IN THE MATTER OF

D. L. CLARK COMPANY

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE CLAYTON ACT

Docket 8154. Complaint, Oct. 24, 1960—Decision, July 9, 1963

Order dismissing complaint charging a Pittsburgh, Pa., candy manufacturer with violating Sec. 2(d) of the Clayton Act by such practices as paying favored vending machine customers, under its "VenKard" promotional programs, 68 cents for each machine displaying an 8¾ x 5 inch card advertising its products — in 1959 granting to Automatic Canteen Company of America in excess of $100,000 under this program — while not offering or granting comparable payments to competitors of the favored customers.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party respondent named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act (U.S.C. Title 15, Sec. 13), as amended by the Robinson-Patman Act, hereby issues this complaint stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent D. L. Clark Company is a corporation organized and doing business under the laws of the State of Pennsylvania, with its principal office and place of business located at 503 Martindale Street, Pittsburgh 12, Pennsylvania.

PAR. 2. Respondent has been engaged, and is presently engaged, in the business of manufacturing and distributing various types of candy, the best known of which is the "Clark Bar". These products are sold and distributed by respondent to wholesalers and retailers located in various parts of the nation. Respondent's sales for the fiscal year ending February 28, 1959, approximated $10,700,000.

PAR. 3. Respondent has sold and distributed, and now sells and distributes, its products in substantial quantities in commerce, as "commerce" is defined in the amended Clayton Act, to competing

customers located throughout various States of the United States, and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished, or contracted to be furnished, by or through such customers in connection with the handling, sale or offering for sale of products sold to them by respondent. Such payments or allowances were not offered or made available on proportionally equal terms to all other customers of respondent competing with said favored customers in the distribution of respondent's products.

PAR. 5. As an example of the practices alleged herein, respondent granted, and is presently granting, promotional payments or allowances to certain candy vending machine operators as compensation for such operators promoting and advertising certain of respondent's candy products on their machines. Said promotional payments or allowances were paid by Richard A. Burleigh & Associates, Inc., Evanston, Illinois, acting on behalf of respondent. The payments or allowances are being granted to candy vending machine operators under "VenKard" promotional programs in which cards, approximately 8¾ inches by 5 inches, advertising certain of respondent's products are affixed on the front or side of the dispensing candy machines. The back of these cards contains a mastic for the purpose of effecting this adhesion to the candy vending machines. Each VenKard program usually lasts between 4 or 5 weeks.

Respondent, through Richard A. Burleigh & Associates, Inc., pays the favored customers approximately 68 cents for each machine containing the aforesaid cards advertising respondent's candy products. These promotional payments or allowances were not offered or granted on proportionally equal terms to all other retailer customers of respondent who compete with said favored customers in the distribution of respondent's candy products. Among the unfavored competing customers of respondent to whom the VenKard promotional programs were not offered or made available on proportionally equal terms are other candy vending machine operators. Included among the favored customers is Automatic Canteen Company of America, Chicago, Illinois. In 1959, promotional payments or allowances granted to Automatic Canteen Company of America by respondent exceeded $100,000.

PAR. 6. The acts and practices of respondent, as alleged above, are in violation of the provisions of subsection (d) of Section 2 of the amended Clayton Act.

Mr. Jerome Garfinkel and *Mr. Benjamin H. Vogler* for the Commission.

Winston, Strawn, Smith & Patterson, by *Mr. Thomas A. Reynolds, Mr. John P. Fox, Jr.*, and *Mr. Edward L. Foote*, of Chicago, Ill., for respondent.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER

This complaint, issued October 24, 1960, charges respondent with violating subsection 2(d) of the Clayton Act (15 U.S.C. 13) as amended, providing, in part, inter alia:

> That it shall be unlawful for any person engaged in commerce to pay * * * anything of value to * * * a customer * * * in consideration for any services or facilities furnished by or through such customer in connection with the * * * sale of any products * * * unless such payment * * * is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Specifically it is charged that respondent's "VenKard" advertising on automatic vending machines in the interstate sale of its candy bars results in respondent's making advertising payments to vending machine operators which are not made available on proportionally equal terms to respondent's other customers who sell identical candy bars at retail, and with whom the automatic vending machines allegedly compete.

In this decision the "vending industry" generally refers to the retail selling of goods and services (specifically candy bars) by means of automatic vending machines. These machines usually have a glass or plastic front which enables a customer to select from among usually 8 to 20 or more different items of candy or other consumables being displayed and offered for sale. The customer obtains the selected item by depositing a coin or coins in the machine and operating levers or buttons in a manner prescribed on the face of the machine. Employees of the vending companies fill the machines with the items being sold, remove the coins, stack the candy, apply advertising, if any, to the face of the machine, and generally maintain the equipment in good operating condition and filled with the items being offered. The term "machines" hereinafter means vending machine operators, owners, lessees, franchise holders, and all persons, firms, or corporations who or which sell respondent's candy bars at retail through automatic vending machines.

Present counsel supporting the complaint (hereinafter complaint counsel) is not the same attorney who filed the complaint, tried the case, and evolved the legal theory upon which it proceeded.

After this record had been closed at the conclusion of respondent's evidence, original complaint counsel entered the private practice of law and present complaint counsel was substituted. "Complaint counsel" referred to herein usually means the original complaint counsel unless otherwise indicated.

Complaint counsel represented to the examiner during the hearings that he was relying heavily upon the Commission's decision of September 9, 1959, in (Docket 6642) *Liggett & Myers Tobacco Co.*, 56 F.T.C. 221, to support his position in the instant proceeding. However, on June 7, 1961, almost two years after the Commission's original decision and after he started to introduce evidence in this case, complaint counsel moved the Commission to reopen the proceedings in Docket 6642 to reconsider its previous decision

> * * * whether under Section 2(d) of the amended Clayton Act, vending machine operator [s] and wholesaler customers of respondent compete in the distribution of its cigarettes within the intent and meaning of said section of the statute.

On August 4, 1961, the Commission ordered the proceedings reopened. On January 22, 1962 [60 F.T.C. 1881], the Commission, having heard the matter on briefs and oral argument, entered an order reciting, inter alia:

> The Commission having determined that there has been no showing of any change in conditions of law or fact or showing of any other circumstance requiring the action sought in the public interest and, therefore, that modification of the Commission's opinion in the manner requested has not been justified:
>
> IT IS ORDERED that the order of August 4, 1961, reopening this proceeding be, and it hereby is, vacated, without implying any views as to the merits of its prior opinion dated September 9, 1959, and without prejudice to the statutory right and duty of the Commission to take such further action, if any, as may be appropriate, whenever in the opinion of the Commission conditions of facts or of law have so changed as to require such action or if the public interest shall so require.

Original complaint counsel never apprised this examiner of his efforts to relitigate the above-stated issue in the Commission's original *Liggett & Myers* decision, *supra*.

Complaint counsel does not assert that respondent's VenKard advertising payments discriminate between different vending machine companies. The thrust of his case is that such payments were and are not "made available on proportionally equal terms" to respondent's other customers competing with the machines in the retail sale of respondent's candy bars.

The hearing examiner, from time to time during this proceeding, pointed out to complaint counsel the insufficiency of his evidence

of competition between retail machine vendors vis-a-vis other retailers of respondent's candy. Counsel promised more substantial evidence but did not produce any. The examiner must, therefore, follow the legal presumption articulated on pages 8 and 9 of the initial decision in *Kenton Leather Products*, Docket 7812 (Dismissed by the Commission without opinion on November 13, 1962) [61 F.T.C. 1150, 1159], that a party will offer evidence which is favorable to him if such evidence exists and is available. It must be presumed that complaint counsel did not offer better evidence of competition between the machine vendors of respondent's candy and other retailers of the same products because he had no better evidence.

The automatic vending industry now accounts for a substantial share of the retail business of this country. Its share is estimated by some observers to be somewhere between 2½ and 3 billion dollars.[1] Its present size, observed in relation to its frequently

[1] A partial list of articles in public print relating to automatic vending machines and related subjects is as follows:

In an article in ADVERTISING AGE, Nov. 13, 1961, p. 6, entitled "Vended Sales of Hot Foods, Non-Foods Soar," it is stated that "estimates are that about $2.75 billion worth of goods is slipping, sliding and sloshing out of some 4,000,000 vending machines throughout the country this year." In the same article, Thomas B. Donohue, president of [National Automatic Merchandising Assn.] and executive vice president of Universal Match Corp. is quoted as predicting "that the number of automatic vending cafeterias will increase by possibly 30% next year. An estimated 3,000 vending cafeterias are now in operation, compared with none five years ago."

In an article entitled "New Developments in Automatic Vending" by Alan R. Andreasen (Graduate Student, Columbia U.) in JOURNAL OF RETAILING, Vol. 37, No. 4 Winter 1961-1962, p. 17, N.Y. Univ. School of Retailing, it is stated:

> "Automatic vending machines will cause the greatest revolution in modern merchandising methods since the invention of the cash register—*if* one accepts the opinions of a great many important retailing executives." (Emphasis in original.)

The same article discusses Filene's [Boston] 1950 venture in machine vending and also refers to Rich's [Atlanta] 1960-1961 test. The article also quotes Frederick L. Schuster, Board Chairman of Automatic Canteen Company of America as stating:

> "This new marketing concept can automate up to 90 percent of supermarket operations * * * the machine makes possible the automatic vending of staples, canned goods, meats, drugs, sundries, textile products, housewares, or ready-to-eat hot foods * * *."

In BARRONS WEEKLY of April 11, 1960, p. 5, Earl Hassebrock, vice president, National Rejectors, Inc., is quoted:

> "Completely automatic supermarkets are not far away. You'll deposit some bills in a machine as you enter, push buttons for the items you want as you go through, and collect your packages and change from a machine at the exit."

VEND, semi-monthly magazine of the vending machine industry published by the Billboard Publishing Company, 2160 Patterson St., Cincinnati, Ohio;

BUSINESS WEEK, Dec. 8, 1962, p. 134, "Automatic Vending Fattens Up With Food";

PROGRESSIVE GROCER, June, 1961, p. 58, an article entitled "Vending Machine Drive-In Forecasts New Food Retailing Technique";

EMPLOYEE FOOD SERVICES IN MANUFACTURING PLANTS (U.S. Dept. of Agriculture, Marketing Research Report No. 325, Supt. of Documents, U.S. Government Printing Office, 1959);

SALES MANAGEMENT (magazine for June 3, 1960), an article on p. 38 states, inter alia, "Machines are selling everything from peanuts to panties";

QUICK FROZEN FOODS (magazine for Nov. 1960), an article on p. 95 entitled "Frozen Food Vending Machines Used for In-Plant Feeding" emphasizes the vending of frozen meals through coin-operated machines.

publicized growth potential, cautions against any holding from which it might be inferred that automatic retail vending is not a potent competitive influence in the business life of this nation. The U.S. Department of Commerce has just released (December 1962, 22 pp., U.S. Govt. Printing Office) a study entitled "The Automatic Vending Machine Industry, Its Growth and Development" which states in the Foreword: "Automatic vending machines, providing large segments of the public with goods and services at all hours of the day, play an important role in the American distribution system. They have become a *necessity* rather than a convenience, and in recent years their industrial and commercial uses have broadened." (Emphasis supplied.)

Even though the fact of competition between machine and non-machine vending may not be proven by reliable, probative and substantial evidence in this particular record, the footnoted material (footnote 1) compels one to conclude that the retail vending by machines of merchandise and services is substantially competitive to other retail sellers of the same merchandise and services.

The very nature of automatic machine retail vending may be such as to require the question of "competition" to be adjudicated on a case by case basis. See, inter alia, *Simplicity Pattern Co.* v. *FTC*, 258 F. 2d 673 (1958) [6 S. & D. 409]; *Lever Brothers Co.*, 50 F.T.C. 494 (1953); *State Wholesale Grocers* v. *The Great Atlantic & Pacific Tea Co.*, 258 F. 2d 831 (1958), *cert. den.* 358 U.S. 947 (1959); *Kay Windsor Frocks, Inc., et al.*, 51 F.T.C. 89 (1954); *Henry Rosenfeld, et al.*, 52 F.T.C. 1535 (1956); *Atalanta Trading Corporation*, 53 F.T.C. 565 (1957); *Chestnut Farms Chevy Chase Dairy*, 53 F.T.C. 1050 (1957); *General Foods Corporation*, 52 F.T.C. 798 (1956); *Curtiss Candy Company*, 44 F.T.C. 237 (1947); the 1959 "tobacco" cases: *Philip Morris, Inc.*, 56 F.T.C. 258; *American Tobacco Co.*, 56 F.T.C. 263; *R. J. Reynolds Tobacco Co.*, 56 F.T.C. 269; *Brown & Williamson Tobacco Corp.*, 56 F.T.C. 275; and *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61; 73 S.Ct. 1017 (1953) [5 S. & D. 531].

This decision, of course, decides nothing more than the issues presented on this specific record, in the pleadings and the proof.

Several sets of hearings were conducted in Pittsburgh, Chicago and Detroit, and respondent completed its evidence on July 21, 1962. On July 27, 1962, the examiner closed the record subject to complaint counsel's reopening for good cause shown. Original complaint counsel was then about to enter the private practice of law, and present complaint counsel moved to reopen the record to present evidence which original complaint counsel had rep-

resented to the hearing examiner would rebut prior evidence in the record. Such evidence was received in Chicago on October 22, 1962, and in Detroit on October 24, 1962.

The threshold question is whether the reliable, probative and substantial evidence in this record proves that automatic vending machines selling respondent's candy bars, upon which machines respondent's VenKard advertisements are posted, did and do, in fact, compete with any, some, or all other retail vendors of respondent's identical candy bars.

Webster's New International Dictionary, 2nd Edition, defines "competition" as an "act of competing, esp. of seeking, or endeavoring to gain, what another is endeavoring to gain at the same time * * * ." To compete is to be in competition. Competition has been defined as "struggle between rivals," *Lipson* v. *Socony Vacuum Corp.*, 87 F. 2d 265, 270, or a "contest" for sales, *United States* v. *Standard Oil*, 47 F. 2d 288 at 297, or a "vying" for trade, *Brown Shoe*, 179 F. Supp. 721, *affirmed* 370 U.S. 294.

In *Liggett & Myers*, *supra*, the examiner found (No. 46), "there will be competition between a vending machine and any nearby over-the-counter operation where the two *are reasonably equal in accessibility* to a cigarette-smoker whose supply is exhausted." (Emphasis supplied.)

Although complaint counsel sought to bring this proceeding within the rationale of *Liggett & Myers*, *supra*, he did not appreciate the full significance of the Commission's finding there that competition between the automatic vending machine retailers of cigarettes and other cigarette retailers *had been proven by evidence in that record.* In its opinion (p. 248), the Commission, inter alia, stated:

> * * * The hearing examiner found and the record shows specific examples of over-the-counter retailer customers, who were not favored, doing business in the same locality as the favored vending machine operator customer locations. In some instances, the outlets were within a block of or next door to each other. *We believe that competition between the groups has been sufficiently demonstrated.* (Emphasis supplied.)

Competition between respondent's VenKard machines and other retail sellers of respondent's candy bars has *not* been "sufficiently demonstrated" in this record.

Respondent's grounds for seeking dismissal of this proceeding on this record, inter alia, are: (1) the evidence fails to establish that VenKard machine retailers of respondent's candy bars do in fact compete with the non-machine retailers; (2) even though such

competition had been proven, which it has not, it was not necessary to offer VenKard to non-machine retailers because such offer would be a "useless or futile" gesture under *Liggett & Myers, supra*, because the non-machine retailers as a matter of business policy or practice will reject a VenKard program; (3) respondent's 6-pak program affords non-machine retailers a legally valid alternative to VenKard; and (4) respondent must use VenKard to meet competition and meeting competition is a good § 2(d) defense under *Exquisite Form Brassiere, Inc.* v. *FTC*, 301 F. 2d 499 (1961) [7 S. & D. 259], and *Shulton, Inc.* v. *FTC*, 305 F. 2d 36 (1962) [7 S. & D. 472].

Proposed findings and conclusions have been filed and argued. All motions heretofore made and presently undisposed, which are not otherwise specifically ruled upon in this decision, are hereby denied. All proposed findings and conclusions not herein adopted, either substantially or in the form in which proposed, are hereby rejected.

Based upon the entire record in this proceeding, the examiner makes the following:

FINDINGS OF FACT

A. The Corporate Respondent and Its Business

1. Respondent D. L. Clark Company, a Pennsylvania corporation, with its principal office and place of business located at 503 Martindale Street, Pittsburgh, Pennsylvania, a wholly owned subsidiary of Beatrice Foods, Inc., manufactures and sells candy products in interstate commerce. It does approximately $11,000,000 annual business. This proceeding involves the years 1958, 1959, 1960, and the early part of 1961. Although complaint counsel's evidence was principally confined to the Chicago and Detroit metropolitan areas, any violation of § 2(d) of the Clayton Act proven in this record in any part of the United States will support a cease and desist order encompassing all of respondent's operations.

2. Respondent has a manufacturing plant in Illinois and markets its products in every state of the United States. It is admitted in this record that respondent is engaged in commerce as "commerce" is defined in the Clayton Act as amended.

3. The Federal Trade Commission has jurisdiction over the parties and the subject-matter of this proceeding, and this proceeding is in the public interest.

4. In the manufacture and interstate sale of its candy bars, respondent is in competition with other manufacturers of candy

bars. Curtiss' "Butterfinger" and Luden's "Fifth Avenue" are examples of candy bars which compete with the "Clark" and "Zag Nut" bars.

5. Clark is known in the industry as a "bar goods" house, as distinguished from candy manufacturers which sell boxed, variety, or specialty candy. In addition to its "Clark" and "Zag Nut" bars, it manufactures a mint, a coconut, and a fudge bar, "Clark Peanut Blossom Kisses," and boxed confections marketed under the name of "Miniature Clark" bar and "Miniature Zag Nut" bar, the Clark French Rose, and the Clark Honeycomb Chips, some or all of which are resold at retail through vending machines and over the candy counters of grocery, drug and cigar stores, and supermarkets. However, complaint counsel has generally confined his evidence to § 2(d) violations, if any, resulting from respondent's participation in the VenKard advertising program of Richard A. Burleigh & Associates, Inc., of Evanston, Illinois. Although respondent does manufacture and sell other candy bars, an analysis of its participation in the VenKard program by the sale of the 10¢ "Clark" and "Zag Nut" bars through vending machines and non-vending retailers will suffice to dispose of the issues presented. Although these bars are retailed at 5¢, 10¢, and 15¢, it is stipulated in this record, and the examiner finds, that all of the candy sold by respondent, regardless of retail price, are goods of like grade and quality.

6. The Clark bar is composed of a peanut or peanut butter center with a chocolate covering and is sold more in the cold weather months. The Zag Nut bar does not have a chocolate coating and is sold chiefly during the warm weather months.

7. Respondent sells its candy in some instances directly to retailers; in some instances through brokers; and in other instances through jobbers. The broker sells the candy as a representative of the manufacturer and receives a commission for his services. He does not take title to the candy. The jobber takes title to the merchandise and resells at a price which he fixes to compensate him for his services. The Potter McCune Company is a jobber in McKeesport, Pennsylvania. A jobber ordinarily sells lines in addition to respondent's candy. The Hoosier Brokerage Co. in Indianapolis, Indiana, is also a broker. It sells a customer, provides Clark with the order and shipping address, and Clark ships directly to the destination indicated in the order. The broker receives a commission for his services. A "house account" is one that is sold directly by the company rather than through the agencies above described. Examples of such accounts are Letty Lane Candy Co.,

Westville, New Jersey, and Fresh-Pack Candy Company, Moline, Illinois.

8. Ralph McKee, Jr., executive vice president of respondent, testified that outside of the so-called "house accounts" most of its accounts are sold through brokers. The Al Fowler Company has been respondent's broker for about four years for the Chicago metropolitan area, which includes Evanston. In prior years respondent sold directly through its own salesmen who were employed and paid by it. Many of its present brokers are general food and confectionery brokers and known as such. Frequently respondent's candy bars are only a small part of the line of merchandise which the broker sells.

B. The Vending Machine Retailers of Respondent's Candy Bars

9. Automatic Canteen Company of America (hereinafter ACA) with its principal office at 1430 Merchandise Mart, Chicago, Illinois, is one of the country's largest operators of automatic vending machines. It leases machines to its wholly owned subsidiary, Canteen Company of America, which has sales autonomy in each locality and carries on the day-by-day vending operations, by area. Canteen keeps an inventory of the machines on cards which follow the machine and show where the machines are at a given time. Maurice Glockner, vice president of ACA in charge of merchandising and a witness for both complaint counsel and respondent, testified that title to the machines remains in ACA. ACA files reports with the New York Stock Exchange, the Securities & Exchange Commission, and other regulatory bodies. It files its income tax returns on a consolidated basis, and the rent paid by Canteen is part of the revenue reported in ACA's return. ACA leases some vending equipment to independent franchise holders as well as to its subsidiary. All franchise holders of ACA place their own orders for merchandise with the ACA office which, in turn, transmits them to the individual suppliers. ACA acts merely as a transmitting agent. Either Canteen or ACA places orders directly with Clark.

10. In addition to Glockner, the following representatives of other vending machine companies testified: Vernon Fox, president of Fox Cigarette Service, a wholly owned subsidiary of Automatic Retailers of America; Edward Israel, manager of Kandy Korner, Inc.; Joseph A. Kaden of the Kandy Kit Company; Walter Lange, manager of the Chicagoland Canteen Co.; William Fishman, vice president of Automatic Retailers of America, Inc., formerly head of Automatic Mechandising Company which was dissolved into

Automatic Retailers; Marty Pollaner, president of Robot Services, Inc.; Venny Koss, a buyer for Cigarette Service Company; and Floyd L. Joyce, the owner of Joyce Vending Machine Co.

C. Richard A. Burleigh & Associates and the VenKard Program

11. Richard A. Burleigh & Associates, Inc., of Evanston, Illinois, is an advertising firm whose principal stockholder and chief executive is Richard A. Burleigh. He manages, directs, and controls the policies and practices of the corporation. In 1954, Burleigh instituted the VenKard advertising program. The copyrighted trademark is owned by him. A VenKard is an 8½″ x 5″ advertisement card for a product sold through a vending machine; the card is adhered by mastic tape to the surface of the machine. Specimens of the VenKards are in evidence as Commission's Exhibits 312 and 313. The advertising copy is prepared and furnished by the manufacturer, respondent, who pays four cents per card to the printer, who is usually one designated by Burleigh and who, at Burleigh's direction, delivers the card to the machine operator. The manufacturers pay Burleigh 80 cents per card for posting the advertisement for a period varying from four to six weeks. Burleigh fixed the 80-cent fee for the 10-cent bar, and the fee is slightly less for the 5-cent bar. Responsibility for posting and removing the cards is with the machine operator who also covenants to keep the machine filled with the candy advertised on the VenKard during the entire period. Burleigh testified he remits 68 of the 80 cents to the machine operator, retaining 15% which he maintains is the usual commission charged by advertising agencies for placing advertisements for clients. After a manufacturer has agreed to participate, Burleigh ascertains from his list of machine operators (which list may be augmented by the manufacturer) which of them desire to participate in the VenKard program, in a designated geographical area, for the specified period, and inquires how many machines will be available.

12. Insofar as respondent's participation in VenKard is concerned, the program is offered in a specified geographic area first to Automatic Canteen Company, and then to the "independent" vending machine operators. There is no discrimination between vending machine companies, but the program is not offered to all operators in the same geographical area at the same time because respondent's production schedules could not accommodate the demand if all machines in an area were posted at the same time. Therefore, respondent offers it first to ACA and then to the inde-

pendent operators, in a particular locality. Then respondent moves the program to a different locality. The VenKard program has to be handled through the individual operator because the VenKard is posted in exclusive locations and in most cases in factories and plants where a stranger is not permitted (Tr. 904).

13. Clark used the VenKard program from its inception in the early 1950's up until February, 1956. Respondent was owned by the Clark family, but after it was acquired by Beatrice Foods and after Edward L. Muldoon became respondent's executive officer responsible for its operations, he continued VenKards for approximately one year. From February, 1956 until the summer of 1957 Clark did not participate in any VenKard program. During the period in which it discontinued the use of VenKards, the programs previously utilized by Clark were utilized by a competitor, the Luden's "Fifth Avenue" bar. From the summer of 1957 when it resumed the VenKard program, respondent has continuously participated in the program up to the present time. In administering VenKard, Mr. Burleigh uses four regions of the United States so that a manufacturer can select any one of them or all of them for VenKard advertising (Tr. 256). The evidence offered by complaint counsel was limited to Chicago and Detroit; both of these cities are located in Burleigh's north central region. Mr. Muldoon testified (1011, 1012) that respondent offers VenKard

> * * * to everybody in the vending business and we aggressively offer and we notify our brokers that it is being offered on scheduled dates, the amount involved and so on.
>
> Q. Is it your policy, sir, to offer the VenKard Program to, let us say, Automatic Canteen Company, at the same time that you offer it to the other vending companies?
>
> A. Well, we have to offer the VenKard Program really by areas in order to keep up with the production with sales that you get from these programs.
>
> Q. But you do offer it to the independent companies and to Automatic Canteen, as I understand it?
>
> A. Absolutely.

14. Respondent's policy of offering the VenKard program to both independents and Automatic without favoritism was reaffirmed by Mr. Burleigh, who testified (Tr. 911):

> A. Yes. * * * I should say they post the VenKard at the Automatic Canteen in one area one time and the following month on the facilities of other vending machine operators and go to another area and repeat process.
>
> Q. Why don't they offer the program to the independent and to the Canteen Company at the same time?
>
> A. Because the VenKard Program is so successful they increase sales and distribution * * * two or three times (the volume) usually generated (in the)

same machines and with all of this additional volume coming in at one time their production would be over taxed.

15. The VenKard program is so organized by Mr. Burleigh that to participate in it at all is to participate on a "proportional" basis. An offer is mailed by Mr. Burleigh to his "entire mailing list plus additional names supplied to me each program by new customers obtained by the D. L. Clark Co."

16. The Clark brokers also advise the vendors of the availability of a pending program (Tr. 912). William R. Poliskie, one of respondent's north central area brokers, explained his duties in representing respondent concerning a VenKard promotion (Tr. 1031-1032):

Q. During this period '58, '59 and '60, did you have anything to do with the VenKard Program on behalf of the D. L. Clark Company?

A. Yes, I did in the State of Michigan.

Q. Were you advised of the availability of a VenKard Program for the so-called independent vending companies?

A. Yes.

Q. And with respect to the programs involving these independents, what duties, if any, did you have?

A. My duties were — the D. L. Clark Company would advise me, oh, anywhere from 60 to 75 days in advance, when the program is going to be — and my duties were to try to get the orders as early as possible so they would know what they would have to produce. If some new vendor would come in I would sign him up for Mr. Burleigh and send him the merchandise to promote the merchandise.

Q. Did you have occasion to advise the vending companies of the availability of such a program?

A. Yes, sir.

17. After the VenKards have been posted for the prescribed period, the machine operators certify to Burleigh that a designated number were posted on a stated number of machines in a general area for a given period of time. These certifications do not designate the precise street address of each machine. On the basis of these certifications, Burleigh invoices the manufacturer at the rate of 80 cents per card per machine and the manufacturer remits the invoiced sum to Burleigh who deducts his 15% commission and transmits the remaining funds to the machine operator.

18. Burleigh testified that approximately 25 manufacturers (including respondent) participate in his VenKard program but the record does not indicate the names of all the other participants.

19. While promulgating the VenKard program, Burleigh also edited ACA's house organ and performed other functions for ACA. He testified (Tr. 201 *et seq.*):

I edit the Automatic Canteen publications * * * it means interviewing people * * * who are customers of theirs, clients of theirs, any one that is

newsworthy to the readers of the publication. The purpose of interviewing suppliers is to write an article about them that would be of interest to the readers of the publication. These suppliers don't pay at all. Outside of the VenKard program I also prepare all sorts of sales aids for the sales department of the Automatic Canteen. By sales aids I mean sales literature, promotional literature, literature promoting the vending services that they render, and several other things. I do not supply such literature to suppliers of Automatic Canteen.

D. Respondent's Participation in the VenKard Program

20. The VenKard operation is a very substantial one. The record shows (CX-292A—309A) that commencing May 5, 1958 and ending September 26, 1960, Clark paid $191,904.60. Assuming that Burleigh retained 15% of this amount, the machine operators were paid by Clark, through the VenKard device, approximately $163,119, which sum was not available nor made available on proportionally equal terms to other retail vendors of Clark bars of like grade and quality.

21. A resume of Commission's Exhibits 274 to 284, inclusive, respondent's orders for VenKard advertising, indicates that by agreements commencing with one dated May 19, 1958 and concluding with one dated May 19, 1961, covering a period from July 19, 1959 and ending August 6, 1962, respondent contracted for VenKard posting involving approximately 306,000 machines and approximately $244,800.

22. Respondent made the following VenKard advertising payments to the named vending machine companies in the Chicago metropolitan area for the period January 1, 1958 to approximately August 15, 1961:

Automatic Canteen Co	$14, 285. 04
Automatic Merchandising Co	2, 659. 58
Vernon Fox Company	1, 564. 00
The Kandy Kit Company	1, 020. 00
Kandy Korner, Inc	3, 414. 28
Coca-Cola Bottling Co., Inc	149. 60
Hahn Automatic Vending Co	123. 08
The Illinois Vending Co	212. 50
The Interstate Vending Co	1, 567. 40
Meldon Products	448. 12
Midwest Vendors	565. 25
Tri-R Vending Service	374. 00
Vendway Merchandising	285. 60
Vendall Service Corporation	280. 84
Venderama, Inc	513. 40
Total	27, 462. 69

23. During the same period, respondent did not pay nor offer to pay similar advertising allowances to the following-named drug and grocery chains or individual members of the cooperatives, which companies also sell respondent's candy at retail in the Chicago metropolitan area:

Walgreen Drug Company, 4300 Peterson Avenue; Ford Hopkins Company, 400 W. Erie Street; Certified Grocers of Illinois, Inc., 4800 South Central Avenue; Grocerland Cooperative, Inc., 3636 W. 51st Street.

The individual members of the cooperatives sell and distribute respondent's products through their members' retail outlets, i.e., Hi-Low Foods, Inc., 30 W. 87th Street.

24. The following advertising payments by respondent under the VenKard program were made to the vending machine companies indicated from the period January 1, 1958, to approximately August 15, 1961, in the Detroit metropolitan area:

Automatic Canteen Co	$9,771.96
Automatic Merchandising Co	1,772.76
Howes-Shoemaker Company	995.52
Robot Services, Inc	397.80
Bruce Enterprises	924.80
Collins Vending	401.20
Fontana Brothers	321.64
Hill Vending Company	91.80
Hopkins Vending	378.76
Union Vending Company	308.04
Veitch Factory Catering Co	316.20
Variety Vendors, Inc	125.80
Total	15,806.28

During the same period respondent did not pay nor offer to pay anything to the following named drug and grocery chains or to individual members of the cooperatives which companies also sell respondent's candy at retail in the Detroit metropolitan area: Cunningham Drug Stores, Inc., Abner A. Wolf Company, and Allied Supermarkets, Inc.

E. Competition Between Vending Machine Retailers of Respondent's Candy and Other Retailers

25. This record will not support a finding that the machines upon which respondent's VenKard advertisements were posted did, in fact, compete with other retail sellers of its candy. And there is affirmative, unrebutted evidence to the contrary. There is no evidence of the precise location of any machine upon which respondent's

VenKards were posted, and the examiner cannot, therefore, find that any specific VenKard machine competed with any other retail seller. Walter Lange, manager of the Chicago branch of Canteen Co., ACA's wholly owned subsidiary, did not know which of his company's machines posted VenKards and had no knowledge of the specific location of the machines. In light of this testimony, complaint counsel was advised by the hearing examiner (Tr. 720) that such testimony would not support a finding concerning the exact locations of machines posted with Clark VenKards. Nevertheless, complaint counsel did not thereafter offer any evidence as to (a) exact machine locations, (b) sales of Clark bars being made from any specific VenKard machines, or (c) VenKards being posted at any specific machine locations by any other vending machine operator.

26. Robert Kozlowski, branch manager of the Detroit Division of Canteen Co., testified as to the VenKard certifications from a period commencing March 16, 1958, through September 10, 1960. Of an average of approximately 1,959 machines on location in the Detroit area in that period, 1,931 were certified under the VenKard programs. The witness testified that the machines were located where there were no other candy machines; that no machines were located in any public places; that he did not know whether any of the machines certified were located in a gasoline station or in a bowling alley, and that he did not know whether there were any grocery stores or drug stores located near a bowling alley in Detroit where there might be one of Canteen's machines. Mr. Kozlowski further testified that most of the machines in Detroit are in "captive" locations. He defined "captive" as a location where those who would use the machines are not allowed to leave the premises in which the machines are located, and are restricted to the premises during their working hours. He did not know how far from any of his machines any Walgreen or Cunningham drug store might be.

27. Vernon Fox, president of Fox Cigarette Service Co., a subsidiary of Automatic Retailers of America, testified that the purchase of Clark bars from vending machines (of which he had approximately 600) would be considered an impulse purchase:

> * * * In other words, I might get up in the morning and decide to buy a package of cigarettes, and I might go out intentionally to buy such a package of cigarettes, * * * and this is, as I understand it, different from what the trade calls an impulse item, which you would perhaps buy on an impulse, and not with a pre-determined plan * * *. In the case of a candy bar, availability has a tremendous relationship to volume of sales.

Mr. Fox did not have with him any records of the location of his machines and could not state how many of his machines were located

within any specified distance of any Walgreen drug store. His testimony negates a finding that VenKard posted machines compete with non-machine retailers of respondent's candy. Mr. Fox testified that cigarette machines are customarily placed in "public" locations to be available to "the transient public," whereas candy machines are not necessarily in public locations. Machine-vended candy is purchased as an impulse item and is customarily promptly consumed in the vicinity of the machine where it is purchased; whereas cigarettes are not an "impulse" item and are not, necessarily, consumed promptly in the vicinity of the machine.

28. Edward Israel, office manager of Kandy Korner, Inc., a company engaged in servicing candy and cigarette vending machines of which his company had approximately 850 on location, testified that his company located its candy machines where there were no other candy machines, and that his machines are not in competition with food stores, variety chains, or general merchandise stores.

29. Mr. William F. Maute of the Monroe Cigar Company testified that his "candies" were placed in buildings which had no other candy counters or source for candy purchases (Tr. 628):

Q. Well, in the buildings that you are in in Chicago, as I understand Mr. Garfinkel's questions to you, you sell candy in all your counters; is that right?
A. Yes.
Q. It would be generally true, would it not, that they would be the only candy counters in these buildings?
A. That is right.
Q. It would also be generally true that they would be the only places to buy candy in the entire building, would it not?
A. That is true.

30. Mr. Richard A. Burleigh testified that the vast majority of the machines certified as using Clark candy bars in a VenKard program were "completely inaccessible to the public" (Tr. 673):

Q. Mr. Burleigh, Mr. Garfinkel asked you several questions regarding certifications of machines in Chicago?
A. Yes.
Q. Did all those exhibits relate to the Canteen Company?
A. All that he showed me did, yes.
Q. How many of those machines would be located in places completely inaccessible to the public?
A. The vast majority of them, practically all.
Q. In the vending machine business that is known as a captive, is it not?
A. Yes.

31. Another Commission witness, Mr. William S. Fishman of the Automatic Retailers of America, testified that his machines would be

placed so as not to be near other outlets such as Monroe Cigar Store retail counters (Tr. 745):

Q. With regard to the placement of machines in certain locations, Mr. Fishman, isn't it a fact that you will place a machine in a location so that there are no other vending machines near there?
A. Yes; for the most part, yes.
Q. And isn't it a fact that you will place machines in locations so that places such as a Monroe Cigar Store or other outlets would also be removed from the location of the vending machine?
A. Yes.
Q. And this is a custom and practice in the industry, isn't it?
A. Yes.

F. Offering VenKard to Non-Machine Retailers would be Useless and Futile

32. Respondent excuses its failure to offer VenKard advertising to other than machine retailers because, it contends, such offer would be a "useless gesture." Even had the evidence established that the VenKard machines compete with the other retailers, the record proves and the examiner finds that the offer of VenKard advertising to such other retailers would be "useless and futile," because the merchandising policies of such other retailers prohibit the use of this type of advertising. Drug stores, such as Walgreens, and grocery stores, such as Certified Grocers, have a policy against the use of in-store display advertising similar to the VenKard program. Each of the eight companies subpoenaed by complaint counsel testified to such policy:

1. *Walgreen:* The candy broker representing Clark has called on the Walgreen Company for many years. He testified: (p. 1135)

Q. And what if any policy does Walgreen have with respect to the placement of advertising like a VenKard on their candy counter?
A. They would object to me placing a card like that on any part of their premises.
Q. Would they permit you to do it?
A. No, sir.

and at pages 1160-1161:

Mr. GARFINKEL: All I am asking the witness is did he offer a VenKard Program to say Certified in 1958 or 1959.
HEARING EXAMINER GROSS: Did you, Mr. Witness?
The WITNESS: It would be ridiculous to offer it to them.
Mr. GARFINKEL: All right.
The WITNESS: The answer is no, you wouldn't offer that to them, it is ridiculous. He wouldn't take it anyway.
HEARING EXAMINER GROSS: What do you mean by saying "it is ridiculous"?

The WITNESS: Well, obviously that VenKard it is established that it is a little sign that goes on the mirror of a vending machine. You take that into like a Certified or High-Low, Grocerland or Walgreens they would have no use for it. You would be wasting his time by asking him for something that you know he doesn't want, that he can't use. You would look ridiculous if you did it. So the answer is no, and I have a little bit better consideration of my buyer's time and my own.

The candy buyer for Walgreen, recalled by complaint counsel to rebut the broker's testimony, confirmed the broker's statement: "Basically when it comes to using indoor display material, we don't accept it." (Tr. 1203) If a program such as VenKard were offered they would "not accept it."

2. *Ford-Hopkins:* The candy broker for Clark testified that Ford-Hopkins would not permit a VenKard to be placed on the candy counter (Tr. 1135-6). On rebuttal the Ford-Hopkins buyer (Tr. 1197) repeated his direct examination testimony that he does accept advertising allowances and a committee determines which to accept (Tr. 1198) and, further, that the records of the company would identify which they had accepted and which they had refused (Tr. 1200). The evidence in the record on the use by Ford-Hopkins of the VenKard program affirmatively establishes that the company has a policy against its use.

3. *Certified Grocers:* A Chicago cooperative which includes 750 supermarkets also has a policy against the use of a VenKard program. On pages 1135-1136, the broker testified:

Q. Directing your attention to Certified Grocers, have you been calling on them in the years that you have been a broker in Chicago?

A. Yes, sir.

Q. What if any policy do they have with respect to the placement of advertising like a VenKard in their candy departments?

A. They wouldn't permit it.

Q. Do they have a policy to that effect?

A. They have a policy to that effect.

The witness further testified (Tr. 1160) that to take a VenKard offer to Certified would be "ridiculous. They would have no use for it." No rebuttal witness was called to contradict this testimony.

4. *Grocerland Cooperative:* Another large food chain in the Chicago area buys for 400 supermarkets. The cooperative is a wholesaler which re-sells to each member store. The witnesses testifying as to this cooperative's practices did not know whether each of the members purchased Clark bars (Tr. 592).

The broker who called on the Grocerland account testified that Grocerland would not permit or use a VenKard program (Tr. 1136) and, further, that it would be "ridiculous" to offer Grocerland such a progam: "they would have no use for it" (Tr. 1160).

Anthony Karlos, the general manager, and Harry G. Lemperis, the candy buyer, of Grocerland were subpoenaed as witnesses by complaint counsel, and Mr. Karlos was recalled as a rebuttal witness, whereupon he testified that his organization exercises no control over the advertising practices of the individual stores. He could not testify positively as to whether Grocerland's individual retail stores would accept VenKard, or reject it.

No evidence was offered to rebut the uncontradicted testimony by the candy broker that Grocerland stores would not use a VenKard program and had a policy against it.

5. *High-Low Foods:* This supermarket corporate chain operates 32 stores in Chicago. (Tr. 605). The Clark candy broker who represented many other candy companies testified (Tr. 1136) that High-Low will not permit VenKard type advertising in their candy departments. Walter J. Roney, the President of High-Low, called as a rebuttal witness testified (Tr. 1189):

Q. What policy, if any, does High-Low Foods have, sir, concerning in-store advertising? Do you have a policy as to in-store advertising?
A. No in-store advertising.
Q. — permitted?
A. Well, no, it isn't permitted.

6. *Cunningham Drug Company of Detroit:* It operates hundreds of retail drug stores throughout Detroit and Cleveland and purchases Clark bars directly from respondent. Whether any particular store has the "product is strictly a local situation" (Tr. 805). Mr. W. R. Poliskie, respondent's broker in Detroit for many years, has called on its customers including Cunningham. He testified that retail food stores cannot use VenKard: "it doesn't fit in their picture." Among other reasons, this is true because the self-service supermarket or drug store could not furnish an appropriate certification (Tr. 1035). The store would be reluctant to supervise the candy counter or candy spot for a period of four weeks to guarantee that Clark bars were continuously available; it would "be an awful expensive operation" for the self-service store.

The witness testified further (Tr. 1039):

Q. That is right. It would not be completely against the business operations of a grocery store to place the sign; would it?
A. Yes, it would.
Q. Which grocery store do you know doesn't have a sign?
A. Your A & P will not allow —
Q. Do you know whether Cunningham Drugs doesn't have it?
A. Cunningham will not allow it also.
Q. Are you sure about that?
A. Yes, sir.

George A. Semack, candy buyer for Cunningham, called as a rebuttal witness by complaint counsel, testified that their stores had never used a program similar to VenKard; that he had never recommended that such type of program be used; that he had never heard of a program similar to VenKard being used in supermarkets or drug stores; and that in the ten years he had been with this chain the stores had never had any cards on their candy counters advertising candy (Tr. 1226-1228).

7. *A. C. F. Wrigley:* The Abner A. Wolf company purchases Clark bars and resells them to the Wrigley Stores—who are not therefore customers of respondent. However, assuming that the Wrigley Stores are "customers" of respondent they, too, have a policy against the use of VenKard style programs. The broker for Clark testified (Tr. 1044):

Q. Do you know whether the ACF-Wrigley Stores, Inc. has a policy with respect to the placement of these advertising signs on their candy counters or other counters?

A. I do.

Q. What is that policy?

A. The policy is against them.

Q. What do you mean by 'against them'?

A. They do not let national people in their stores on the basis of their own prescribed advertising, but they do it on their own, so they keep it uniform of all advertising material within their outlets.

Harold Burt Phelps, candy buyer for the Wrigley supermarket chain and called as a rebuttal witness by complaint counsel, testified that he had never seen such a program in the Wrigley Stores (Tr. 1235).

33. Marsh H. Blackburn of the Hoosier Brokerage Company, Indianapolis, and a broker for Clark candy and 18 other companies and about 500 products, who had been in the food distribution business for 16 years, testified (Tr. 1120):

Q. Have you ever offered a vending card as such to A & P in Indianapolis?

A. I would say that years ago — back in the '58 period probably when we first came out we discussed if it would be feasible. It has been offered in essence.

Q. What policy, if any, does A & P have with respect to advertising in their candy counter area?

A. That is the reason that none of the grocery chains in essence, the A & P in this particular discussion, they cannot use it. It is not feasible at all within their operation. They have no place to use a VenKard or any type of advertising of that nature.

Q. What policy, if any, does A & P have with respect to the placement of advertising cards, let us say similar to VenKard, in the candy counter?

A. It is prohibited.

Q. What do you mean by that?

A. It is a national policy of A & P, I believe, not to allow any manufacturer's advertising material to be placed in the candy department in their retail stores.

Q. As I understand it they do buy the 6-Pak?

A. They certainly do.

Q. Is there any reason why they would buy the 6-Pak and not permit any other kind of advertising?

A. Well, in addition to their over-all company policy, it is not necessary in reality because the 6-pak serves as a form of advertising.

Q. What do you mean by that?

A. Well, the basic problem is how do you draw attention to the housewife to actually six candy — five-cent candy bars which are of the small size, so by displaying them in 6-Pak type of package, it allows the consumer who normally buys and makes her own impulse selection, so to speak, it allows her to see these bars more readily and thus be able to purchase them. The 6-Pak in essence is a form of advertising as well as packaging.

Q. Do I understand then that A & P does permit this type of advertising?

A. I would say yes, they do. But to understand it, this advertising is affixed to the package.

34. Mr. Burleigh has never offered the VenKard program to the non-vending retailers even though it would be in his interest to obtain additional commissions by so doing (Tr. 914). He stated that the VenKard program would be unacceptable to the non-vending retailers because:

In the candy field the bulk of the bar goods outside of that sold in vending machines and to jobbers is sold in self-service stores, drug stores and food markets which are the primary markets for this and therefore found it necessary to go to self-service to keep cost under control. The displays in these stores are very, very large, many, many bars on sale and the food stores and drug stores could not afford to have one of their employees constantly at their stand to make sure the Clark bar, for example, was on sale every minute of every day in connection with the VenKard.

In addition to this the nature of the business of the food stores and drug stores is such that they prefer and insist on having advertising message on the product so the customer does not have to look for it.

There is another factor in this and that is on the vending machine the advertiser is guaranteed that his advertisement would be the only one placed on that machine. There is no food store or drug store who could do this.

35. On the basis of the evidence in this record, the examiner finds that non-machine retailers of respondent's candy bars do not, will not, and could not use the VenKard advertising on their candy counters or in their stores, because, inter alia, (1) they cannot afford the cost and trouble of ensuring that a VenKard product is always stocked; (2) in-store displays of all candy bars on an item-by-item basis is impractical; (3) VenKard's certification procedure is too costly, and impractical to comply with; (4) care must be taken not to prefer one candy item over another in their overall advertising programs; (5) advertising to be useful to a supermarket, grocery or drug store operator must be on the product itself and draw attention to the product in that way; (6) other time, cost and operational factors make VenKard unacceptable for the non-machine retailers

of respondent's candy bars; and (7) most chains have a national policy of advertising which would make VenKard-style advertising nonusable by them. In many instances VenKard has been offered to non-machine retailers and the offer has been refused for the reasons enumerated above, among others. In those instances where VenKard has not been offered to non-machine retailers such omission is legally excused because the offer would, as a matter of fact, "be a useless or futile gesture."

In *Liggett & Myers*, *supra*, the Commission held (p. 253):

> We do not believe, however, that it is necessary to make known a promotional plan where such would be a useless or futile gesture. The question of whether the gesture would be futile is one of fact.

36. The facts in this record support a finding, and the examiner finds, that respondent's offer of VenKard to the non-machine retailers as to whom evidence was proffered would have been a "useless or futile gesture." The rebuttal hearings which were conducted at the request of complaint counsel served only to shore up the conclusion stated above. The record is silent as to whether respondent may not have non-machine retailers, other than those who testified, who would use VenKard.

37. Witnesses testified and the examiner finds that respondent has offered an identical VenKard program to all vending machine companies and has not favored any vending machine company over any other when offering its VenKard program. The reliable, probative and substantial evidence in this record does not prove that respondent, when it participates in the VenKard program, discriminates in favor of any particular vending machine company. The only witness that had not been advised of the VenKard program, Fred L. Joyce, of the Joyce Vending Machine Company of Detroit, testified:

> * * * I don't allow any advertising of any kind on my machines, cigarettes, candy or otherwise. I don't allow them to stick any signs on my machines. If I was approached by any VenKard people I would turn them down regardless * * *.

G. 6-Pak as an Alternative to VenKard

38. Respondent contends that its "6-Pak" program which the evidence shows was offered to all non-machine retailers of its candy bars, constitutes for those retailers a legally valid alternative to VenKard. The 6-Pak contains six five-cent candy bars aligned side by side on a card "substantially the size of a VenKard" with advertising on the exposed surface and transparent paper enclosing the entire package. No specimen of a 6-pak was offered. Respondent alleges that these 6-paks are priced to the retailer so that the retailer

may offer them to his customers at a price cheaper than the customers would pay for six 5-cent candy bars purchased separately. Respondent further contends that these 6-paks, when stacked on the candy counters of supermarkets or drugstores, advertise respondent's candy in substantially the same way that the VenKards on machines advertise the bars. The 6-pak allegedly promotes increased sales of respondent's bars, and advertises them at the same time, without VenKard's costly certification procedure. This packaging does not require some representative of the retailer to be in constant attendance to ensure that the candy bar is always available, as is required under VenKard.

39. A large number of the non-machine retailers of respondent's candy, particularly the grocery stores and supermarkets, did and do retail the 6-paks in substantial quantities. Respondent asserts its *reduction* in the wholesale cost of the 6-pak to such non-machine retailers as grocery and drug stores, is about 7.7065% of sales, and the VenKard payments to machine retailers is 7.5076% of sales. Respondent's Exhibit 11 in evidence states that in 1959 and 1960, on $368,968.48 sales to all vending companies in Chicago, Detroit and Indianapolis of Clark and Zag Nut bars, it made VenKard payments of $27,700.50, and the cost of the program to Clark was 7.5076% of total sales. The same exhibit states that on $344,160 worth of 6-pak sales (other than jobbers) in the same area and for the same time "by broker territories" the cost to Clark was $26,522.69, or 7.7065% of sales. This record will not support a finding that the 6-pak in fact proportionalizes the VenKard payments to non-machine retailers or offers a legally valid alternative advertising allowance, because (1) the 6-pak applies only to 5-cent bars, whereas VenKard applies extensively to 10-cent bars; (2) 6-pak does not appeal to the "impulse buyer" as respondent claims is true for the machine buyer; (3) 6-pak is a take-home item rather than a "consumed-on-premises" item; (4) the cash payments to machine operators for VenKards is totally different from an alleged discount from the wholesale price on the 6-pak; (5) 6-pak does not single out Clark bars from all other bars available on the candy counter as VenKard singles out the Zag Nut or Clark bar from all other bars being vended by a machine; (6) respondent has not elected who is the advertiser under the 6-pak—the retailer or respondent; and (7) 6-pak requires the retailer to *do nothing*. The proof does not *conclusively* demonstrate that the discount on the 6-pak sale gives the retailer more profit from a 6-pak than from six bars sold separately. All it really does is to permit the retailer to promote respondent's bars by selling six 5-cent bars as a package cheaper than the individual

bars purchased separately. The evidence does not disclose whether the 6-pak is ever broken up so that a customer buys individual 5-cent bars for a nickel out of the 6-pak. The inference is clear that just the contrary is true and that the customer is required to buy all six bars in one package. A merchandising device designed to sell six 5-cent bars in one package for home consumption is not in any way comparable to the VenKard system designed to sell individual 10-cent bars which are usually consumed in the vicinity of the premises where purchased. The test of compliance with § 2(d) is whether an alternative plan such as 6-pak results in the same net money benefit to the user of the alternative.

40. Since respondent is the proponent of the proposition that 6-pak is a legally valid alternative advertising allowance, the burden was on it to show that a retail grocer selling the same dollar volume of bar goods under the 6-pak plan would receive in cash, or its equivalent, as an advertising allowance, substantially the same amount of money that a VenKard machine retailer selling the same dollar amount of candy would receive. Such proof is not in this record. The hearing examiner finds, therefore, that the 6-pak is not a legally valid alternative to VenKard nor does it result in proportionalizing VenKard payments to non-machine retailers.

41. There is substantial failure of respondent's proof concerning the 6-pak. The net wholesale price of six 5-cent bars, purchased separately, as contrasted with a 6-pak cost is *inferred* but not proven in Commission's Exhibit 11. Respondent's Exhibit 10, its general price list effective September 15, 1961, does not furnish sufficient information from which the examiner might compute wholesale costs for the same *weight* of respondent's candy sold through the 6-pak as compared with machine vended bars. Respondent has not demonstrated by evidence how the 6-pak, which essentially promotes the sale of six 5-cent bars at one time, for later consumption, equates with VenKard which promotes the impulse purchase of one 10-cent bar usually consumed at or about the time of its purchase, in the vicinity of the machine where purchased. As found in paragraphs 22 and 24, respondent paid $27,462.69 under VenKard to 15 vending machine companies in the Chicago metropolitan area for the period January 1, 1958 to approximately August 15, 1961; and $15,806.28 to 12 vending companies in the Detroit metropolitan area during the same period. Respondent has not proven in this record that its non-vending retailer customers selling an identical dollar amount of identical goods, or even an identical dollar amount of 6-paks, received, or were offered, in money, or money equivalent, a $27,462.69

advertising allowance in the Chicago area, and a $15,806.28 advertising allowance in the Detroit area from January 1, 1958 to approximately August 15, 1961.

42. *State Wholesaler Grocers* v. *A & P*, 258 F. 2d 831 (1958), was a Clayton Act treble damage action grounded, among other statutes, upon § 2(d) violations allegedly based upon advertising in the A & P magazine, WOMAN'S DAY. The District Judge rendered judgment for defendants, 154 F. Supp. 471, and plaintiffs appealed. The Circuit Court affirmed in part and reversed in part. Although respondent relies upon this case in support of its 6-pak position, such reliance is misplaced, for the Court of Appeals held that the trial court erred in concluding that plaintiffs failed to prove a violation of § 2(d) by the defendant suppliers. See also the so-called *Toy* cases recently decided, involving the catalog advertising by toy manufacturers, *Transogram, Inc.*, Docket No. 7978, decided September 19, 1962 [61 F.T.C. 628], and the other dockets referred to in the Commission's opinion.

43. With all due respect, this examiner finds nothing in *Wholesaler Grocers* v. *A & P*, which transforms respondent's 6-pak into absolution for VenKard under § 2(d).

44. In *Lever Brothers Co.*, 50 F.T.C. 494, a § 2(d) complaint was dismissed and the Commission clearly recognized in that decision that some advertising programs may be of such a nature that they cannot, as a practical matter, be uniformly used by all of a seller's customers. The fact that offering a promotional allowance to all of a seller's customers may, under a proven set of circumstances, be a useless and futile gesture does not necessarily exculpate an advertising payment which is otherwise discriminatory under § 2(d). In the Lever Brothers opinion at page 510, the Commission held:

> Each of the respondents offers alternative promotional allowances for those who do not for any reason use the advertising allowances. These offers are also made to all customers. For example, in the case of Lever Brothers, a retail customer who holds a feature sale supported by handbill or radio advertising is paid 8¢ or 9¢ per case of products purchased. There is also a second option — to wit, for a sale supported only by a store display, 6¢ per case is allowed.
>
> In other words, the newspaper advertising allowance is a part of the comprehensive plan of payment for promotional services offered by respondents to their several hundred thousand customers throughout the country. The conditions under which these customers operate, of course, vary. Although it appears that the use of advertising by means of newspaper, handbills, or store displays is general throughout the country, we will assume that among these many customers will be found some who do not find newspaper advertising practical. *There is no proof, however, that either handbills or store displays are not reasonably practical for all.* (Emphasis supplied.)

45. In *Elizabeth Arden, Inc.* v. *FTC*, 156 F. 2d 132 (1946) [4 S.&D. 490], the court cautioned against promotional plans tailored to fit the special needs of customers whom a seller wishes to favor. If proof of such "special tailoring" in the case of either VenKard or 6-pak were present in this record, and the requisite competitive injury were established, instead of 6-pak being an alternative to VenKard, it might well be subject to the same attack as VenKard.

46. In the treble damage case of *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F. 2d 988, at 994, the court stated:

> [9] We think it must be held that a seller engaged in commerce who furnishes clerk's services or pays clerk's salaries in unequal amounts to customers competing in the distribution of its products, which amounts have no other basis or standard than the seller's discretion or favor, and as to which there is no competitive way for such customers to qualify for proportional or equal levels, is, to the extent of any differences in such amounts, guilty of a discrimination in the furnishing of services or facilities under subsection (e) or in the payment for services or facilities under subsection (d) of section 2 of the Clayton Act as amended by the Robinson-Patman Act, 15 U.S.C.A. § 13(e) and (d) * * *.
>
> The Federal Trade Commission has aptly expressed the situation in relation to subsection (e), in the cease and desist order which it issued against appellant, as referred to above: "* * * the statute affords the seller a free election in the first instance as to what services or facilities, if any, he will provide to purchasers of his products; but having elected to furnish a particular service or facility to a particular purchaser or purchasers, he thereby assumes the obligation of according similar services to all competing purchasers to the extent required by the statute. The furnishing of a service or facility which cannot be proportionalized for the benefit of competing purchasers or, in the alternative, the failure or refusal to proportionalize the terms upon which services or facilities are granted, so as to make it reasonably possible for competing purchasers to avail themselves of such services or facilities if they desire to do so, constitutes a failure to accord such services or facilities upon proportionally equal terms."

H. Meeting Competition

47. As previously found in paragraph 13, *supra*, respondent has used VenKard advertising continuously from its inception up to the present with the exception of a period from February, 1956 until the summer of 1957, when Mr. Muldoon temporarily suspended the use of VenKards. During the period of time when respondent did not participate in the VenKard program its machine sales decreased substantially. According to Respondent's Exhibit 3, from May 1, 1956 to May 1, 1957, its sales decreased from $789,526 to $629,242, or 19.895% less than the previous period. After the program was reinstated from March 1, 1959 to March 1, 1960, sales increased from $629,242 to $1,200,533, or 90.79% over the 1956-to-1957 period.

48. Respondent argues that if all other issues should be decided against it, its use of VenKard, even though discriminatory under § 2(d), is legally excused under § 2(b) because it must participate in VenKard to "meet an equally low price of a competitor, or the services or facilities furnished by a competitor." Respondent asserts, correctly, that the decisions in *Exquisite Form Brassiere* and *Shulton*, *supra*, have established respondent's right to prove a § 2(b) defense of a § 2(d) discrimination. However,

> * * * The seller has the burden of bringing himself within the exculpating provision of § 2(b) * * *.

See page 9 of slip opinion in *Federal Trade Commission* v. *Sun Oil Company*, decided January 14, 1963 [7 S.&D. 633], by the Supreme Court of the United States, citing *Standard Oil Co.* v. *FTC*, 340 U.S. 231. *Sun Oil* involved a § 2(a) discrimination. In that case, Justice Goldberg, in discussing the Robinson-Patman amendments to the Clayton Act, inter alia, stated:

> * * * In short, Congress intended to assure, to the extent reasonably practicable, that businessmen at the same *functional level* would start on equal competitive footing * * *. (Emphasis supplied.)

49. Inasmuch as it is undisputed that respondent used the VenKard program *from its inception*, at that point in time respondent was not "meeting" the VenKard practices of its competitors. It was in fact setting the competitive pace insofar as the use of VenKard was concerned. After having temporarily abandoned the VenKard advertising medium and suffering a substantial loss in sales, respondent re-entered the VenKard program. It seeks to justify here such § 2(d) discrimination as may be in the VenKard payments by asserting that it is "meeting competition." WHOSE COMPETITION? Other candy manufacturers such as Luden's and Curtiss? If so, that is not the "functional level" where injury to competition has been asserted here to have occurred. Competitive injury has been asserted between machine retailers vis-a-vis non-machine retailers of respondent's candy; i.e., Automatic Canteen Company vis-a-vis A & P supermarkets. If VenKard had been proven to be injurying A & P competitively vis-a-vis Automatic Canteen Company, the "functional level" at which respondent seeks to "meet competition" by using VenKard is hazy and unproven. The theory of respondent's evidence does not establish that respondent's initial use of VenKard was to "meet" competition. Respondent's temporary suspension of VenKard and reemployement of it do not confer a § 2(b) exculpation upon VenKard which it did not initially possess. See also *FTC* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (a § 2(a) case) [4 S.&D. 346].

50. Had respondent established in this record that it was using VenKard to meet the competition of its competitors, Luden's and Curtiss, such proof might excuse it under *Exquisite Form Brassiere*, *supra*. Respondent's theory is that the protection which the § 2(b) exculpation might afford respondent competing vis-a-vis Curtiss and Luden's also protects Automatic Retailers of America competing vis-a-vis Walgreen Drug Stores and Cunningham Drug Stores. This theory is not supported by any legal precedents which have come to this examiner's attention and appears to be contrary to the rationale of the U.S. Supreme Court's *Sun Oil* decision, *supra*.

51. Respondent's § 2(b) defense is rejected as having not been proven by facts in the record nor justified by legal precedents.

52. Testimony in this record, which is not as precise as it might be, is to the effect that during the period when respondent had suspended its use of VenKard its competitors, Luden's and Curtiss, took over the VenKard time that respondent released. The record does not show the extent of VenKard participation by respondent's competitors at any time; precisely what other products, other than Clark bars, actually used VenKards; and the extent to which such other products participated. The fact of other companies' participation in VenKard, insofar as the record is concerned, is chiefly by innuendo.

CONCLUSIONS

1. Respondent D. L. Clark Company, a Pennsylvania corporation, manufacturers and sells candy products, particularly candy bars, and is engaged in commerce as "commerce" is defined in the Clayton Act, as amended.

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

3. In the manufacture and interstate sale of its candy bars, respondent competes with other manufacturers of similar candy bars.

4. By participating in Richard A. Burleigh's VenKard advertising program for candy vending machines, respondent pays substantial sums to vending machine retailers of its candy, in consideration for services and facilities furnished by the said vending machine retailers, without making such payments available on proportionally equal terms to respondent's other non-machine customers.

5. The reliable, probative and substantial evidence in this record will not support a finding that any, specific, VenKard posted machine does, in fact, compete with any other non-machine retailer in the sale of respondent's candy. Some evidence in this record is to the contrary.

6. Respondent, under the rationale of *Liggett & Myers Tobacco Co.*, 56 F.T.C. 221, is excused from offering the VenKard program to its non-machine vendors because the evidence supports a conclusion that such offer to non-machine vendors would be useless and futile.

7. When it uses the VenKard program, respondent does not discriminate between various vending machine companies, i.e., it makes its VenKard program available to all vending companies on proportionally equal terms.

8. Respondent's "6-pak program" has not been proven in this record to be a legally valid alternative to VenKard for respondent's non-machine customers.

9. During the period that respondent did not participate in the VenKard program its machine sales decreased substantially and when it resumed VenKard its machine sales increased substantially. Proof that a particular form of advertising such as VenKard substantially increases retail sales does not support a conclusion that respondent must engage in VenKard to meet competition. Several elements of the "meeting competition" defense required under the law are not proven by reliable, probative and substantial evidence in this record.

However, because of the failure of proof, in this record, of competition between specific VenKard posted machines and non-machine retailers, and the preponderance of evidence that the VenKard program would not be acceptable to non-machine retailers and that, therefore, a VenKard offer to them would be useless and futile,

It is ordered, That this proceeding be and hereby is dismissed.

Order Dismissing Complaint

This matter is before the Commission upon the appeal of complaint counsel from the hearing examiner's initial decision dismissing the complaint. The Commission has determined that the present record does not constitute an appropriate basis for issuance of an order to cease and desist. Without resolving any of the issues argued upon this appeal, the Commission believes that the public interest will be sufficiently safeguarded by maintaining close scrutiny of respondent's operations to assure that they are in compliance with law. If it should appear that any future Commission action is required, the disposition now made of the instant proceeding will not stand in the way. Accordingly,

It is ordered, That the complaint be, and it hereby is, dismissed.

By the Commission, Commissioner McIntyre not concurring.

IN THE MATTER OF

BUSINESS & PROFESSIONAL, INC., ET AL.

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

Docket C-524. Complaint, July 16, 1963—Decision, July 16, 1963

Consent order requiring Roselle, N. J., collectors of debts on a commission basis in which connection they used a variety of forms to obtain information regarding delinquent debtors, to cease using on post cards such misleading terms as "REGIONAL REGISTRY BOARD" signed "———— Director", printing at the end of demand letters the titles "Legal Department", "Claims Department", and "Credit Manager", and mailing to delinquents printed forms resembling legal summons headed "Final Notice Prior to Suit".

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 Business & Professional, Inc., a corporation, and Thomas Campagna, Sallianne Campagna, and Richard N. Heale, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Business & Professional, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 613 St. Georges Avenue in the City of Roselle, State of New Jersey.

Respondents Thomas Campagna, Sallianne Campagna and Richard N. Heale are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the collection of debts alleged to be due and owing by others, upon a commission basis, contingent upon collection.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, printed forms to be mailed from their place of business in the State of New Jersey