the individual concerned; and

Chairman Dixon having filed with the Commission a memorandum denying the existence of any grounds for his disqualification from participation in this proceeding:

It is ordered, That the motion directed to the Commission requesting that it disqualify Chairman Dixon from participatiing in this proceeding, be, and it hereby is, denied.

Commissioner Dixon not participating. (Dated May 31, 1963.)

AUSTIN PACKING COMPANY

Docket 7730. Order and Opinion, May 23, 1963

Order granting complaint counsel's motion to issue an amended and supplemental complaint by adding as a respondent the concern's legal successor.

ORDER GRANTING MOTION OF COUNSEL SUPPORTING THE COMPLAINT AND DIRECTING ISSUANCE OF AMENDED AND SUPPLEMENTAL COMPLAINT

The hearing examiner having, on January 2, 1962, certified to the Commission for its consideration and appropriate action a motion filed by counsel supporting the complaint requesting issuance of an order amending the complaint in this proceeding in respects therein designated, together with a brief in opposition thereto and a motion to dismiss the complaint filed by counsel for respondent and answer filed by counsel in support of the complaint in opposition to the motion to dismiss; and

The Commission having duly considered the motions filed by the respective parties and answer and brief in support thereof and in opposition thereto and the Commission, for reasons stated in the accompanying opinion, having determined that the information contained in the record and that developed in investigation constitutes adequate grounds for preliminary administrative determination or "reason to believe" that in the distribution and sale of food products respondent, Austin Biscuit Corporation, and Fairmont Foods Company, a corporation, have violated, and Fairmont Foods Company is now violating, the provisions of subsection (a) of Section 2 of the Clayton Act, as amended; and

The Commission having determined that exercise of its administrative responsibility to issue an amended and supplemental complaint is required in the public interest and it appearing that the right of the respondent and Fairmont Foods Company to full and fair hearing on the charges against them is protected under procedures provided for the conduct of the Commission's adjudicative proceedings;

It is ordered, That the amended and supplemental complaint of the Commission issue herewith and be served on the respondent, Austin Biscuit Corporation, and on Fairmont Foods Company, and that the hearing examiner fix a time for the resumption of hearings not less than thirty (30) days from the date of service of this order and amended and supplemental complaint.

It is further ordered, That the evidence heretofore introduced in the proceeding under the original complaint shall have the same force and effect as though received at hearings under the complaint, as amended and supplemented, this action being without prejudice to the hearing examiner's authority and duty to rule upon the merits of any motion which may be filed requesting opportunity to further cross-examine witnesses heretofore appearing in the proceeding or to strike evidence or to take such further action as may be appropriate to protect any of the respondent's rights.

MEMORANDUM ON QUESTION CERTIFIED BY HEARING EXAMINER

BY THE COMMISSION:

This matter is before the Commission for disposition of a question certified by the hearing examiner which has been raised by a motion filed by complaint counsel to amend the complaint. Respondent has interposed objection to the granting of the motion. Although not certified to the Commission, the hearing examiner notes in the order of certification that respondent Austin Packing Company had previously filed a motion to dismiss the complaint; that complaint counsel had interposed objection thereto; that he has not ruled on respondent's motion to dismiss; and that the Commission may wish to consider respondent's motion to dismiss in connection with its consideration of the certified motion to amend the complaint.

The salient facts in the chronology of this matter are: On January 6, 1960, the Commission issued its complaint charging the Austin Packing Company, a corporation, with violation of Section 2(a) of the Clayton Act, as amended, in selling food products through the use of a rebate system based on cumulative monthly volume of purchases. Therefore, in June, 1960, all of the capital stock of respondent Austin Packing Company was acquired by Fairmont Foods Company, a corporation engaged in the manufacture and distribution of food products in dairy and related lines on a nationwide basis.

At the hearing on the complaint held on April 18, 1961, it transpired that on December 31, 1960, Fairmont Foods Company had caused Austin Biscuit Corporation (name changed from Austin Packing Company in July, 1959) to be dissolved and that thereafter the business was conducted by Fairmont Foods Company under the designation "Austin Biscuit Company, Division of Fairmont Foods

Company". The former president of Austin was hired as manager of this Division. The rebate system based on cumulative monthly volume of purchases which formed the basis for the complaint issued by the Commission on January 6, 1960, was continued in effect until August, 1961. At that time a new pricing policy was formulated and placed in effect. This new pricing policy supplanted the challenged monthly rebate system.

Following the certification of the matter by the hearing examiner on January 2, 1962, the Commission directed investigation of the sales practices of the Austin Biscuit Company, Division of Fairmont Foods Company. This investigation disclosed that the revised pricing system embodies a discount schedule whereby the customer is granted a discount ranging from 1% to 3½% of each invoice, computed on the basis of the dollar amount of qualifying products on the invoice. The essential difference between the present system and the one it replaced is that the discounts are now based upon the amount of each individual order, whereas under the previous system rebates were granted in accordance with the total purchases during the preceding month. Although the plans differ in respect to the basis for computing the discounts granted, the Commission has reason to believe that both provide for varying discounts to different purchasers and may result in violations of Section 2(a) of the amended Clayton Act.

The amended and supplemental complaint challenges both plans. Respondent Fairmont Foods Company was a party in interest during a period of over a year and a half in which the pricing system challenged in the complaint was employed. For some seven months prior to discontinuance of that plan and the substitution of a revised pricing method, Fairmont conducted the business as an integral part of its corporate operations. At the times that the hearings were held in this matter (April, 1961) the business was being so conducted. Thus, Fairmont is a party properly chargeable in any action which challenges the legality of the two pricing systems.

It is our preliminary administrative determination that the information developed in this matter is sufficient to give us "reason to believe" that Section 2 of the amended Clayton Act has been and is being violated. We are likewise convinced that the interests of both parties and the public interest will best be served by the issuance of an amended and supplemental complaint in this proceeding rather than by the initiation of a new proceeding through the issuance of a new and separate complaint.

Four days of hearings were held in this matter in April, 1961, at which testimony was taken as to the extent of competition and the substantiality of competition in the sale of the type of products

involved in this proceeding. As has been indicated herein, at the time these hearings were held Fairmont Foods Company was operating the business, had done so for several months and had owned the stock of the corporation conducting the business for some seven months prior thereto. Under those circumstances we believe that it is proper that the evidence developed in the hearings that have been held in this mater should be available for consideration against Fairmont Foods Company. In order to insure that its rights will be fully protected and safeguarded, Fairmont shall have the right to recall for further cross-examination those witnesses who have already testified and shall have the right to file motions to strike evidence which it contends to have been objectionable when offered.

Accordingly, the motion of complaint counsel for the issuance of an amended and supplemental complaint is granted and the record made in this case is preserved as to respondent Fairmont Foods Company, subject to its rights of further cross-examination and motions to strike. As the action taken herein is inconsistent with the motion of respondent to dismiss the complaint, its motion is by this action denied. An order directing the issuance of an amended and supplemental complaint shall issue.

J. C. MARTIN CO. ET AL.