the respondent container manufacturers would issue nonexclusive licenses to cosmetic manufacturers for the

sale of refillable lipstick containers or cases and refills, including the nonpatented cosmetic lipstick paste, purportedly under the claims of the licensed patents.

(4) They have agreed upon the prices at which cosmetic manufacturers would resell the refillable lipstick cases and refills, including the nonpatented cosmetic lipstick paste, such being applicable to sales to consumers as well as to retail dealers.

(5) They have agreed upon the terms of royalty to be paid by the cosmetic manufacturers as licensees to the container manufacturers for payment over to respondent Revlon, basing such payments upon the retail selling price of the refillable lipstick cases and the nonpatented cosmetic lipstick paste inserted therein.

(6) They have agreed upon the prices at which not only the refillable lipstick containers or cases and refills have been resold, but also, the prices at which the nonpatented cosmetic lipstick paste has been resold.

PAR. 7. In furtherance of the combination, conspiracy, understandings, and agreements referred to in Paragraph 5 herein, respondent licensees together with respondent Revlon and respondent container manufacturers have agreed and conspired to sell and distribute refillable lipstick containers or cases and refills, including the nonpatented cosmetic lipstick paste, and to pay or collect royalty thereon, and to resell such products at prices fixed and agreed upon and adhered to.

PAR. 8. Pursuant to the combination, conspiracy, understandings, and agreements referred to in Paragraph 7 hereof, said respondents have done, among others, the following acts or things:

(1) They have agreed to execute license agreements whereby the respondent container manufacturers would grant nonexclusive licenses to cosmetic manufacturers for the production of refillable lipstick containers or cases on order of said cosmetic manufacturers for completion by the addition of the nonpatented lipstick paste and sale by said manufacturers under the terms of the license agreement.

(2) They have agreed to the resale of such products, including the nonpatented cosmetic lipstick paste, at fixed minimum resale prices and have agreed upon and adhered to such prices and they have agreed that all including respondent Revlon would be bound to sell at the prices fixed and established.

(3) They have agreed that the payment of royalty should be based upon the retail selling price of the refillable lipstick containers or cases and refills plus the nonpatented cosmetic lipstick paste, with the cosmetic manufacturers paying royalty to the container manufacturers on behalf of respondent Revlon.

(4) Formal license agreements were executed in 1956 between two

of respondent container manufacturers, namely respondents Risdon and Scovill and respondent licensees, whereby the latter were purported to have been granted nonexclusive licenses to sell the refillable lipstick containers or cases and refills, including the nonpatented cosmetic lipstick paste, at minimum resale prices fixed and agreed upon and adhered to.

PAR. 9. Respondent Revlon as a cosmetic manufacturer and the licensee cosmetic manufacturers named as respondents herein, together with the container manufacturers also named as respondents herein, have all combined to enter into and carry out the conspiracy, understandings, and agreements as aforesaid to eliminate competition in the manufacture, sale and distribution of refillable lipstick containers or cases and refills, including the nonpatented cosmetic lipstick paste. By means of the agreements between and among the various respondents and also by means of the various patents heretofore referred to, said respondents have brought about and participated in a combination and conspiracy to fix minimum resale prices, and to enhance prices, and to otherwise restrain trade in the production, sale and distribution of refillable lipstick cases or containers and refills, including the nonpatented cosmetic lipstick paste.

PAR. 10. The acts and practices of said respondents, as herein alleged, have been to the prejudice of the public and to competitors of said respondents, have a dangerous tendency to hinder and prevent, and have actually hindered and prevented, competition in the sale in commerce of refillable lipstick containers or cases and refills, including the cosmetic lipstick paste, within the meaning of the Federal Trade Commission Act, and constitute unfair methods of competition in commerce, or unfair or deceptive acts or practices in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Lewis F. Depro for the Commission.

Mr. Philip Blumenthal, of New York, N.Y., and *Davies, Richberg, Tydings, Landa & Duff*, by *Mr. James T. Welch*, of Washington, D.C., for respondent Revlon, Inc.;

Gager & Henry, by *Mr. William W. Gager*, of Waterbury, Conn., for respondent The Eyelet Specialty Company;

Shepherd, Murtha & Merritt, by *Mr. Henry L. Shepherd*, of Hartford, Conn., for respondent The Plume & Atwood Manufacturing Company;

Chadbourne, Park, Whiteside & Wolff, by *Mr. Edward R. Neaher*, of New York, N.Y., for respondent The Risdon Manufacturing Company;

Initial Decision

62 F.T.C.

Mr. Heminway Merriman, of Waterbury, Conn., for respondents Scovill Manufacturing Company, Nethercutt Laboratories, and Merle Norman Cosmetics, Inc.; and

Sherman & Goldring, by *Mr. Rosalind Kramer* and *Mr. Albert M. Kaufman*, for respondent Helena Rubinstein, Inc.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER
FEBRUARY 28, 1962

This proceeding involves the charge that all of the respondents have violated the provisions of § 5 of the Federal Trade Commission Act by entering "into a combination, conspiracy, understandings and agreements to restrain trade and eliminate competition in the production, sale and distribution of certain patented refillable lipstick containers or cases, and the nonpatented cosmetic lipstick paste" used therein, by agreeing upon the retail prices at which such commodities were to be sold to consumers and to retail dealers, and also that respondents have participated in carrying out such conspiracy. Respondents all deny such charge; and some claim, in substance, that the individual agreements which furnished the alleged basis for the charge were substantially modified about May 1957, and were terminated about October 1957, long prior to the issuance of the complaint; that the agreements and practices complained of have been discontinued and abandoned; and that they will not be resumed.

In this initial decision it is determined that respondents did violate § 5 of the Federal Trade Commission Act by agreeing upon fixed and unanimous retail prices for cartridge-type lipstick containers and refills therefor. But it is found that they have discontinued and abandoned the practices complained of to such an extent, and under such conditions, that there is no reasonable likelihood that further such violation will occur, and the complaint is therefore dismissed without prejudice as to all respondents who still engage in the manufacture or sale of lipstick containers and refills therefor. The complaint is also necessarily dismissed as to those respondent corporations which either have been dissolved or have withdrawn entirely and permanently from such business.

The complaint herein was issued June 16, 1958, and after service upon each of the respondents on or after June 30, 1958, in due course they filed their several separate answers during September 1958. On December 18, 1958, respondent The Eyelet Specialty Company, hereinafter usually referred to as Eyelet, filed its motion to dismiss the complaint as to it upon the basis of its corporate dissolution. Shortly after the complaint was issued, counsel for all parties, after and pursuant to tentative agreement reached at an informal conference with

the hearing examiner, began negotiating a stipulation of facts and additional testimony, which document was at length finally executed on August 1, 1960. This document and all the exhibits attached thereto, designated "Appendix", were received in evidence as Commission's Exhibit 1 on September 7, 1960 (R. 10). Since another exhibit also bears identification as Exhibit 1, for clarity this document itself will be referred to herein as the stipulation.

Hearings had been deferred pending the negotiation and execution of such stipulation. Pursuant to a provision of said stipulation that counsel might adduce testimony or other evidence not covered thereby, counsel supporting the complaint presented additional evidence at hearings held in New York, N.Y., September 7 and 8, 1960, and in Washington, D.C., on September 9, 1960. He thereupon rested his case-in-chief. All respondents other than Eyelet then filed their respective motions to dismiss the complaint, with supporting briefs. Eyelet also supplemented its earlier motion to dismiss with a supporting brief. Counsel supporting the complaint filed his answer opposing all the motions to dismiss other than that of Eyelet, and filed his brief in support of such answer. Requested oral argument by all counsel except Eyelet's was delayed by reason of fully warranting circumstances, but was finally heard on September 5, 1961, whereupon respondents waived their privilege of presenting further evidence, as reserved in said stipulation, and the reception of evidence was thereupon closed. The stipulation provided, in effect, that the facts presented and the legal principles enunciated in the numerous decisions cited in the respective briefs of counsel might be considered as proposed findings and conclusions; hence no others were submitted. Therefore, upon careful consideration of the facts and the arguments and briefs of counsel, and thorough study of the cases cited, as well as other pertinent decisions, said briefs have been taken as formal proposals of the respective parties. All proposed findings and conclusions, presented in such briefs, which have been accepted are herein set forth, either verbatim or in substance; and all proposals not so incorporated herein are hereby rejected.

The evidence in this proceeding consists of the said "Appendix", more specifically entitled "Stipulation As To The Facts" and "Stipulation As To Additional Testimony", together with the attached photostatic copies and other documents described and referred to as exhibits therein, a subsequent stipulation on the record (R. 8-10), referring to further documents and physical exhibits, and the testimony of eight witnesses, together with the exhibits received in evidence during the taking of their testimony. While not formally offered and received in evidence, the affidavit of Philip Blumenthal, secretary

and counsel for respondent Revlon, attached to said respondent's motion to dismiss complaint, the counter-affidavit of the Commission's Attorney-Examiner, Ernest G. Barnes, filed with the brief of counsel supporting the complaint, and the several affidavits and statements on behalf of other parties, relating to abandonment, are also all considered, with other relevant evidence, in accordance with the Commission's administrative practice relating to any issue of abandonment. There is no dispute as to the basic facts, but only as to the inferences drawn therefrom, and the ultimate conclusions to be reached.

In finding the facts in this proceeding upon the whole record, as required by law, the hearing examiner has given full, careful and impartial consideration to all the reliable, probative and substantial evidence and to all the fair and reasonable inferences to be drawn therefrom. From such consideration of the whole record, and from his personal observation of the conduct and demeanor of the witnesses, the hearing examiner makes the following:

FINDINGS OF FACT

Respondent Revlon, Inc., hereinafter referred to as Revlon, is a corporation organized in 1955, and still existing, under the laws of the State of Delaware, with its principal office and place of business now located at 666 Fifth Avenue, New York 22, New York. It is, and at all times material hereto has been, engaged in the business of manufacturing and selling cosmetics and cosmetic products. Upon its incorporation, it succeeded to such business, which had theretofore been carried on by its predecessor, Revlon Products Corporation, which had been organized under the laws of the State of New York.

Respondent The Eyelet Specialty Company, herein referred to as Eyelet, at the time the complaint was issued and long prior thereto, was a corporation organized and existing under the laws of the State of Connecticut, with its principal office and place of business located at 50 State Street, Waterbury, Connecticut. On December 11, 1957, however, its stockholders had instituted appropriate legal action to liquidate the corporation, which program was finally completed and the corporation dissolved on November 22, 1958. Eyelet, for over 20 years, had been engaged, among other things, in the manufacture and sale of containers for lipsticks and other cosmetics. Upon its liquidation all of its operations ceased, and will not be resumed in any manner. Its motion for dismissal of the complaint as to it is therefore hereinafter granted, and counsel supporting the complaint and all counsel representing other respondents herein have clearly stated upon the record that they have no objection to such dismissal as to respondent Eyelet. In the subsequent recitation of the facts out of which

this proceeding arose, however, the actions of respondent Eyelet relating to such facts are stated for clarity and completeness.

Respondent The Plume & Atwood Manufacturing Company, hereinafter referred to as Plume & Atwood, is, and at all times material hereto was, a corporation organized and existing under the laws of the State of Connecticut, with its principal office and place of business located at Thomaston, Connecticut. For some years prior to 1956 this respondent was engaged, among other things, in the manufacture and sale of containers for lipsticks and other cosmetics. On May 25, 1959, it sold its Fabricating Division to another corporation, Landers, Frary & Clark, a Connecticut corporation located in New Britain, in that State, covenanting against ever resuming such business, which included its manufacture and sale of cosmetic containers. Its motion for dismissal of the complaint, while opposed by counsel supporting the complaint, is also granted.

Respondent The Risdon Manufacturing Company, hereinafter referred to as Risdon, is now and at all times material hereto has been a corporation organized and existing under the laws of the State of Connecticut, with its principal office and place of business located at Naugatuck, Connecticut. This respondent is now, and has been for more than 25 years, engaged, among other things, in the manufacture and sale of containers for lipsticks and other cosmetics.

Respondent Scovill Manufacturing Company, hereinafter referred to as Scovill, is now and at all times material hereto has been a corporation organized and existing under the laws of the State of Connecticut, with its principal office and place of business located at 99 Mill Street, Waterbury, Connecticut. This respondent is now, and for over 40 years has been, engaged, among other things, in the manufacture and sale of containers for lipsticks and other cosmetics.

Respondents Jack B. Nethercutt and Dorothy Nethercutt, hereinafter referred to as Nethercutt, are now, and at all times material hereto have been, individuals trading as copartners under the firm name and style of Nethercutt Laboratories, with their principal office and place of business located at 9130 Bellanca Avenue, Los Angeles 45, California. These respondents, at all times material hereto, were and still are engaged in the business of manufacturing and selling cosmetics and cosmetic products. Respondent Merle Norman Cosmetics, Inc., hereinafter referred to as Norman, was at all times material hereto, and still is, a corporation organized, existing and doing business under and by virtue of the laws of the State of Nevada, with its principal office and place of business also located at 9130 Bellanca Avenue, Los Angeles 45, California. Until November 8, 1957, respondent Jack Nethercutt was a director of Norman, and is related to

Merle Norman, one of the principals of respondent Norman. But neither of the respondent partners Nethercutt, who are husband and wife, is affiliated presently with respondent Norman through stock ownership or membership on Norman's board of directors, although located in the same building as respondent Norman. Respondents Nethercutt purchase lipstick containers from container manufacturers, fill them with lipstick paste, and then sell such filled containers to respondent Norman, which was at all times material hereto, and still is, a distributor of such completed lipsticks to various retailers. Since the only connection of these two respondents with this case has been through the joint license granted to them by Scovill, they will now usually be referred to as Nethercutt and Norman.

Respondent Helena Rubinstein, Inc., hereinafter referred to as Rubinstein, was at all times material hereto, and still is, a corporation organized and existing under the laws of the State of New York, with its principal office and place of business located at 655 Fifth Avenue, New York 22, New York. This respondent was at all times material hereto, and still is, engaged in the business of manufacturing and selling cosmetics and cosmetic products. It does not manufacture lipstick containers, but buys them from container manufacturers, fills them with lipstick paste, and sells them on the market. This respondent's original connection with the issues involved in this proceeding was by and through the activities of its subsidiary, H. R. Laboratories, Inc., a corporation which is not a respondent herein.

In the course and conduct of their respective businesses, all respondents have, at various times material hereto, been in competition in interstate commerce with other corporations, partnerships and individuals, and in some instances with each other. The products here involved have been likewise sold in interstate commerce at times material hereto, and the transactions whereon this proceeding is based occurred in interstate commerce. All respondents, with the exception of Eyelet, are now engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act. But also, as elsewhere herein more specifically pointed out, Plume & Atwood, since May 29, 1959, has no longer manufactured or engaged in commerce with respect to the products here involved.

In addition to the named respondents, another corporation not made a respondent herein also took an active part in some of the transactions involved herein: Bridgeport Metal Goods Manufacturing Company, hereinafter referred to as Bridgeport, of Bridgeport, Connecticut. This concern was also engaged, among other things, in the manufacture and sale of containers and refill cartridges for lipsticks and other cosmetics. This company and the respondents Eyelet, Plume &

Atwood, Risdon and Scovill comprised the major producers of such products in the United States during 1956 and prior thereto, although vague reference is briefly made to several small companies then so engaged. The connection of Bridgeport with such transactions is stated more in detail hereinafter. None of these five major producers manufactured or sold lipstick paste.

The record is replete with statements and documents which pertain either to a number of preliminary acts which preceded the execution of the several contracts in 1956 which furnish the basis for this proceeding, or to the subsequent performance of such contracts or other activities of the participants allegedly done pursuant to such contracts. For the purpose of determining the issue of the alleged violation of § 5 of the Federal Trade Commission Act, however, some of these prior and subsequent activities, while relevant, are not material. Some of such activities, however, are both relevant and material to the question of abandonment, and are therefore hereinafter discussed in connection therewith.

In 1954 Revlon acquired ownership of United States Letters Patent No. 2,565,346, issued August 21, 1951, and No. 2,609,092, issued September 2, 1952, from the inventor of the devices so patented, one C. H. Braselton. For brevity these patents have been referred to in the record, and are now referred to herein, as the Braselton patents. They are shown in the record as Exhibits 1 and 2 of the appendix to the stipulation. The various documents attached to and referred to in the stipulation of August 1, 1960, are referred to herein simply as exhibits by their respective numbers, for brevity and to distinguish them from the duplicitous numbering of Commission's Exhibits 2 to 7, inclusive, and 35-A through -D, which were received at the hearings.

These Braselton patents, in substance, relate to cartridge-type lipstick containers having a particular combination of structural elements whereby the refill or cartridge container of lipstick paste, when placed in such device, rests upon a base which turns on a swivel. This swivel can raise or lower the container of the paste and its contents by the user turning the outside base of the case. As stated in the patents, this new type of retractable lipstick container has a number of advantages over the conventional type of such containers, therefore used, including avoidance of soiling the case or the fingers of the user or objects which might otherwise come into contact with the lipstick paste; improved appearance of the case or container; and the convenience and versatility of its use by reason of the replaceable cartridge which contains the lipstick paste or other cosmetic material. The patents themselves, and the advantages of using the device, are not in question in this proceeding, and the record amply attests the

very substantial popularity of the device and its immediate and growing success in the market since its introduction to the public. The refill cartridges, when sold to the public, include the lipstick paste, which is made and inserted by the cosmetic manufacturers and not by the container manufacturers. Such refill cartridges, containing paste, can be, and often are, sold and used as complete lipsticks, without the external containers or cases.

In 1955, following its acquisition of said patents, Revlon began to have made for itself the cartridge-type lipstick containers and refills therefor under said patents. Since about 1956 it has gradually tended to confine its lipstick business to the cartridge-type lipstick containers and refills therefor, under the trade name of "Futurama." Apparently more fully realizing the economic value of the patents it had acquired, Revlon also began, late in 1955, to meet separately and individually, but never together, with the five above-named major manufacturers of lipstick containers. Their various discussions concerned the issuing of licenses under the Braselton patents, and the licensing of cosmetic manufacturers by such container manufacturers acting as Revlon's agents; the method of calculating royalties payable to Revlon thereunder; and the marketing of the cartridge-type lipsticks. Revlon met separately with Scovill at various times late in 1955, and also met separately at other times in 1955, and during the first 7 months of 1956, with Eyelet, Plume & Atwood, Risdon, and Bridgeport.

Following and as a result of the said several meetings, separate nonexclusive license agreements under the Braselton patents were entered into during the forepart of 1956 between Revlon and each of these five major container manufacturers. Revlon contracted with Risdon for the manufacture of Revlon's own cartridge-type lipstick containers. And Revlon also authorized Risdon to manufacture such products for the cosmetic manufacturers, which was done by a non-exclusive agreement finally executed on February 15, 1956. The text of this agreement, Exhibit 13, except for the manufacturer's name and the date, is identical with that of the other 1956 nonexclusive agreements made, respectively, with the remaining four major container manufacturers. The agreements with Risdon and Scovill were amended by riders as to the arbitration clause to meet certain objections thereto by Scovill, but this amendment was typed into the body of the other agreements, which were apparently prepared by Revlon at a later date than those of Risdon and Scovill (see Exhibits 12 to 16, inclusive). By these five separate nonexclusive agreements, each of the container manufacturers was authorized to issue nonexclusive licenses to any of Revlon's competitors in the cosmetic-manufacturing business, for their respective use and sale of said patented device,

with certain restrictions. Revlon particularly reserved to itself, as was its legal right, certain specific sizes and types of the containers, to protect its individuality in the sale of its own products, and to prevent the interchange of such sizes and types by any of its competitors. Revlon also required that the containers be of high quality, for the stated purpose of preserving the value of the licensed patents. The agreements with Bridgeport and Scovill were finally executed on February 24, 1956; the agreement with Eyelet on March 5, 1956; and that with Plume & Atwood on July 18, 1956. Each of the five manufacturers knew that the others had the same type of agreement with Revlon, and none of them expressed any interest in anything in the proposed agreements before their execution, except matters relating either to the validity of the patents, to how royalties might be computed, or to the arbitration clause.

After some futile negotiations with Bridgeport for a license to use and sell the lipstick containers and refills under the Braselton patents, respondent Rubinstein, through its subsidiary, H. R. Laboratories, Inc., finally received such a nonexclusive license from Risdon on December 27, 1956. This agreement is Exhibit 34, which was confirmed and interpreted by letter, Exhibit 35. Scovill already had issued a nonexclusive license, Exhibit 33, to Nethercutt and Norman, jointly, on June 22, 1956. No other licenses under said patents were issued to any other cosmetic manufacturers by Risdon, Scovill or any of the other three container manufacturers under their said respective agreements with Revlon executed in 1956. And there is no evidence that Revlon ever met with Rubinstein, Nethercutt and Norman, or any of Revlon's competitors in the business of manufacturing cosmetics.

The conspiracy issue in this case involves primarily minimum retail price provisions of the 1956 agreements between Revlon and the five container manufacturers, and the 1956 licenses granted by the two container manufacturers, Risdon and Scovill, respectively, to Rubinstein and to Nethercutt and Norman. All such agreements and licenses expressly provide for the minimum prices (less each licensee's normal discounts to its customers) whereat the lipstick cases and cartridge refills therefor were to be resold to the public. The royalties to Revlon fixed in the agreements with the five container manufacturers, who were designated as "agents" of the principal, Revlon, were based (in paragraph 1 of each of said agreements) upon scales of various retail prices of the cases with the refill containers. Paragraph 3 of each of the agreements set forth specifically certain minimum-price-fixing provisions, as follows:

In order that the value of the licensed patents shall not be destroyed or depreciated by low grade articles made thereunder and to give commensurate protection to both Principal and Licensees, the licensed articles are required to be

Initial Decision

62 F.T.C.

of high quality. Accordingly, to assure the foregoing, the minimum prices of the licensed articles sold by each Licensee to its customers, less however Licensee's normal discount to such customers, shall be as follows:

Lipstick case with refill.....	\$1. 75
Lipstick case without refill.....	\$1. 25
Refill.....	\$.90

Provided, however, that with respect to the hour-glass shaped case, which involves special skills and increased manufacturing costs, the foregoing minimum prices shall be as follows:

Lipstick case with refill.....	\$3. 00
Lipstick case without refill.....	\$2. 50.

In the license issued June 22, 1956, by Scovill to Nethercutt and Norman jointly, and also in the license issued by Risdon on December 27, 1956, to Rubinstein, Paragraph 1 is materially but a copy of Paragraph 3 of the agreements between Revlon and each of the five container manufacturers hereinabove quoted verbatim. In each of these two licenses Scovill and Risdon, respectively, were referred to as "Agent-Manufacturer", and Nethercutt and Norman, and Rubinstein, respectively, were referred to as "Licensee". Revlon was an unnamed principal in each of said licenses, being referred to therein merely as the "Principal". It is clear from the record and from inferences fairly drawn therefrom, however, that Nethercutt and Norman, and Rubinstein, knew that their competitor Revlon was the owner of the Braselton patents, specifically identified by their official patent numbers in each of the said licenses, and was the "Principal" referred to in its license. All respondents knew with whom they were dealing in the several separate transactions leading up to the execution of said agreements and licenses. All the container manufacturers definitely knew that each of their four major competitors was also getting a nonexclusive agreement with Revlon. Nethercutt and Norman, and Rubinstein, it must be inferred, were experienced concerns in the cosmetic field in dealing with various manufacturers of containers for their products; and as such, must have known what container manufacturers, other than their own suppliers, also had agreements with Revlon.

There is no substantial dispute upon the law governing this conspiracy phase of the case. All respondents have failed even to discuss the law of conspiracy in its application to the facts, and Revlon, speaking for all respondents by reason of their express or substantial adoption of Revlon's presentation of the case, frankly states, "[We] decline to argue the legality or illegality of the inclusion of such provision [fixing minimum retail prices] in the agreements. The question is moot. * * *". The basic factual contention of respondents made directly on this phase of the case is the claim that they never met or cor-

responded all together as a group, but each dealt only with the other party to its own specific agreement or license.

Revlon's counsel and secretary, Blumenthal, originally contended, on May 22, 1957, in a conference with Barnes, the Commission's attorney-examiner, in Revlon's office, that it had been his opinion, based on an examination of the decision in the *General Electric* case [*U.S. v. General Electric Co.* (1926), 272 U.S. 476], that Revlon had a right to control the minimum resale price of the patented products in question, in order to assure that the lipstick containers would be of high quality. He also told Barnes that Revlon's officials, as a matter of business judgment, had also been considering the advisability of eliminating all provisions of that character from its said license agreements with the container manufacturers, and also from the said licenses issued by such manufacturers to their customers, the cosmetic manufacturers. Blumenthal and Barnes only disagree upon whether Revlon's officials had already decided to eliminate the price-fixing provisions. The contention that the price-fixing provisions are legal is not presented by respondents in their briefs and arguments, doubtless because further study of the *General Electric* decision itself, and many later decisions such as *U.S. v. Univis Lens Co., Inc.* (1942), 316 U.S. 241, 247-252, and *U.S. v. Masonite Corporation, et al.* (1942), 316 U.S. 265, 274-283, has convinced all respondents' counsel herein that since Revlon dealt directly with independent manufacturers and indirectly through them with Revlon's competitors in the cosmetic field by licensing the use of the patented products by others, with certain reservations, Revlon could not legally extend its patent rights by further controlling the prices at which its patented lipstick containers were sold or were to be sold to the consuming public by Revlon's competitors.

Counsel supporting the complaint has correctly cited and quoted from many controlling judicial decisions which establish beyond any question that minimum-price-fixing agreements such as those involved here are contrary to both the Sherman Act and the Federal Trade Commission Act, and are illegal *per se*; and that simultaneous joint action or express agreement on the part of all those charged as conspirators is not essential to establish a conspiracy if each of those so charged enters separately into a price-fixing arrangement, even without direct dealings with all of the others and at different times, which arrangement, if carried out, is sufficient to restrain commerce. It serves no useful purpose to analyze herein any of the multitudinous cases supporting these undisputed basic legal principles applicable to this phase of the case.

In the present proceeding we have definite written agreements

and licenses thereunder which expressly fix minimum retail prices, tying all other respondents in with Revlon as the principal. Such express written agreements are rare indeed, and no better *per se* case could be established. It is deemed unnecessary to discuss further the other pre-agreement or post-agreement facts to determine that all respondents, by reason of the agreements and licenses alone, have violated § 5 of the Federal Trade Commission Act, as charged in the complaint.

The issue of abandonment of the practices complained of is now considered. This issue has been thoroughly covered in brief and argument by counsel for all the parties. It serves no useful purpose to analyze herein the decisions in numerous abandonment cases, *pro* and *con*, cited, quoted from and fully discussed by counsel, as the basic governing principles of law on the subject are clear, and each case, of course, must be decided upon its own particular merits. The controlling principles to be deduced from the many leading cases may be briefly stated:

The propriety of issuing a complaint or an order in any proceeding depends upon the existence of a specific and substantial public interest. *FTC v. Klesner* (1929), 280 U.S. 19, 28-30 [1 S. & D. 1166]; *FTC v. Raladam Co.* (1931), 283 U.S. 643, 648-649 [2 S. & D. 116]; *FTC v. Royal Milling Co., et al.* (1933), 288 U.S. 212, 216 [2 S. & D. 217]; and *FTC v. National Lead Co.* (1957), 352 U.S. 419, 428 [6 S. & D. 198]. While the Commission exercises broad discretion in the issuance of complaints, whenever in the course of the proceeding the facts show that the proceeding is not in the public interest, the complaint should be dismissed. *FTC v. Klesner, supra*, 283 U.S. at pages 28-30. Several fairly recent orders of the Commission clearly and succinctly state the general rules under which any issue of abandonment shall be determined, and cite many of the leading decisions supporting them. See, for example, *Ward Baking Co.*, Docket 6833 (1958), 54 FTC 1919, and *Sheffield Merchandise, Inc., et al.*, Docket 6627 (1958), 55 FTC 2027. The Commission's broad discretion must be a sound, reasoned discretion, based upon the facts and circumstances of record. The proceeding does not become moot merely by reason of the discontinuance of a practice found by the Commission to constitute a violation of law. When discontinuance by respondents only reluctantly follows action by the Commission, dismissal is rarely warranted. Dismissal on the ground of abandonment should not be granted unless there is a clear showing that, in the interest of the public, unusual circumstances require it. But when the practice has been voluntarily and surely stopped by the offender, so that the purpose of the proceeding has already been accomplished, no cease-and-desist order should issue;

and dismissal should certainly be granted when the practice has been long abandoned, and the circumstances which gave rise to such practice have so changed as to render a resumption thereof highly unlikely.

In the proceeding at bar there has been such a clear showing of unusual circumstances culminating in absolute and early abandonment of the price-fixing provisions in the 1956 agreements and licenses, which generated and were the gist of the Commission's complaint, and which provisions have hereinabove been found to have constituted, *per se*, a price-fixing conspiracy violative of § 5 of the Federal Trade Commission Act. The attitude of respondents, and whether the practice has been actually stopped and, in all reasonable likelihood, will not be renewed by respondents, are the necessary considerations here.

It is conceded by all parties that Revlon is the central and controlling figure, by reason of whose activities this case originated. It owned the Braselton patents upon which the agreements and licenses in question were based. Had Revlon not desired to profit, in addition to its own sales, from its ownership of said patents by making the new type of lipstick container and refill covered thereby available to others in the field of cosmetic manufacture and sale, it could well have kept those devices entirely to itself, and sold them to the consumer solely through its own distributors during the life of the Braselton patents. Its business motive of increasing its profits by so offering the patented devices for use by its competitors was perfectly legal, except for its incorporation into its dealings of the far-reaching and unlawful price-fixing clauses in the said several 1956 agreements and licenses.

It is contended in substance by counsel supporting the complaint that Revlon, and the other respondents as well, did not show good faith, and lacked any intent to abide by the law in the negotiation of such agreements and licenses and in related conduct, which facts negate any good faith on their part now. Certainly, as far as Revlon is concerned, any contention that its officials ever believed the inclusion of the price-fixing provisions in its said contracts was legal, under any rational interpretation of the decision in *U.S. v. General Electric Co.*, *supra*, is untenable. And all of the negotiations prior to the execution of the respective agreements with the container manufacturers, insofar as recorded, disclose that no question as to the legality of such price-fixing provisions was ever raised, either verbally or in writing, by any of the manufacturers or by their licensees. Various revision of the original agreements resulted from a number of suggested changes proposed by Scovill, before the final draft of the agreement was approved after some 3 months of bargaining. Scovill wanted an exclusive agreement, which Revlon would not grant. But Scovill's only

references to prices were that the prices at which the products were to sell at retail should be known in advance, and that royalties should be included in the sales prices, a suggestion not finally adopted. Apparently the other four container manufacturers raised no material objections to the proposed agreements, but simply signed them. It is found that none of such container manufacturers were at all concerned with the legality or illegality of the price-fixing provisions. As for the respondents Rubinstein and Nethercutt and Norman, neither of them objected to such price-fixing provisions prior to the execution of their respective licenses.

But the 1956 agreements and licenses did not prove to be successful. During the remainder of the year of 1956, following the execution of the said several agreements and licenses, and during early 1957, the business thereby obtained was far from monumental, and apparently was a cause of great dissatisfaction and disappointment to all concerned. Scovill had procured no such business at all except a negligible amount from the comparatively small business of respondents Nethercutt and Norman, its sole licensees under the joint license it had issued to them on June 22, 1956. This amounted to a total volume of only slightly over \$30,000 in the 11-month period from August 1, 1956, to June 30, 1957. This gave Revlon a total, from such licenses, of only \$1,724.07 in royalties. Nethercutt and Norman's total sales of the cartridge-type lipstick containers and refills in 1956 were only about \$60,000, and were slipping. They only amounted to \$47,000 in 1957 and \$38,000 in 1958, while apparently these licensees not only maintained but substantially increased their business volume in the older, nonpatented type of lipstick containers. Scovill noted in its incipency this decline in business and its own inability to interest other cosmetic manufacturers in taking such licenses, and therefore, after some correspondence setting forth complaints with respect to Revlon's selling prices (Exhibits 20-21), Scovill conferred with Revlon's executives on October 2, 1956. It is to be observed that at this time Rubinstein had not yet received its license from Risdon, and no licenses at all had been issued during this period by any of the other three container manufacturers, despite their efforts to obtain licenses.

At this interesting meeting on October 2, 1956, held in Revlon's office in New York between representatives of Revlon and of Scovill, it was urged by Scovill that the negotiation of new agreements was essential, since Scovill was unable to interest cosmetic houses in licenses authorizing them to market the Revlon patented cartridge-type lipstick containers and refills therefor, because, among other things, of the minimum retail resale price provisions of such agreements. This condition of things, as stipulated by the parties, was

confirmed by the testimony of the witness William H. Harris, called by counsel supporting the complaint at the hearing held in New York on September 7, 1960. Harris was Scovill's product manager of its cosmetic container division, and one of Scovill's two representatives at the October 2, 1956, meeting with Revlon. He also had carried on the subsequent correspondence with Revlon (Exhibits 22 and 25), in which Scovill continued to object to several matters relating to said agreement, among them the difficulty of negotiating with prospective customers because, despite its agreement to be bound with the others by the price-fixing clause, Revlon, on short notice, could act unilaterally to reduce its own minimum prices, leaving inadequate time to Scovill and its licensees and prospective licensees for any readjustment of their costs and prices, particularly the time and expense involved in retooling. On October 5, 1956, after the said conference, Harris, by letter to Revlon, again strongly pressed for the execution of new agreements, proposing to delete therefrom any type of control over retail prices, as well as other matters (Exhibit 22).

On November 15, 1956, Blumenthal reported to Revlon that both Scovill and Bridgeport had claimed they could have gotten business, except for the price restrictions in the contract and Revlon's own change of prices, and urged, among other things, "the elimination of the minimum retail prices" (Revlon interoffice memo, Exhibit 23). Harris of Scovill credibly testified, in response to inquiry from counsel supporting the complaint at the said hearing of September 7, 1960, regarding this correspondence (R. 62-63) :

Well, I think this correspondence pretty well explains what the situation was. If you want me to summarize it, it amounted to this: when we negotiated with any potential customer, there is a relationship between what they can afford to pay for a cosmetic container, a lipstick container, and what they can retail it for ultimately. In other words, they have to accumulate their costs and that determines what they can sell it at. Now, with an agreement which said that such and such type containers were to be sold not below certain minimum retail prices, they might negotiate with us for a particular type of container which would cost "X" number of cents each. If in the meantime Revlon, who were the licensing company, the owners of the patent, decided, without saying anything, as they did, that instead of having a certain minimum they were going to come out with one at less than that price, at retail, it meant that our customers might be three-quarters of the way through a program involving a case that we were going to sell them at such and such a price, suddenly to find that the Revlon Company was on the market with one at a price lower than they could then afford to sell the one they had expected to sell at a higher price. That was an insurmountable objection, one of the insurmountable objections on getting anybody to buy lipstick containers from us when that first license agreement existed.

This witness remarked that Revlon had actually reduced its own minimum retail prices without notice. This was one of the reasons

Initial Decision

62 F.T.C.

Rubinstein's subsidiary, H. R. Laboratories, Inc., had held up signing a license (Letter, Exhibit 28, dated May 2, 1956). Bridgeport also, in May, 1956, had questioned such action of Revlon, as hereinafter more fully stated.

Since about February 1957, Scovill had been promoting its own cartridge-type lipstick container and refill therefor, on which it had applied for a patent. On April 8, 1957, Scovill ran one advertisement simultaneously in several drug and cosmetic trade journals, stating that it was prepared to furnish such containers and refills on a royalty-free basis. It shortly thereafter booked orders for such items, under its pending patent application, from five substantial cosmetic manufacturers who were competitors of Revlon.

Bridgeport, in May 1956, had written Revlon that some of its customers had questioned the minimum-price provisions in the licenses offered them, on the ground that Revlon itself might not be bound thereby (Exhibit 26). Since Revlon had theretofore reduced its own prices on the products without notice, even Revlon's responsive letter (Exhibit 27) assuring Bridgeport that it was bound by such price provisions the same as were all the other parties to the agreements and licenses, quite evidently did not assuage the fears of any of Bridgeport's prospective-licensee customers, so none of them accepted the tendered licenses. Rubenstein was included in this group. It had broken off negotiations with Bridgeport after Bridgeport, in happy contemplation of a still-unexecuted license, had begun to tool up for its performance. Bridgeport, after trying vainly for nearly a year to get licensees in accordance with its agreement with Revlon, finally cancelled such agreement on February 6, 1957, effective as of April 8, 1957, stating in part (Exhibit 30) :

In view of supervening events and the fact that no third parties have requested and/or accepted a license for us as your agent, we have determined to cancel the aforesaid agreement.

And the president of Bridgeport, Herman K. Beach, testifying on September 8, 1960, as a Commission's witness, Bridgeport not being involved as a respondent in this proceeding, explained the reasons for the cancellation of this agreement as follows (R. 118-119) :

For two reasons. One, we had never come to an agreement on whether we were free to make lipsticks for a customer who did not want to take a license agreement, as I explained earlier, provided they would indemnify us for it. We disagreed with Revlon on just what that clause meant. The second reason was that we had no customers at that time and we had no prospect of getting any and we thought, as long as the thing was in the air a little bit, we would be better off without it. Another possibility that did enter our minds if we came up with an invention related to it that we might be able to use was that we would be freer to use it if we didn't have the agreement.

Revlon's general situation in late May 1957, was then as follows: It had had five original licensee manufacturers, but one, Bridgeport, had cancelled its agreement. Only two of the remaining four had been able to license any cosmetic manufacturers. Scovill had issued just one joint license to Nethercutt and Norman, and Risdon, Revlon's own manufacturer, had issued only one license, that to Rubinstein. Nethercutt and Norman were "relatively small" concerns (Exhibit 23), and their business with Scovill, never large, was steadily dwindling toward the vanishing point. There is no indication in the record of the amount, if any, of Nethercutt's and Norman's business in cartridge-type lipstick containers after 1958. Such business, in 1958, was \$38,000, or about 15% of their total 1958 lipstick-container sales, which, however, showed a substantial gain over prior years. The resulting royalty to Revlon from Nethercutt's and Norman's sales was only \$1,724.07, as before stated, for the 11 months from August 1, 1956, through June 30, 1957, and evidently too small thereafter to warrant stipulating it herein. Rubinstein had not yet sold any containers or refills under its license, although it had purchased \$76,714.41 worth of such articles in March and April 1957, on which the royalties due Revlon from Risdon for those 2 months amounted to, at most, \$4,718.72, and with all of the May 1957, royalties added, only totaled \$10,827.12 (Exhibit 38 and 39). It is inferred that all royalties had been promptly paid by Scovill and Risdon. Revlon, by May 22, 1957, had received a total not exceeding, and probably somewhat less than \$10,827.12 in royalties from sales by Nethercutt and Norman and by Rubinstein, as a result of the 1956 contracts containing the objectionable price-fixing provisions. While Revlon's manufacturers were not permitted to advise Revlon what cosmetic manufacturers had been licensed, Revlon knew of Scovill's license to Nethercutt and Norman, and it would be naive to believe that Revlon did not know by May 1957, from the small amount of its royalties and its knowledge of the trade, just how few licenses had been issued to its competitors in the cosmetic field, and who such licensees were: namely, Nethercutt and Norman, and Rubinstein.

Since October 4, 1956, Revlon's officials, of course, had had before them the report of Scovill's and Bridgeport's several objections to the price-fixing provisions of the agreements and licenses. By May 1957, one of these two objectors, Bridgeport, had already cancelled its license in February 1957, no doubt due to Revlon's unwarranted delays in providing it with an acceptable and workable agreement. And now, of the other four manufacturers, only two were producing, and one of them, Scovill, was suddenly becoming Revlon's threatening competitor with its new lipstick cartridge-type container device, and

getting valuable business therewith from numerous cosmetic companies.

Even the slumber of the slothful must sometime end in awakening, and Revlon's management was most certainly aware, by May 1957, that it faced, not a theory of possible increased profits, but an actual condition requiring prompt and effective action by Revlon to salvage any of its anticipated royalty business from licenses issued under its Braselton patents. But before it had actually moved, however, the Commission's Attorney Examiner, Barnes, came to its offices on May 22, 1957. He informed Revlon's attorney, Blumenthal, that the Commission was making an investigation to determine if Revlon's said 1956 agreements licensing the products to be made and sold under the Braselton patents were violative of the Federal Trade Commission Act as agreements to fix minimum resale prices. While there is disagreement between Barnes and Blumenthal as to whether Blumenthal told Barnes that Revlon's officials had already decided to delete the price-fixing provisions from its agreements, or whether he merely left the impression with Barnes that they were only considering taking such action, it is clear that Barnes' visit emphatically jarred Revlon, and sparked the action taken by it the following day, May 23, 1957. The close timing of Barnes' visit and Revlon's action may or may not have been a mere coincidence, since Scovill's representatives conferred with Revlon's patent counsel early the next day, but that is immaterial. Action was promptly taken by Revlon, and its nature and the results thereof, long before the complaint herein was issued, and more than 13 months before it was served on respondents, are clear in the record.

At any rate, on May 23, 1957, after Revlon's patent counsel announced that pursuant to a conference and agreement with Scovill earlier that date, Revlon would cancel immediately the price-fixing provisions in the agreements with all of the container manufacturers, Blumenthal wrote, on that day, to each of Revlon's four remaining container-manufacturer agents, Eyelet, Risdon, Plume & Atwood, and Scovill, advising them that paragraph 3 of the agreements between them and Revlon (hereinbefore quoted) was amended by striking out everything contained therein following the first sentence; that is, all matter referring to the minimum resale prices. These letters requested confirmation (Exhibit 45), which Risdon promptly gave on June 8, 1957 (Exhibit 46), and the same day, in turn, deleted the provisions from Rubinstein's license.

Scovill and others, during this period, were settling several independent patent controversies with Revlon, which involved alleged infringements of the Braselton patents.

There were several other patent controversies, involving Revlon, with one Gruska, an inventor of a foreign patent, and Revlon with

Coty, Inc., another cosmetic manufacturer, which had acquired Gruska's foreign patent for refillable lipstick containers, which it proposed Scovill should manufacture for it. Gruska and Revlon, in August 1955, agreed not to challenge each other's patents, and in March 1957, Coty, Inc., and Revlon dismissed actions against each other and agreed that Revlon might use Coty's Gruska foreign patent, and that Coty could handle products made under the Braselton patents without paying royalties to Revlon. These transactions have no relevancy whatsoever to any other respondent than Revlon.

Scovill's controversy with Revlon involved a competing invention developed by Scovill about February 1957, on which Scovill filed application for a patent on February 27, 1957. It finally obtained U.S. Letters Patent No. 2,872,034 on February 3, 1959. Scovill, however, had finally settled its patent infringement dispute with Revlon during 1957 by agreeing to pay Revlon royalties on all products manufactured under the application then pending for a patent for Scovill's device. No respondent other than Revlon and Scovill had any part in this controversy and its settlement. The pendency of the controversy between Revlon and Scovill caused some months' delay in the preparation and execution of new formal agreements between Revlon and the said four remaining container manufacturers. But the activities of all respondents after the said letters from Revlon dated May 23, 1957, with reference to matters material herein took place under the amended agreements and licenses from about May 23, 1957, to October 24, 1957. Scovill did not notify its joint licensees, Nethercutt and Norman, of Revlon's May 23, 1957, excision of the price-fixing provisions, as they then had no outstanding unfilled orders with Scovill. There is no evidence that Nethercutt and Norman ever bought any cartridge-type containers or refills after May 21, 1957, and their 1957 purchases thereof only totaled \$1,226.75, with resulting royalty to Revlon of but \$100.74 (Exhibit 38). Neither Eyelet nor Plume & Atwood had ever acquired any licensees to notify.

Finally, on October 24, 1957, Revlon formally cancelled its earlier license agreements with Scovill, Risdon, Eyelet and Plume & Atwood, as amended on May 23, 1957, by said excision, and issued to them new nonexclusive license agreements, all identical except for the manufacturer's name and the date of execution. Exhibit 49, Scovill's new agreement, exemplifies the precise form used by Revlon with all four of its manufacturers. Under these new agreements the container manufacturer does not license its cosmetic manufacturers or distributors, but merely sells them on order. Hence Risdon cancelled its amended license to Rubinstein on October 26, 1957, effective as of

October 1, 1957, and Scovill's joint license to Nethercutt and Norman was cancelled at about the same time.

At this point Revlon's new type of agreement, made on and after October 24, 1957, with the various container manufacturers, did not, and does not now provide for the granting of licenses to the cosmetic manufacturers or distributors, to whom they sell on order only. These new license agreements provide for a royalty to Revlon to be paid by the container manufacturers, based upon the ultimate retail price of the refillable lipstick containers or cases, expressed in price brackets of \$6 per thousand on retail prices up to \$2 each; of \$12.50 per thousand on retail prices of \$2.01 to \$5 each; and of \$20 per thousand on retail prices of \$5.01 and up each. Royalty on refills is fixed at \$5 per thousand, which is without regard to retail prices. These new agreements contain no provision as to fixed minimum or any other retail prices, leaving such matters entirely to the business judgment of the individual cosmetic manufacturers and distributors, and also ultimately to the retail store operators, except where manufacturers are legally permitted too, and do, fix resale prices in "Fair Trade" jurisdictions, as provided by § 5 of the Federal Trade Commission Act, as amended. Careful examination of Exhibits 49 and 50, which exemplify all such agreements, reveals no provision from which any illegal price-fixing agreements or understandings may be inferred. The basis for the complaint herein, the minimum-price-fixing provision of the original agreements, has been entirely eliminated by the modification of May 23, 1957, and the new agreements made on and shortly after October 24, 1957. None of respondents' acts since that time indicate that they have the slightest reason or desire for a restoration of the original agreements. To the contrary, a return to the former *status quo* would not only be completely irrational, but economically disastrous; and respondents have solemnly promised on the record to refrain from any price-fixing practice in the future.

Since the execution of the new agreements in October 1957, all respondents have done well in business with the Braselton-patent types of products, with the exception of Nethercutt and Norman, and Eyelet. Nethercutt and Norman had evidently dropped such products after May 15, 1957. Eyelet, whose officers and stockholders, for undisclosed reasons immaterial hereto, had decided to go out of business entirely and dissolve the corporation, began proceedings for such dissolution on December 11, 1957, which culminated November 22, 1958. Eyelet never manufactured any lipstick containers or refills under the Braselton patents.

Risdon continued as before to manufacture such products for Revlon itself. Under its new manufacturer's license agreement with Revlon,

it has continued its business with Rubinstein on an order basis. Rubinstein has concentrated on its "Convertible" type of lipstick containers and refills, made under the Braselton patents, and has shown a very considerable overall increase of lipstick business, so that, by July 30, 1958, about 90% of its total lipstick business was the "Convertible" type. Since October 24, 1957, Risdon has also manufactured lipstick containers and refills under the Braselton patents for Lambert-Hudnut Manufacturing Laboratories, Inc., another substantial cosmetic manufacturer.

Scovill increased the number of its customers in the United States, as well as some in Canada, who were now willing to buy the Braselton-patent cartridge-type containers and refills therefor. By June 1, 1959, Scovill's business had increased from the five buyers it had in the spring of 1957, due to pushing its own competitive invention, to a total of 21 such customers, in addition to Nethercutt and Norman, whose business of this type, as already stated, had steadily declined to nothing. The list of these other 21 customers of Scovill (Exhibit 55), including the 5 it had in early 1957, however, reads almost like a "Who's Who" of the American cosmetic business, since, except for Revlon, Rubinstein, Coty, and several other leaders, it comprehends the major cosmetic manufacturers of the United States and Canada. Among Scovill's purchasers of cartridge-type lipstick containers and refills are such renowned names as Daggett & Ransdell, Lehn & Fink, Macy's and Schiaparelli.

Plume & Atwood produced only refills for these cartridge-type containers, and these for Revlon alone after the execution of the said new agreements. Plume & Atwood never produced any containers or refills under the Braselton patents for any other customer at any time prior to its sale of its Fabricating Division to Landers, Frary & Clark on May 25, 1959. By this sale it not only disposed of this division, which manufactured, among other things, lipstick containers and refills, but expressly covenanted with said purchaser never to engage in such manufacturing operations again (paragraph 60, page 18, of the stipulation, and Exhibit 54), and Landers, Frary & Clark ultimately became, and is now, known as Dorset-Rex, Inc. (R. 96-98), which corporation continued, and still continues, to carry on the same business with Revlon that Plume & Atwood did prior to May 1959, as well as to manufacture certain other products for Revlon. Plume & Atwood is now entirely and permanently out of that type of manufacturing business, and Dorset-Rex, Inc., is not a respondent herein.

While Eyelet did not manufacture any lipstick containers or refill cartridges under the Braselton patents, however, beginning in 1960 such products have been manufactured under those patents for Dana

Perfumes, a well-known cosmetic manufacturer, by the Eyelet Specialty Division of the International Silver Company, which has carried on the same general type of business of manufacturing cosmetic containers as Eyelet had previously carried on, among other things. While it must be inferred that International has had a nonexclusive license agreement from Revlon to do so, this is immaterial here, as Eyelet has been dissolved and International is not a respondent herein.

On November 28, 1958, Revlon entered into a new license agreement with Bridgeport, identical to those entered into in late 1957 with the four respondent container-manufacturers. Apparently Bridgeport, with an eye to some profitable business, and then unhampered by the unlawful minimum-price-fixing provisions and licensing requirements contained in Revlon's original agreements, desired to manufacture Braselton-patent cartridge-type lipstick containers and refills for two of its cosmetic manufacturer customers, Frances Denney of Philadelphia, Pennsylvania, and Rilling Dermatics, of Bridgeport, Connecticut. Since its new agreement with Revlon, Bridgeport has sold such products to these two customers, and paid royalties thereon to Revlon, basing all such royalties on the lowest bracket of prices, \$2.00 and under (R. 116).

There is no specific evidence as to the amount of sales, either separately or in their totality, that these numerous cosmetic manufacturers have made of the Braselton-patent type of lipstick containers and refills since the new agreements were executed between Revlon and the various container manufacturers. But the total industry sales of all types of lipstick containers, Revlon's market share thereof, and other statistics set forth in paragraph 66 (pages 20-21) of the stipulation, Exhibit 1, clearly indicate, among other things, the stupendous growth of sales of the products made under the Braselton patents in the period from 1956 through 1959. Nearly all the major cosmetic manufacturers of North America are now buying such products through one or the other of the major container-manufacturers which have agreements with Revlon for such manufacture. Although Revlon's own share of the entire lipstick market grew from 23.7% in 1956 to 32.3% in 1959, the business of the other 25 or more major or substantially large cosmetic manufacturers identified in the record necessarily has amounted to a very substantial part of the remaining 67.7% of the entire lipstick container market. This market grew from a total of \$64.8 millions in 1956 to a total of \$88.9 millions in 1959. Of such total business in each of these years, the market share of all cosmetic manufacturers other than Revlon was based in some part on their sales of the old-type nonrefillable lipstick containers, and what portion of the total business of the cosmetic manufacturers other

than Revlon, Rubinstein and Nethercutt and Norman consisted of cartridge types manufactured under Braselton-patent license agreements between Revlon and the container-manufacturers is therefore not clear in the record. Nor is Revlon's total gross income from royalties under the said agreements ascertainable with certainty, since the price structure of retail sales in the business varies from year to year, and differs as well between manufacturers, and as to each manufacturer's various styles and sizes of lipstick containers manufactured and sold under the Braselton patents. One fact emerges with certainty from these statistics, however, and that is, that Revlon's gross income from its royalties under the Braselton patents has increased each year, from only a few thousands of dollars early in 1957, before the original agreements were superseded, to increasingly substantial amounts evincing a steady growth from late 1957 through 1959.

A considerable part of the record involves alleged but unproven violations of law by reason of the maintenance of "Fair Trade" prices in nonfair trade jurisdictions. But Nethercutt and Norman never "fair-traded" their products, although Rubinstein and Revlon did in jurisdictions where so permitted by law. Revlon's order blanks and invoices (Exhibits 62 and 72-A through 75-D) all clearly say or otherwise indicate that these goods must be sold at the stated prices only "in states where fair trade is in effect". Rubinstein's order blanks (Exhibit 71), however, indicate such prices without any such stated limitation. Counsel supporting the complaint, therefore, did not strongly attack Revlon on this particular issue, but endeavored to prove that Rubinstein violated the law by fixing minimum retail resale prices in nonfair trade jurisdictions, apparently in an effort to establish on its part a continuation of the "fixed minimum price" conditions existing during the life of Rubinstein's license from Risdon in early 1957, or at least to show bad faith in Rubinstein's claim of abandonment of such practices. This attempt wholly failed when buyer representatives of several leading retail department stores in the District of Columbia, a nonfair trade jurisdiction, when called as Commission's witnesses, testified that Rubinstein's printed prices were always treated by their stores and by Rubinstein only as suggested prices, and were never considered by any of them as fixed minimum retail prices, such retailers always being free to sell to the public at their own prices.

Counsel supporting the complaint attempts to bypass, in large part, these undisputed facts which have occurred subsequent to the issuance of the complaint. He argues, in substance, that the new agreements themselves are illegal, and that the respondents, by their past and

present conduct, have not demonstrated that good faith which is necessary to a successful defense of abandonment.

Counsel claims that the language in paragraph 1 of Revlon's present agreements with the manufacturers, that the licensed articles are required to be of high quality in order to protect the value of the Braselton patents, constitutes a restraint of trade. He does not point out, however, just how this is accomplished. Scovill's executives testified that this language merely meant that the outside case itself, which was to be used over and over again, should be finished in a manner to outlast the refill cartridges and not become shabby, for it would receive hard wear in a woman's purse with other articles contained therein (R. 47 and 67). This language of the agreement was originally inserted by Revlon in the superseded 1956 agreements and licenses upon the recommendation of Scovill's vice president, and was retained in the new agreements, freed from the alleged price-fixing provisions. Pride of workmanship and lasting quality and utility of the product, both on the part of the patent holder and the manufacturer, is beneficial rather than damaging to the consumer. These factors reduce the cost to the consumer of repeated buying of containers, and also enhance the article's chances of meeting competition in the market.

It is contended by Commission's counsel that the general price floor-level of lipsticks has increased since the advent of the refillable type because the prices of this new type were about 40% above the prices of the old-style lipsticks, and that it was the plan of respondents to enhance prices and to increase the price structure of the whole lipstick market. In making this contention he disregards the fact that the cost of lipstick containers of the new type varies from one cosmetic manufacturer to another, and also varies greatly as to styles. He also disregards the fact that while refill prices have been slightly increased by Revlon and Rubinstein, container costs have been substantially cut. He also fails to consider the right of the public to prefer the new refillable type of lipstick over the old-fashioned type, and the fact that the costs of making the two types are quite evidently not comparable, even though such specific manufacturing costs do not appear in the record.

It is further contended that the provisions of paragraph 2 of the new agreements, providing for the calculation of royalties in a bracketed range of retail prices, tends to produce prices to the consumer in the higher brackets of the price range. There is, however, evidence refuting this speculative contention, in that Bridgeport computed its royalty payments to Revlon upon the *lowest* bracket of prices (R. 116). Of course, there had to be some rational basis for computing the royalties, and counsel supporting the complaint has not

suggested how a better one could be devised, nor has he specified anything illegal about the method of computation which he challenges.

Neither of the foregoing contentions as to illegality of the present agreements sustains the claim that respondents are now fixing, or since May 1957, have fixed retail minimum prices. There was never any agreement as to the manufacturer's prices either with Revlon or among the manufacturers themselves. And the manufacturer cannot, and does not attempt to, force upon the distributor or retailer any higher price than the market will support.

On the issue of respondents' good faith in their discontinuance of the objectionable practices, counsel supporting the complaint first contends that respondents are not in good faith because they have denied consistently throughout the litigation, and still deny, that they have ever engaged in any illegal conduct. Such an attack upon respondents' good faith was held irrelevant in *Stokely-Van Camp, Inc., et al. v. FTC*, C.A. 7 (1957), 246 F. 2d 458, 465 [6 S. & D. 355], and since that decision the Commission's previous policy of viewing any defense on the merits as constituting *prima facie* evidence of bad faith by a respondent has been completely abandoned by the Commission.

Counsel further attacks the respondents' good faith on the ground that the affidavit attesting Revlon's good faith, made by its authorized official, Blumenthal, is too vague. The affidavit states emphatically that Revlon "does not ever intend to resume in the future its former method of licensing such manufacture and sale of such products, as illustrated in the 1956 agreements, which are the subject-matter of the litigation". And further, said affidavit recites that Revlon offers any other assurances which the Commission may desire with respect to the abandonment of that type of agreements, and positively states that Revlon has no intention whatever of ever resuming the practices charged in the complaint. Counsel supporting the complaint does not indicate what more could be offered by Revlon or desired by the Commission than this broad and evidently sincere promise, based upon long-established facts and covering the vital issues of the complaint. This affidavit, and other similar affidavits and statements presented by the other respondents, were timely, having been made appropriately after the Commission's case-in-chief had been completed. And all of them are adequate for their purpose, convincing as to their sincerity, and in full accord with established practice in such matters.

Counsel supporting the complaint further contends, in substance, that the business success of Revlon and other respondents in connection with the production and sale of the products manufactured under the Braselton patents is a further evidence of bad faith because, having succeeded by reason of the original conspiracy in making a substantial

profit on the Braselton patents, they may, in the future, again attempt to capitalize further thereon through similar violations of law. This is purely conjectural, and not premised upon the actual facts, which demonstrate beyond question that none of the respondents will ever re-engage in such practices, because, far from making any money, they found those practices to be extremely unprofitable, while those respondents continuing in the business under the lawful 1957 agreements have profited substantially.

It is further contended by counsel supporting the complaint that Revlon admitted that the Braselton patent structure was weak, and therefore that Revlon's negotiations with Scovill as well as with Coty and Gruska for a settlement of lawsuits and other disputes over the Braselton and other patents were a part of the alleged conspiracy, and so demonstrate bad faith. These lawful settlement negotiations were never a part of the circumstances leading up to the 1956 agreements and licenses. The Revlon-Scovill settlement occurred early in 1957, during the time that Scovill was insisting upon new agreements, and was a legitimate settlement of a business dispute. No other respondent had anything to do with it, and such settlement has no bearing upon the present good faith of any respondent, all of whom, for many years now, have been doing business under the legitimate 1957 agreements. Certainly the valid settlements between Revlon on the one hand, and Coty and Gruska, at best strangers to this case, on the other, do not involve the other respondents herein, and are therefore irrelevant.

The essence of counsel's attack on respondents' good faith is that the cancellation of the minimum-price provision in the 1956 agreements and licenses was not due to respondents' belief that such provisions were unlawful, but due only to Revlon's desire to increase its royalties from the manufacturers by getting other cosmetic houses to buy from the manufacturers the products made under the Braselton patents. The Commission has not been established by Congress to act "as a censor of commercial morals", nor are the motives of respondents, whatever they may have been in 1956, material in 1960 or now, when the practices complained of have been completely stopped for some years.

In summary, only three of the five manufacturers with which Revlon made its 1956 agreements are still in the lipstick-container and refill business. Two of these are the respondents, Risdon and Scovill. The third present manufacturer, Bridgeport, is not a respondent, although in November 1958, it resumed and still engages in the business of manufacturing the Braselton-patent types of lipstick containers and refills, under an agreement with Revlon identical with those under which Risdon and Scovill have operated since November 1957. While the Com-

mission has discretion in naming respondents in its complaints, since Bridgeport began to manufacture under its current agreement with Revlon shortly after the complaint was served and some twenty months before the stipulation herein was agreed upon, it is difficult to justify the issuance of any cease-and-desist order against the respondents, unless Bridgeport be named a respondent also. If Bridgeport has been operating under a lawful contract with Revlon since November 1958, all respondents, including Revlon, have also been lawfully operating, and for a year longer. Nethercutt and Norman were never more than minor figures, and Rubinstein, since June 1957, has been doing business with Risdon on an order basis. The licenses of Nethercutt and Norman and Rubinstein from the manufacturers, inoperative in fact after mid-May 1957, were cancelled in October 1957.

The record shows plainly that the perfectly legal 1957 agreements were not brought about by any action of the Commission, but by economic pressure. Counsel supporting the complaint has not explained how any order of the Commission to cease and desist, issued at this time, could inhibit an activity on the part of the respondents that now has not occurred for nearly 5 years, and certainly will not be resumed. All that could possibly be accomplished by a cease-and-desist order has long since taken place, by the compulsion of a law more inexorable than any under which the Commission operates: the law of supply and demand. This economic law, unlike those on the statute-books, is self-enforcing. The "insurmountable objections" to the price-fixing provisions of the 1956 agreements arose and were recognized and yielded to by respondents before any complaint was issued. Such objections still effectually bar the respondents from hereafter resuming a practice which has proved to be so financially unrewarding. And the best possible guarantee of their good faith, when they declare they will do so no more, is the fact that if they did, they could not afford to remain in such business very long. Any order to cease and desist issued at this time would be nothing but punitive, and not in the public interest.

The Commission's powers under the Federal Trade Commission Act only "authorize it, after finding an unfair method present" (*FTC v. National Lead Co., supra.*, 352 U.S. at page 428 [6 S. & D. 201]) to issue a cease-and-desist order. There is no longer any present violation, nor is there the remotest likelihood of any such violation by any respondent in the future. Therefore, upon the facts, the hearing examiner makes the following:

CONCLUSIONS OF LAW

1. In 1956, respondents violated the Federal Trade Commission Act by actually entering into agreements fixing minimum retail prices upon

cartridge-type lipstick containers and refills therefor, manufactured under the Braselton patents.

2. On and after May 23, 1957, all respondents discontinued and abandoned all their minimum-retail-price-fixing agreements, and ever since have operated in accordance with law; such agreements and the unlawful practices thereunder have been completely and finally stopped; and there is no likelihood of their resumption at any future time by any of the respondents.

3. Public interest now requires that this proceeding be dismissed as to each and all of the respondents.

Therefore,

It is ordered, That the complaint herein be, and the same hereby is, dismissed without prejudice to the right of the Commission to take such further actions as future facts and circumstances may warrant.

OPINION OF THE COMMISSION

DECEMBER 18, 1962

By ANDERSON, *Commissioner*:

The complaint herein charges respondents with violating Section 5 of the Federal Trade Commission Act by entering into agreements fixing minimum resale prices for certain patented and nonpatented products. The hearing examiner in his initial decision held that respondents had engaged in practices violating Section 5, as charged. He further held, however, that respondents had abandoned these practices and ordered that the complaint be dismissed. Counsel supporting the complaint, having been granted a petition for review, have filed exceptions to the initial decision and the matter is now before us for consideration.

Respondents Revlon, Inc., Helena Rubinstein, Inc., Jack B. Nethercutt and Dorothy Nethercutt are engaged in the business of manufacturing and selling cosmetics and cosmetic products. Respondent Merle Norman Cosmetics, Inc., is engaged in the sale and distribution of cosmetic products to the retail trade. The remaining respondents are engaged in the manufacture and sale of containers for lipsticks and other cosmetics. In 1954, Revlon acquired from one Braselton, an inventor, patents for a combination lipstick case and refill. During the first seven months of 1956, Revlon and various manufacturers of lipstick containers, including respondent container manufacturers, entered into agreements whereby the container manufacturers were appointed agents of Revlon to issue nonexclusive licenses for the sale of lipstick cases and refills claimed in the Braselton patents to manufacturers of cosmetic products. Included in each of the agreements

was a provision establishing minimum retail, resale prices for the lipstick containers and refills sold by the container manufacturers to the licensee cosmetic manufacturers.¹ Licenses were issued pursuant to the aforementioned agreements to respondent Rubinstein (by Risdon) and jointly to respondents Nethercutt and Norman (by Scovill). Each license expressly provided for minimum prices at which the lipstick cases and refills were to be sold to the public. Revlon contracted with Risdon for the manufacture of Revlon's own lipstick containers and refills. All parties understood that Revlon was bound by the minimum resale price provision in the agreements.

On May 22, 1957, an attorney-examiner of the Federal Trade Commission called on Revlon's counsel and secretary, Blumenthal, and informed him that an inquiry was being made by the Commission to determine whether Revlon's 1956 agreements licensing the products to be made and sold under the Braselton patents were violative of the Federal Trade Commission Act as agreements to fix minimum resale prices. There are conflicting statements in the record as to whether Blumenthal advised the attorney-examiner at that time that Revlon had already decided, as a matter of business judgment, to eliminate the retail, resale price provisions from the aforesaid agreements. In any event, the following day, May 23, 1957, Blumenthal sent notices to respondent container manufacturers informing them that, effective that date, the agreements had been amended by the cancellation of that portion thereof relating to the maintenance of retail, resale prices.² As a result of this action by Blumenthal, the agreements in question and licenses issued pursuant thereto were eventually rescinded, and, in October 1957, new agreements were entered into between Revlon and respondent container manufacturers. By the terms of these new agreements, the container manufacturers were licensed under the Braselton patents to manufacture and sell the containers

¹ The following provision was contained in each of the agreements:

"In order that the value of the licensed patents shall not be destroyed or depreciated by low grade articles made thereunder and to give commensurate protection to both Principal and Licensees, the licensed articles are required to be of high quality. Accordingly, to assure the foregoing, the minimum prices of the licensed articles sold by each Licensee to its customers, less however Licensee's normal discount to such customers, shall be as follows:

Lipstick case with refill	\$1.75
Lipstick case without refill	\$1.25
Refill	\$.90

Provided, however, that with respect to the hour-glass shaped case, which involves special skills and increased manufacturing costs, the foregoing minimum prices shall be as follows:

Lipstick case with refill	\$3.00
Lipstick case with refill	\$2.50."

² This unilateral action was taken although the licensing agreement by its terms could "not be altered, modified, amended or discharged except in writing signed by both parties."

and refills claimed thereby. The new agreements did not contain any price-fixing provision similar to that included in the originals.

The hearing examiner found that the minimum retail, resale price provisions in the 1956 agreements between Revlon and the container manufacturers and in the licenses issued pursuant thereto violated the Federal Trade Commission Act, as alleged in the complaint. He specifically ruled that the price-fixing provisions were illegal *per se* and that it was unnecessary "to discuss further the other pre-agreement or post-agreement facts to determine that all respondents, by reason of the agreements and licenses alone, have violated Section 5 of the Federal Trade Commission Act." He held, however, that on and after May 23, 1957, respondents' price-fixing agreements were terminated and that the discontinuance of these illegal practices came about under such circumstances that there is no likelihood that respondents will again attempt to fix prices by agreement. Counsel supporting the complaint have taken numerous exceptions to the initial decision, but the only real issue presented is whether the hearing examiner erred in holding that there has been a good faith abandonment of the practices found to be unlawful.

As stated above, the price-fixing provision in the 1956 agreements was not rescinded until after Revlon had been contacted by a representative of the Commission and had been made aware of the Commission's investigation. We have previously held in this connection that dismissal of a complaint on the ground of abandonment is rarely warranted in cases where the discontinuance of a practice does not occur until after the Commission has acted. *Ward Baking Company*, Docket No. 6833 [54 F.T.C. 1919] (1958); *The Firestone Tire & Rubber Company*, Docket No. 7020 [55 F.T.C. 1909] (1959); *Carter Products, Inc., et al.*, Docket No. 7943 [60 F.T.C. 782] (1962). The reasonable inference to be drawn in such a case is that the practice has been stopped, not on a voluntary basis, but only in anticipation of a Commission proceeding. Under the circumstances, there can be no assurance that the practice will not be resumed when the threat of a proceeding has been removed.

The hearing examiner has held, however, that respondents in this proceeding had planned to do away with the price-fixing provision long before the attorney-examiner's visit and that the discontinuance would have occurred even though an investigation had not been undertaken by the Commission. This holding appears to be based in part, at least, on an affidavit of discontinuance signed by Blumenthal.

The examiner has found, in this connection, that cosmetic houses were reluctant to obtain licenses to sell refillable cartridge-type lipsticks and refills therefor manufactured under the Braselton patents

because of the minimum retail, resale price provision in the agreements between Revlon and the container manufacturers and in the licenses issued by the latter. He states in this connection that the objections to the price-fixing provisions of the 1956 agreements were "insurmountable" and that they were yielded to by respondents before any complaint was issued. According to the examiner, "such objections still effectually bar the respondents from hereafter resuming a practice which has proved to be so financially unrewarding".

We think this finding is wrong in several respects. First of all, there were other factors, such as a suit by Coty, Inc., to invalidate the Braselton patents, which tended to deter cosmetic manufacturers from purchasing the Braselton cases and refills.³ Of greater significance, however, is the fact that the cosmetic manufacturers refused to enter into the licensing agreements, not because of the existence of the price-fixing provision therein, but because Revlon could not be trusted to adhere to such provision. On May 9, 1956, the following letter was written by the law firm representing the Bridgeport Metal Goods Manufacturing Company to Blumenthal, who was then counsel for Revlon, concerning the agreement between the two companies whereby the former was to manufacture Braselton lipstick containers and refills:

Dear Mr. Blumenthal:

I am writing to confirm our telephone conversation of May 8, 1956, with respect to the subject agreement. As I pointed out to you, some of Bridgeport's customers have raised the question of whether Revlon, Inc. is bound by the minimum prices set forth in paragraph 3 of the agency agreement. It was my view that the agreement clearly provided that Revlon was bound by such prices since the preamble to that paragraph indicates that it was designed to give "commensurate protection to both Principal (Revlon) and Licensees (Bridgeport's customers)." You and I agreed that this was clearly the intention of the parties in entering into the aforementioned agreement and that Revlon was bound by such minimum prices.

However, in order to satisfy the prospective licensees, I would appreciate it if you would write me to that effect so that there will be some explicit commitment with respect to this provision of the agreement. In order to prevent any prolonged correspondence with respect to this subject, it is advisable to have Mr. Revson either write you a letter to that effect or endorse your letter * * *.

Mr. Blumenthal sent the following response to the above-quoted letter on May 22, 1956:

I have your letter of May 9, 1956, with respect to the above captioned agreement and patents.

³ The following comment was made by Blumenthal in a memorandum dated November 15, 1956: "Another bearing on the absence of licenses is the current suit by Coty to invalidate the Braselton patents. Our feeling is that the various cosmetic houses are standing by for the outcome of this action." This suit was eventually settled and Coty received a license under the Braselton patents.

Opinion

62 F.T.C.

Your interpretation of the agreement is in accord with mine and I am authorized by client to inform you that for the purpose of giving commensurate protection to both Principal (Revlon) and Licensees (Bridgeport's licensed customers), *all parties, including Revlon, are bound by the minimum prices set forth in the agreement.* [Italic supplied.]

The minimum price for the lipstick case with refill fixed by the agreement between Revlon and the container manufacturers was \$1.75. Approximately two months after giving assurance that Revlon would be bound by the minimum prices fixed by agreement, Blumenthal announced that Revlon would sell the case and refill combination for \$1.25. In this connection, Blumenthal sent the following letter to the Scovill Manufacturing Company on July 26, 1956:

On or about September 6, 1956, Revlon, Inc. will commence marketing a cartridge-type lipstick container under the Braselton patents with refill at a total combination price of \$1.25.

Will you, therefore, be good enough to advise our licensees that commencing with such date their licenses should be deemed to be amended accordingly.

In response to this letter, the sales manager of Scovill Manufacturing Company made the following observations to Revlon's attorneys on August 6, 1956:

It would be our opinion that where this license agreement establishes prices, on the theory that certain minimum prices are essential to maintain certain standards of quality, it is hazardous to progressively reduce these prices, thereby weakening the original premise.

We further find it very difficult to negotiate with prospective customers under this agreement, only to find, in the midst of such negotiations, that Revlon has changed their thinking as to price limitations, which may necessitate a completely changed approach to the container design originally conceived on the basis of prices as set up in the original agreement.

The same individual later commented to Revlon that "It is to be hoped that your company and your attorneys will give serious consideration to a revised licensing arrangement along the lines of the above inasmuch as the present license agreements are obviously unsatisfactory and have caused considerable lost time and money for various of the licensed container manufacturers *through at least two violations of the agreement on the part of Revlon * * *.*" (Italic supplied.)

We are also in disagreement with another phase of the examiner's decision. Both the decision and the affidavit of discontinuance signed by Blumenthal suggest that Revlon had decided to amend the 1956 agreements with container manufactures prior to May 22, 1957, and that the agreements as amended would not contain any price fixing provisions. On page 3 of his affidavit, Blumenthal states:

5. That he actively participated and was primarily responsible for conducting the negotiations carried on in 1956 and the early part of 1957 between Revlon, Inc. and respondent Scovill and also with Bridgeport with respect to a modifica-

tion of the 1956 license agreements *for the purpose of eliminating all reference therein to the maintenance of retail, resale prices for the products manufactured and sold under the claims of the Braselton patents.*

6. That on November 15, 1956 he recommended the elimination of the provision in the agreements with the container manufacturers to the effect that their customers must execute license agreements and must maintain minimum retail resale prices for the products involved in such agreements *which recommendation was later accepted and approved by Revlon, Inc.* (Italic supplied.)

The record shows, however, that Blumenthal in his memorandum of November 15, 1956, recommended "The elimination of the minimum retail prices and *in lieu thereof the fixing of a minimum manufacturer's price both for the case and the refill so as to make certain it will be economically unfeasible for our competitors to sell at depressed prices.*" (Italic supplied.) It appears, therefore, that Blumenthal was proposing that minimum prices for containers and refills be fixed by a multiple licensing arrangement with the principal members of the container manufacturing industry for the purpose of establishing minimum price levels at which the Braselton containers and refills could be sold by Revlon's competitors and their retailer customers. Such a price-fixing provision, if incorporated in the licensing agreements between Revlon and container manufacturers, would, in our opinion, have been unlawful. *United States v. New Wrinkle, Inc.*, 342 U.S. 371 (1952), and *Newburgh Moire Company, Inc. v. Superior Moire Company, Inc.*, 237 F. 2d 283 (1956). Blumenthal's recommendation is, therefore, significant in that it demonstrates, contrary to the impression conveyed by the affidavit of discontinuance, that no change was contemplated in Revlon's policy of maintaining by agreement the resale prices of the Braselton containers and refills. It seems, therefore, that what the hearing examiner has found to be a determination to abandon an unfair trade practice was at best nothing more than a tentative decision to replace a price-fixing provision which had proven to be unworkable with one which would accomplish virtually the same result.

For the foregoing reasons, it is concluded that the record does not support the hearing examiner's holding that there is no likelihood that the unfair practices engaged in by respondent will not be resumed. To the contrary, we find that the discontinuance of the practices did not occur under circumstances which indicate that the practices have been surely stopped and that an order is, therefore, unnecessary. Consequently, we are of the opinion that the examiner erred in accepting respondents' plea of abandonment.

In arriving at this decision, we are also influenced by the fact that the unfair trade practice involved in this proceeding is price-fixing. We believe, as did the hearing examiner, that Revlon was fully aware that the price-fixing provision contained in the 1956 agreements was

Order

62 F.T.C.

illegal *per se* and that neither Revlon nor any of the other respondents was concerned with the legality or the illegality of this provision. The complete indifference to the requirements of the law demonstrated by this record further persuades us that a cognizable danger of a recurrent violation would exist if the complaint were to be dismissed.

Apparently as an afterthought, counsel supporting the complaint contend in their exceptions and briefs that the Braselton refills come within the patent grants only when used or sold in combination with the Braselton container. They argue, therefore, that certain provisions in the 1957 agreements between Revlon and the container manufacturers placing restrictions on the manufacture and sale of such refills by themselves and not in combination are not protected by the patents and are unlawful in that they extend the scope of the patents to control and prevent competition in the sale of an unpatented product. For example, counsel supporting the complaint now contend, in effect, that restrictions imposed by Revlon on the size of refills which may be made by container manufacturers effectively foreclose competition in the sale and distribution of refills which may be used by consumers in containers made by Revlon. These exceptions, however, go beyond the questions stated in the petition for review which, on their face, can reasonably be interpreted as relating only to the issue of abandonment. Moreover, they raise certain issues which, in our opinion, are not reasonably within the scope of the proceeding initiated by the complaint herein. Consequently, whatever merit there may be to these contentions, they are not properly before us for determination at this time and no ruling will be made thereon.

The exceptions of counsel supporting the complaint to that portion of the initial decision holding that the unfair practices engaged in by respondents have been abandoned are granted. Our order providing for appropriate modification of the initial decision is issuing herewith.

Commissioner Dixon dissented from the decision herein for the reason that he would amend the complaint and remand the case to the hearing examiner.

Commissioner Higginbotham did not participate in the decision of this case.

PROPOSED FINAL ORDER

DECEMBER 18, 1962

This matter having been heard by the Commission on exceptions to the hearing examiner's initial decision filed by counsel supporting the complaint and on briefs and oral argument in support thereof and in opposition thereto; and

The Commission having rendered its decision and having determined that the initial decision should be modified in accordance with the views expressed in the accompanying opinion and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision be modified by striking therefrom the findings and conclusions beginning on page 984 with the words "The issue of abandonment" and ending on page 1,000 with the words "and all of the respondents."

It is further ordered, That the initial decision be modified by striking therefrom the order dismissing the complaint and substituting therefor the following:

It is ordered, That respondents, Revlon, Inc., The Risdon Manufacturing Company, Scovill Manufacturing Company, Merle Norman Cosmetics, Inc., and Helena Rubinstein, Inc., all corporations, and Jack B. Nethercutt and Dorothy Nethercutt, individuals, trading as copartners under the partnership name, Nethercutt Laboratories, named as parties respondent herein, their respective successors and assigns, officers, agents, representatives 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 lipstick containers and refills, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any conspiracy, planned common course of action, understanding, combination or agreement between or among themselves to fix, establish, or maintain prices, terms or conditions of sale of lipstick containers and refills or to continue in effect any resale price maintenance contracts, programs or arrangement with respect to such products.

It is further ordered, That the complaint be, and the same hereby is, dismissed as to respondents, The Eyelet Specialty Company, and The Plume & Atwood Manufacturing Company.

It is further ordered, That the hearing examiner's initial decision, as modified, be, and it hereby is, adopted as the decision of the Commission.

Commissioner Dixon dissenting for the reason that he would amend the complaint and remand the case to the hearing examiner; and Commissioner Higginbotham not participating.

FINAL ORDER

MARCH 22, 1963

Respondents having filed, under § 4.22(c) of the Commission's Rules of Practice, exceptions to the proposed order in this proceeding,

reasons in support thereof and proposed alternative forms of orders, and counsel supporting the complaint having filed an answer in opposition to said exceptions; and

The Commission having determined that the said proposed order to cease and desist should be modified and, as so modified, entered and adopted as the Final Order of the Commission:

It is ordered, That the proposed order issued in this proceeding on December 18, 1962, be, and it hereby is, modified to read as follows:

It is ordered, That respondents, Revlon, Inc., The Risdon Manufacturing Company, Scovill Manufacturing Company, Merle Norman Cosmetics, Inc., and Helena Rubinstein, Inc., all corporations, and Jack B. Nethercutt and Dorothy Nethercutt, individuals, trading as copartners under the partnership name, Nethercutt Laboratories, named as parties respondent herein, their respective successors and assigns, officers, agents, representatives 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 lipstick containers and refills, do forthwith cease and desist from entering into, continuing, cooperating in, or carrying out any conspiracy, planned common course of action, understanding, combination or agreement between or among themselves to fix, establish, or maintain prices, terms or conditions of sale of lipstick containers and refills or to continue in effect any resale price maintenance contracts, programs or arrangement with respect to such products.

It is further ordered, That nothing contained in this order shall be construed as prohibiting:

1. Any seller of empty lipstick containers or refills therefor from entering into agreements with any of its customers to sell to any such customers lipstick containers or refills therefor at any price or on any terms and conditions of sale independently determined and offered by either such seller or buyer and independently accepted by either such seller or buyer in any bona fide transaction when such agreements are not for the purpose nor have the effect of restraining trade.

2. Any resale price maintenance contracts which any of the respondents may enter into in conformity with Section 5 of the Federal Trade Commission Act, as amended by the McGuire Act (Public Law 542, Chapter 745, 82nd Cong., 2nd Sess., approved July 14, 1952).

3. The establishment or maintenance of any lawful, bona fide agreements, discussions or other action solely between

Complaint

the officers, directors, agents, representatives and employees of any corporate respondent relating solely to the carrying on of that corporate respondent's sole or separate business, or between any corporate respondent and any of its wholly owned subsidiaries.

It is further ordered, That the complaint be, and it hereby is, dismissed as to respondents The Eyelet Specialty Company and The Plume & Atwood Manufacturing Company.

It is further ordered, That the proposed order as modified be, and it hereby is, entered and adopted as the Final Order of the Commission.

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

Commissioner Dixon dissenting and Commissioner Higginbotham not participating by reason of the fact that this matter was argued before the Commission prior to the time when he was sworn into office.