

Complaint

IN THE MATTER OF

SUN OIL COMPANY

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

Docket 6934. Amended Complaint, April 7, 1959—Decision, Nov. 22, 1963

Order requiring one of the Nation's major integrated producers of oil and other petroleum products, to cease entering into such arrangements for fixing and maintaining resale prices as that under which it imposed upon its independent retail dealers in the Portsmouth-Norfolk-Virginia Beach, Virginia, area an alleged agency consignment agreement which was not a bona fide agency but was a fiction and a subterfuge, the primary purpose of which was to enable it to fix the retail price for its "Blue Sunoco" gasoline in the area concerned.

AMENDED AND SUPPLEMENTAL COMPLAINT

The Federal Trade Commission, having reason to believe that Sun Oil Company, a corporation, hereinafter referred to as respondent and more particularly designated and described, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Sec. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its amended and supplemental complaint, stating its charges with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent, Sun Oil Company, 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 1608 Walnut Street, Philadelphia, Pennsylvania. Respondent is now, and for several years last past, has been, among other things, engaged in the offering for sale, sale and distribution of gasoline and other petroleum products throughout some 22 states in which the respondent markets its products. Said gasoline is extensively advertised and sold under the brand name "Blue Sunoco" and enjoys wide public acceptance in such states. Respondent, one of the nation's leading producers and marketers of gasoline and other petroleum products, comprises an integrated unit in the petroleum industry. It is engaged in the acquisition, development and exploitation of oil and other petroleum products as well as the purchase, sale and transportation of crude oil, and the refining of crude oil and its derivatives, and the subsequent transportation and

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marketing at wholesale and retail of the products of its refineries in the United States, Canada and foreign countries. Respondent has refineries at Marcus Hook, Pennsylvania, and Toledo, Ohio. It also owns and operates a number of steel tank steamers in addition to leasing and operating approximately 1,400 tank cars and approximately 2,700 motor vehicles. Respondent also owns and operates various distributing plants as well as approximately 1,800 service stations in some 22 States of the United States and Canada. Sun Oil Company has approximately 8,900 outlets selling Sunoco products. In 1956 its gross sales of petroleum products totalled \$731,412,219.

PAR. 2. Respondent markets its gasoline and petroleum products through its own company-owned and operated stations as well as under contract with independent dealer stations.

Respondent in the sale of its gasoline to independent Sunoco dealers located in the Portsmouth-Norfolk-Virginia Beach, Virginia, area, as well as in other areas in different States of the United States, has entered into certain contracts or leases, now in force whereby respondent sells and delivers to such independent retail dealers all of their respective requirements of respondent's brand of gasoline during the terms of such contracts. For the purpose of supplying said customers and making deliveries pursuant to said contracts, respondent ships or otherwise transports its gasoline from its refineries across state lines to bulk stations and other distributing or terminal points in or near the specified area or areas from which it is delivered to said retail dealers. There is now and has been at all times mentioned herein, a continuous stream of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said gasoline between respondent's refineries, terminals and bulk stations and said independent retail dealers purchasing said gasoline in the areas mentioned herein. All of said purchases from respondent by the said independent Sunoco dealers are and have been in the course and furtherance of such commerce. Said gasoline is transported into Virginia and sold by respondent for resale in the Portsmouth-Norfolk-Virginia Beach, Virginia, area and other areas.

PAR. 3. Except to the extent that competition has been hindered, frustrated, lessened and eliminated as set forth in this amended and supplemental complaint, respondent has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the sale and distribution of gasoline in commerce as that term is defined in the Federal Trade Commission Act.

PAR. 4. It is now and has been for the past few years the policy of Sun Oil Company to enter into certain agreements, understand-

ings and arrangements with various of its independent Sunoco dealers located in certain areas throughout the United States whereby respondent is able to dictate or fix the retail price at which Blue Sunoco gasoline is sold to the purchasing public through such dealers.

One of the means and methods employed by respondent to enable it to dictate or fix and maintain the price of Blue Sunoco gasoline is through what is termed or designated as an Amendment to the Dealer's Agreement existing between said respondent and what has heretofore been its independent Sunoco retail dealers. This Amendment takes the form of an alleged consignment whereby respondent undertakes to place certain of these heretofore independent Sunoco retail dealers in the position of a consignee of respondent. This has the effect of terminating the said dealer's status as an independent Sunoco service station dealer for the duration of the alleged consignment agreement. Respondent's plan is referred to in some areas as the "C" plan. Under the terms of this alleged consignment plan respondent and dealer agree, among other things, that title to all gasoline delivered to said dealer will be retained in respondent; that respondent may fix the price at which said gasoline is to be sold by the said dealer to the purchasing public; and that said dealer, in return for his services, shall receive a certain designated commission on each gallon of gasoline sold. In no instance does the commission received approximate the margin of profit formerly enjoyed by such dealer and in most, if not all, instances the said dealer was an unwilling party to the arrangement, having been coerced, pressured or otherwise persuaded, through various means and methods employed by respondent, to enter into such agreement.

This alleged consignment is, in effect, a fiction and a subterfuge, the primary purpose of which is to enable respondent, through such agreement to fix and maintain the price at which its gasoline will be sold at retail, through the stations of these dealers to purchasing members of the public.

Beginning on or about November 1956, and at different times thereafter, certain Sunoco dealers located in the Portsmouth-Norfolk-Virginia Beach, Virginia, area, as well as in other areas, upon being urged, threatened, coerced or otherwise persuaded by respondent, in various ways and by different means, entered into a combination, planned common course of action, agreement and understanding with respondent under the terms and conditions of which the aforesaid consignment policy of respondent was placed into effect, maintained and carried out by said respondent and each of the said independent dealers concerned.

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PAR. 5. Pursuant to and in furtherance of the aforesaid unlawful combination, planned common course of action, understanding and agreement, respondent, acting together and in combination as aforesaid with such Sunoco dealers, agreed to fix and maintain, and did fix and maintain, the retail price at which gasoline was to be sold or was sold at retail stations of the said Sunoco dealers to the purchasing public.

PAR. 6. This alleged unlawful planned common course of action is singularly unfair, oppressive and to the prejudice of the public and respondent's competitors and retailers of gasoline in the Portsmouth-Norfolk-Virginia Beach, Virginia, area and other areas, and has a dangerous tendency to unduly restrain, hinder, suppress, and eliminate competition between and among respondent's retail dealers, and others, in the sale and distribution of gasoline in commerce within the meaning of the Federal Trade Commission Act, destroys the freedom of action that is customarily enjoyed by independent businessmen and constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT II

PAR. 7. The allegations of paragraphs ONE through sub-paragraph Two of paragraph FOUR of this amended and supplemental complaint are hereby adopted and made a part of this COUNT as fully as if set out herein verbatim.

PAR. 8. In the Portsmouth-Norfolk-Virginia Beach, Virginia, area, and other areas, there exists a number of so-called private-brand or unbranded service stations which sell gasoline at retail to the public in direct competition with respondent's Sunoco dealers and the independent dealers of other major oil companies. These unbranded or private-brand stations have been in existence for a number of years and have uniformly and consistently posted a pump price of two cents, or more, below the posted pump price of major oil company stations. This historical two cent or more differential is necessary to the unbranded or private-brand stations in order that they may compete in a market with major oil company stations having such competitive advantages as national advertising, wide public acceptance, national credit cards, and better facilities and locations. Beginning on or about November 1956, and at different times thereafter, respondent, fully aware of the aforementioned conditions, through and together with its aforesaid Sunoco dealers, adopted, placed in effect and followed a pricing policy in the Portsmouth-Norfolk-Virginia Beach area, and other areas, whereby Sunoco

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stations posted a pump price which was uniformly and consistently within one cent of the posted pump price of the aforementioned unbranded or private-brand stations. This aggressive move was in fact a predatory pricing policy entered into by respondent with the avowed purpose and intent of shrinking the historical two cent differential to the point where unbranded or private-brand competitors were unable to compete, and survive, in the market. This aggressive and predatory pricing policy of respondent had the tendency or effect of diverting substantial gallonage from the private-brand or unbranded stations to Sunoco stations and stations of other major oil companies, thus increasing respondent's share of the market, to the detriment of competition in the area, and other areas.

PAR. 9. This alleged unlawful predatory pricing practice is singularly unfair, oppressive and to the prejudice of the public and respondent's competitors and retailers of gasoline in the Portsmouth-Norfolk-Virginia Beach marketing area and has a dangerous tendency to unduly restrain, hinder, suppress and eliminate competition between and among respondent's retail dealers and the independent retail dealers located in the area, or others, and has unduly restrained, hindered, suppressed and eliminated competition therein in the sale and distribution of gasoline in commerce within the meaning of the Federal Trade Commission Act and constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Rufus E. Wilson, Mr. Ross D. Young, Jr., Mr. Daniel J. Baum, and Mr. A. M. Minotti, for the Commission.

Mr. Leonard J. Emmerglick, of Washington, D.C., and Mr. Henry A. Frye, and Mr. Richard L. Freeman, of Philadelphia, Pa., for respondent.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

MAY 17, 1962

PRELIMINARY STATEMENT

On November 8, 1957, the Federal Trade Commission issued its complaint against Sun Oil Company, a corporation (hereinafter called respondent or Sun), charging it with unfair methods of competition and unfair acts and practices in violation of § 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41 *et seq.*, by entering into an agreement or combination with

its retail dealers to fix resale prices. Copies of said complaint together with a notice of hearing were duly served upon respondent.

On April 7, 1959, after the conclusion of the case-in-chief, the Commission granted the motion, certified to its by the undersigned, of counsel supporting the complaint to amend the complaint by adding a second count charging respondent with engaging in a predatory pricing practice in violation of § 5 of the Act. Respondent appeared by counsel and filed answer denying all the substantive allegations of the complaint, including the allegation that the alleged practices were engaged in in commerce within the meaning of the Act.

Pursuant to notice hearings were held before the undersigned hearing examiner, duly designated by the Commission to hear this proceeding, at various times and places. Both prior to the commencement of hearings and after the conclusion of the case-in-chief, respondent's motions to dismiss the complaint for want of jurisdiction and want of proof were denied.

Both parties were represented by counsel, participated in the hearings and were afforded full opportunity to be heard, to examine and cross-examine the witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. Both parties filed proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof. All such findings of fact and conclusions of law proposed by the parties, respectively, not hereinafter specifically found or concluded are herewith specifically rejected.¹

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The Business of Respondent

The respondent is a New Jersey corporation with its principal office and place of business at 1608 Walnut Street, Philadelphia, Pennsylvania.

II. Interstate Commerce and Competition

Respondent is an integrated oil company engaged in the production, purchase and sale of crude oil, the refining of crude oil and its derivatives, the transportation of crude oil and refined petroleum

¹ 5 U.S.C. § 1007(b).

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products, and the sale and distribution of gasoline and other petroleum products in various states of the United States, Canada and foreign countries, including the Norfolk, Portsmouth and Virginia Beach area, in the State of Virginia. Respondent has refineries at Marcus Hook, Pennsylvania, and Toledo, Ohio, and distributes gasoline under the brand name "Blue Sunoco" through approximately 8,900 outlets in 22 states of the United States and in Canada. In 1956 respondent's gross sales of petroleum products exceeded \$731 million. Respondent markets its gasoline and petroleum products through wholesale distributors, company-owned and operated stations, and sales to independent dealer stations.

In the course and conduct of such business, respondent ships or otherwise transports its gasoline in tank cars, tankers, and trucks from its different refineries, terminals, and distribution points, located in various states of the United States, to retail dealers located in the Norfolk, Portsmouth and Virginia Beach area and in various other states of the United States. Respondent itself is, of course, engaged in interstate commerce and so concedes. In addition, it is well-established that such sales of gasoline and petroleum products to retail dealers are in interstate commerce.² However, Sun contends that the practices alleged in the complaint are not in interstate commerce within the meaning of the Act. Count I of the complaint alleges that an agency consignment agreement entered into between Sun and its dealers was a fiction or subterfuge, and was in fact an agreement or combination to fix the resale price of gasoline. Respondent contends that because such resales are local and intrastate, an agreement or combination fixing such prices is not in commerce. Count II of the complaint alleges that, assuming the consignment agreement was valid and title to the gasoline remained in Sun, Sun engaged in a predatory pricing practice with the purpose and effect of destroying or substantially lessening competition. With respect to this count, Sun contends that its sales at retail were not in interstate commerce because they were local and intrastate.

With respect to the first Count, for the reasons adverted to in the orders denying the motions to dismiss the complaint, it seems well-established that an agreement or combination between Sun and its dealers fixing the retail resale prices is in interstate commerce, as that term has been interpreted by the courts. While it may be that the sales of such dealers are not in interstate commerce (although there are some rulings to the contrary), the agreement or combination concerning the resale prices was made prior to the sale by re-

² *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951).

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spondent to the dealers. As noted above, such sales are definitely in interstate commerce. While the alleged price-fixing concerns retail sales made by the independent dealers, respondent is a party to the transaction and indeed the principal proponent and beneficiary thereof, and the agreement or combination concerns gasoline which moves in interstate commerce from respondent to the dealers. It is apparent that the price-fixing conspiracy or combination concerns a product which, without respondent, who admittedly moves it in interstate commerce, would not be available to the dealers who sell it locally. The resale prices are fixed by agreement or combination in advance of the movement of the product in interstate commerce, even though at the time of resale the product may have come to rest and no longer be in interstate commerce.

Upon substantially similar facts, a federal court has decided that such price-fixing, in advance of a sale in intrastate commerce, concerning products which move in interstate commerce prior to such sale, constitutes an unlawful interference with that commerce.³ The Supreme Court has decided that it is unlawful to fix local prices through the use of interstate commercial transactions.⁴ In addition, the Supreme Court in the *Cement Institute* case held that the Commission has authority under § 5 to restrain a price-fixing conspiracy involving some parties in interstate commerce and other parties not engaged in interstate commerce.⁵

In *Moore v. Mead's Fine Bread*,⁶ the Supreme Court held that local intrastate price-cutting and discrimination designed to injure or destroy a local competitor, even though purely intrastate in character, was a violation of the Clayton Act when engaged in by one also engaged in interstate commerce, because the effect was to tend to monopoly and substantially to lessen competition locally through the use of the power of the organization engaged in interstate commerce. In *Dr. Miles*, *Beech-Nut*, and *Parke, Davis*,⁷ the lower courts and the Supreme Court had no difficulty in concluding that an agreement or combination to maintain retail resale prices was in commerce, even though such retail resales were, as here, intrastate.

With respect to the second count, which assumes that the sales at retail were by Sun itself, such sales would be part of the flow or

³ *United States v. Food & Grocery Bureau of Southern California*, 43 F. Supp. 966 (D.C. S.D. Cal. 1942).

⁴ *United States v. Frankfort Distilleries*, 324 U.S. 293 (1945).

⁵ *FTC v. Cement Institute*, 333 U.S. 683 (1948). See also, *Standard Container Mfg. Assn. v. FTC*, 119 F. 2d 262 (5th Cir. 1941).

⁶ 348 U.S. 115 (1954).

⁷ *Dr. Miles Medical Co. v. Parke & Sons Co.*, 220 U.S. 373 (1911); *FTC v. Beech-Nut*, 257 U.S. 441 (1922); and *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

stream of commerce from the refinery to the customer, and as such clearly would be in interstate commerce for the reasons enunciated by the Supreme Court in the *Standard Oil* case.⁸ It is concluded and found that the activities and practices alleged in both counts of the complaint were in commerce within the meaning of the Act.

In the course and conduct of its business, including its sales to retail dealers and direct sales to the consuming public, respondent is in direct and substantial competition in commerce with other corporations, individuals and partnerships likewise engaged in the sale and distribution of gasoline.

III. The Unlawful Practices

A. The Issues

The amended complaint contains two counts. Count I alleges that an agency consignment agreement between Sun and its dealers was a fiction and subterfuge, and in fact was an agreement or combination to fix the resale prices of gasoline. Count II alleges that, assuming such consignment agreement created a valid agency, Sun engaged in a predatory pricing practice for the purpose of destroying competition or competitors, with the effect of unduly restraining and lessening competition.

B. Background Facts

1. The market area involved in this proceeding is comprised of the metropolitan areas and contiguous territory of the cities of Norfolk, Portsmouth and Virginia Beach, Virginia, hereinafter referred to as the Norfolk area. The period of time encompassed by the complaint is from November 1956 through April 1959.

2. The nature of competition in the market area was somewhat unusual because of the presence of more than 12 military exchanges selling major-brand gasoline at prices substantially below those prevailing in the Norfolk area. In 1956 there were 12 such Navy exchange stations plus several other PX stations. They normally posted prices which were from four to five cents below the prevailing prices of major brands for regular gasoline. However, only authorized military personnel and their dependents could purchase at such exchange stations. During the relevant time period, with a universe of approximately 100 million gallons of gasoline a year in the Norfolk area, the Navy exchanges accounted for approximately 8 million gallons thereof.

⁸ Footnote 2, *supra*.

In addition to the Naval exchanges, in 1956 there were 21 private-brand stations in the area. They normally and customarily posted a price for regular gasoline two cents below the prevailing price at the stations of the major oil companies. The private-brand stations accounted for about 9 million gallons of the same universe. At the time of the hearings herein, Sun accounted for approximately 7 million gallons of the total sales in the area. The large share of the market accounted for by the military exchange stations was a circumstance not usual in other areas.

In purchasing gasoline wholesale, the military exchanges received a discount from the tankwagon price (the posted price to dealers and commercial users) of approximately 3.69 cents per gallon, and the private-brand operators received a discount of approximately 3 cents net from the tankwagon price. The area was an unstable market in which depressed prices occurred spasmodically. There were occasional price wars, and a price disturbance in one section, in time, usually would spread throughout the entire area.

3. Sun entered the gasoline market in the Norfolk area in 1946. Sun marketed its gasoline exclusively through a wholesale distributor, Taylor. Taylor sold Sun gasoline at prices equal to the lowest posted by the private-brand operators. As a result, the purchasing public did not think of Sun's gasoline as a major brand, and was accustomed to purchasing it at the same price level as the private brands. In 1951, Taylor's share of the overall market was approximately 7.4 percent; in 1952, approximately 6.5 percent; and in 1953, approximately 7 percent.

4. In July 1954, Taylor was operating 34 stations with an overall gallonage of approximately 723,000 gallons per month, or an average of 21,272 gallons per station. In September 1954, Sun took over the operation from Taylor. Sun began to open its own stations, leased to independent dealers, and operated as a major, with its dealers and company-operated stations generally posting the prices prevailing at the stations of the other major oil companies. At the time Sun took over from Taylor he had about 6 percent of the overall market. Sun commenced operations with substantially fewer stations and its share of the market declined substantially from that enjoyed under Taylor. In addition, Sun was handicapped by the aforesaid public concept, and the public being accustomed to a price similar to that posted by the private brands, i.e., two cents or more below the prevailing major prices.

During early 1955, with from twelve to fourteen stations, Sun averaged about 20,000 gallons per station. Sun gradually increased its number of stations. Near the end of 1955 it had 20 stations selling

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approximately 300,000 gallons a month, or an average of 15,000. Sun accounted for about 2.65 percent of the market in 1955. By October 1956, Sun had 29 stations selling approximately 391,000 gallons, or an average of 13,488 gallons per station. Sun accounted for approximately 3.85 percent of the overall market in 1956. Although never reaching the gallonage sold under Taylor, Sun's share of the market gradually increased from its time of entry in 1954 to November 1956. However, its gallonage per station was declining as the number of stations increased.

5. After taking over from Taylor and prior to November 5, 1956, Sun sold its gasoline to retail dealers, who were independent contractors operating filling stations. Sun and such independent dealers entered into contracts providing for the sale of gasoline and other petroleum products by Sun to the dealers, and also entered into leases of the stations from Sun to the dealers. The agreements required the purchase of specified minimum amounts of gasoline. The leases contained a specified base monthly rental plus an additional rent of one-half cent per gallon sold. The computation of the specified base rental was based upon Sun's estimate of the potential gallonage the station might be expected to sell. Such estimates (and hence such base rental figures) were in all instances substantially in excess of the actual gallonage achieved. At nearly every station the actual gallonage sold was approximately one-half of the estimated potential. As a result, the stated base rental in each lease was substantially in excess of what it would have been, computed on the basis of the actual gallonage, and substantially in excess of what a dealer could afford to pay.

The leases were for year-to-year periods. At the time of the execution of the original lease, and every three months thereafter, an amendment to the lease was executed, reducing the base rent to a figure in most cases slightly less than half of the base rent set forth in the lease. In the event that such a quarterly amendment to the lease was not entered into, the rent set forth in the original lease immediately became effective. This situation gave Sun a potential power of coercion over its dealers because, if a quarterly amendment was not executed, the rental immediately more than doubled, which would probably force the dealer out of business. This could occur if the dealer declined to execute such a quarterly amendment to the lease, or if Sun chose not to execute such an amendment for any reason, including lack of cooperation.

6. Sun originally conceived and adopted its commission consignment plan in 1953 in other areas of the United States. As set forth in Sun's policy directives, the plan originally was designed to assist

individual dealers in isolated cases of depressed prices. Sun used it in the Norfolk area for a two-week period in April of 1956 without agreement of the dealers.

C. The Price-Fixing Agreement or Combination

1. During late October and early November 1956, a localized price disturbance occurred in Norfolk on upper Hampton Boulevard in a few blocks stretch near the seven military exchange stations clustered in that area at the Naval Base. Several major stations, namely, Cities Service, Esso, Pure, Shell and Texaco, posted prices three cents under the major price generally prevailing in the Norfolk area. There was one Sun station located in the same general neighborhood.

2. On November 5, 1956, as a result of this price disturbance, Mr. Southard, Norfolk District Manager of Sun, called all of the Sun dealers to a meeting at his office. Southard explained the details of Sun's commission consignment plan to the dealers, pointing out to them the situation on Hampton Boulevard, the declining gallonage per station, the fact that Sun had not achieved a share of the market comparable to that enjoyed under Taylor, the need to be more competitive in price with the military exchange stations and the private-brand stations, and indicating the probable necessity in the near future of Sun's posting a price within one cent of the prevailing private-brand price and an intention of maintaining such a differential no matter how low the private brands might reduce their prices.

Southard explained to the dealers that under the consignment plan they would be company agents for the sale of gasoline only, the company would retain title to the gasoline, establish the prices to be posted, and pay the dealers a minimum commission of four and one-half cents per gallon. This was 1.6 cents less than the 6.1-cent margin the dealers were then receiving. Primarily for this reason most of the dealers were opposed to the consignment plan. However, economically they had no other choice. While Sun gave them the alternative of accepting commission consignment or continuing to purchase gasoline at the established tankwagon price and posting whatever retail price they saw fit as independent dealers, because Sun intended to reduce the posted price at its own stations and those which went on consignment to 27.9 cents, and the tankwagon price was 24.8 cents and was to remain unchanged, the dealers who rejected consignment and continued to post a price of 30.9 cents would be unable to achieve sufficient gallonage to survive, while those who met

the price of 27.9 cents would realize a margin of only 3.1 cents per gallon, less than the 4.5-cent minimum commission offered by Sun.

3. In view of the above economic realities, as well as the power inherent in Sun through the quarterly amendments to the basic lease rentals and the contractual requirement to purchase a specified minimum amount of gasoline referred to above, the bargaining between Sun and the dealers concerning commission consignment was hardly as equals.

4. Except for the price disturbance on upper Hampton Boulevard the prevailing major price in the Norfolk area was 30.9 cents, the prices at the military exchanges were 25.9 cents in Norfolk and 26.9 cents in Portsmouth, and the prevailing private-brand price was 28.9 cents. Although the price disturbance was limited to upper Hampton Boulevard, and therefore had little if any effect on any of the Sun stations other than the one in that neighborhood, the nearest being approximately three miles away while the Sun stations in Virginia Beach were over 20 miles away, and such other dealers did not need or want assistance, Southard advised the dealers that Sun intended to adopt the consignment plan throughout the entire Norfolk area and reduce the price to 27.9 cents, that posted by the other majors on upper Hampton Boulevard.

5. The proposed consignment agreement constituted a written amendment to the sales agreement. By its terms it purported to retain title to the gasoline in Sun, provided for deliveries of gasoline to the dealer upon consignment as an agent, Sun fixed the prices at which the gasoline was to be sold, and until August of 1957 the amendment contained a specified minimum commission. At that time Sun dropped the stated minimum commission fee from the consignment contracts, which were amended to provide that it was to be in the discretion of the company. Sun purchased the gasoline already in the dealers' tanks. The gasoline in the tanks was measured each time the posted price was changed by Sun, and the dealers were required to account for that sold at the previous price.

Under this arrangement, the dealer purportedly acted as a commission agent in the sale of gasoline although he remained an independent dealer in the sale of all other products and services. The dealers were required to segregate the funds from the sale of gasoline, but in fact never did so. All risk of loss or shortage was on the dealer. Collateral deposit agreements which the dealers previously had entered into as independent contractors to secure the payment of certain indebtedness were amended also to secure Sun for the payment of the consigned gasoline. The consignment agreements

were terminable on five days' notice except for defaults which made them terminable upon 24 hours' notice.

6. All of the dealers except Mr. Williams in Portsmouth, who owned his own station, accepted commission consignment on November 5, 1956. On November 6, although the price disturbance was limited to upper Hampton Boulevard, Sun posted a price of 27.9 cents throughout the entire area. The nearest private-brand station to the area of disturbance was a Stallings station $3\frac{1}{2}$ miles south on Hampton Boulevard. At that time the generally prevailing price of the private brands was 28.9 cents. Sun's area-wide reduction necessarily had the effect of spreading the price war throughout the entire area. Within a few days the other major dealers met Sun's price and the private-brand operators reduced their prevailing price to 25.9 cents, attempting to restore the 2-cent differential. Prices continued to decline for several months. Each time that Sun and the other majors reduced their prices, the private brands in general posted a price two cents lower. However, in the latter part of March 1957, the private brands apparently gave up the fight and posted one cent below Sun's prevailing prices, which then were 26.9 in Norfolk and 24.9 in Portsmouth. Shortly thereafter, in April, the prices at most Sun stations returned to the pre-price-war level of 30.9, and the private brands posted at a price of 29.9.

7. After the adoption of commission consignment, Sun's gallonage increased overall and at nearly all of its stations. During 1957 Sun's share of the market was 4.15 percent and during 1958 it was 4.25 percent. By June of 1959 Sun had increased the number of its stations to 32 and its gallonage to approximately 567,000 gallons per month, or an average of 17,715 gallons per station.

8. Although their gallonage increased, most of the dealers were financially hurt rather than helped, because the increased gallonage was more than offset by the decreased amount received per gallon plus the increase in cost necessitated by pumping the additional gallonage. Prior to November 6 their margin had been 6.1 cents per gallon. With a commission of 4.5 cents, they were receiving 1.6 cents less per gallon. Under a commission of 4.5 cents per gallon, the dealer bore more than half of the cost of the reduction to 27.9 cents, the price posted by Sun at the inception of the plan. At this price and commission, the dealers lost 1.6 cents per gallon while Sun realized 1.4 cents less per gallon, of the 3 cents reduction in price from 30.9 to 27.9 cents. Increased gallonage but decreased income did not help the dealers but it did increase Sun's share of the market.

The average increase in gallonage per station was less than 4,000

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gallons. Even if the gallonage increased as much as 4,000 gallons a month, any dealer with a prior average gallonage of 11,250 gallons or more lost money under the commission consignment plan. With an increase of 4,000 gallons a dealer previously selling 11,250 gallons gained \$180, 4.5 cents per gallon on the extra 4,000 gallons, but lost \$180, 1.6 cents difference on the 11,250 gallons. With the added labor cost of increased pumping, he suffered a loss. As noted above, the average dealer gallonage in 1956 prior to consignment was approximately 13,500 gallons. At 13,500 gallons a dealer netted \$823.50, yet with a 4,000-gallon increase after commission consignment he would net only \$787.50.

A tabulation in the record reveals specifically what happened to most of the dealers. For example, although dealer Bates sold 1,800 more gallons of gasoline in November than in October, his net commission was \$172 less than his margin in October. Although he sold about 300 gallons more in December than in October, his commissions netted him \$236 less. Dealer Hudgins pumped about 4,400 more gallons in November, yet netted \$163 less. He pumped only 300 gallons less in December than in October, yet his gross income declined \$378. Dealer Stone pumped the same gallonage in December as he had in October, yet under the plan his commissions amounted to \$490 less than his margin of profit in October.

9. Williams, the only dealer who refused commission consignment, held out for a few months. He was required to pay the tankwagon price of 24.8 cents. Sun and the other majors in his neighborhood reduced the posted prices to 24.9 cents, at which price he would have netted one-tenth of a cent per gallon. Williams posted 29.9 cents, and necessarily sold very little gasoline. On February 1, 1957, he gave up and accepted commission consignment.

10. To some extent a tankwagon reduction in price only would have reduced the prevailing retail price without benefit to the marketer, because the military exchanges and some of the private-brand operators purchased their gasoline at a fixed discount below the tankwagon price.

11. A survey by Sun prior to its decision to adopt the consignment plan indicated that Sun was not getting a "normal" share of the market at posted prices of 30.9 or 31.9, but that it could do so at 29.9. This would have been within one cent of the price posted by the private brands.

12. The adoption of the plan on November 5 was contrary to the stated purpose set forth in Sun's written policy directives concerning

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its use. Those directives in effect on November 5, 1956, provided, *inter alia*:

Where a dealer is confronted with depressed price conditions that affect his net profit to such an extent it becomes impossible for him to continue operations on a normal basis, the plan * * * may be offered to him.

* * * * *

In these cases, if we should offer this plan to any one dealer, we must make it available to all dealers in the "same competitive marketing area" (i.e., an area in which all Sunoco dealers are faced with the same competitive pricing conditions).

Dealers should not be offered the plan in anticipation of a depressed price condition which later *might* require assistance on the part of the Company. The plan should be offered only where the dealer will immediately benefit (i.e. will enjoy a higher commission than the margin he could realize on a tank-wagon basis).

It is clear that the plan did not conform to this policy. Instead of benefiting the dealers financially it cost them money. The directive provides that it should be offered *only* where the dealer will immediately benefit by enjoying a higher commission than the margin he could realize. On the contrary, the dealers received 1.6 cents less than the margin they were receiving. Also contrary to the policy directive, the plan was inaugurated in anticipation of a price condition which later might require assistance. As found above, most of the dealers neither wanted nor needed assistance.

13. As found above, one part of the lease rental consisted of the payment of one-half cent a gallon on all gasoline sold in a month. The leases contained a provision that this part of the rent "represented the value of those portions of said demised premises suitable for the storage and dispensing of gasoline and motor fuel". Although purportedly title to the gasoline was retained by Sun and the dealers were acting only as agents, nevertheless this provision of the lease was never amended. The dealers continued to pay one-half cent a gallon rent to store and dispense gasoline.

14. The original sales contract contained a provision that the dealer was required to operate the station under his own name, post a sign with his name and the word "Proprietor" thereon, and not represent the business as an agency of Sun or himself as an agent of Sun. This provision was not amended by the consignment amendments.

15. Under local law the dealers were required to pay a retail merchants' license to sell gasoline. After the adoption of commission consignment, they continued to pay this license or tax until 1958, when Sun began to pay it after the tax officials called it to Sun's

attention. Sun did not refund the license payments theretofore made by the dealers.

D. The Alleged Predatory Pricing Practice

The record contains no substantial evidence that the private brands lost gallonage or share of the market after the adoption of the consignment plan. On the contrary, it contains affirmative evidence that the private brands did not suffer competitively from the one-cent differential. The record establishes that many private brands had better locations, facilities and services than many of the major stations, sold either identical gasoline or gasoline of equal quality, gave coupons and other discount premiums, enjoyed greater gallonage per station, possessed a larger share of the overall market than Sun, and from the time of the adoption of the consignment plan to 1960 increased in number from 21 to 26 stations. The record contains no proof of predatory price-cutting, i.e., selling at unreasonably low prices (such as selling below cost or below a competitor's cost), for the purpose of destroying competition or eliminating a competitor.

CONCLUSIONS

I. The Price-Fixing Agreement or Combination

As hereinabove found, the allegations of Count I of the complaint embrace both an agreement or conspiracy to fix resale prices through the fiction or subterfuge of commission consignment agreements, and, sans agreement, a plan or combination to fix such resale prices by means of commission consignment. It is respondent's position that the commission consignments were genuine agency contracts entered into for the bona fide purpose of assisting its dealers in a depressed price or price war situation. Of course it is well settled that price-fixing agreements are illegal *per se* regardless of their purpose and hence in this respect consideration of purpose or intent is immaterial. However while on its face the commission consignment agreement constituted the creation of an agency relationship between Sun and its dealers the complaint alleges it was a fiction and subterfuge and in fact an agreement to fix resale prices or a plan or combination for the same purpose. In evaluating whether or not the consignment arrangement was a fiction or subterfuge, it becomes pertinent to consider its purpose and intent.

The record reveals clearly and it has been found that, contrary to respondent's contention and its stated policy requirements, the pro-

gram was not a bona fide attempt to assist the dealers financially. Instead it was adopted to enable Sun to post uniform lower retail prices throughout the area, increase its share of the market, and attempt to reduce the differential between Sun and the private-brand operators to one cent a gallon. It hurt the dealers financially instead of assisting them. Almost all of the dealers neither wanted nor needed assistance, and were opposed to the plan, but the economics of the situation as well as the contractual power possessed by Sun left them no alternative except to go out of business. If the plan had been adopted in good faith to assist the dealers financially in meeting depressed prices in individual situations, instead of to enable Sun to post a uniform area-wide price reduction and attempt to increase its market share, it would not have been necessary for Sun to adopt it throughout the entire area.

In addition, Sun could have offered the dealers a choice between accepting consignment with a guaranteed minimum commission, or buying at an equivalent tankwagon price. Under the program adopted, Sun originally posted a price of 27.9 cents and gave a commission of four and one-half cents. Thus Sun's net was 23.4 cents per gallon, which in effect became its tankwagon or wholesale price. Sun could have given the dealers the alternative of a tankwagon price of 23.4 instead of 24.8, and permitted them to elect what price to post as needed competitively. It seems apparent that this alternative, which would have assisted each dealer and permitted him to select an appropriate price and margin, was not adopted because it would not have enabled Sun to fix a uniform price throughout the area and post a price one cent above the private brands, and because the dealers unaffected by the price disturbance would in all probability continue to post a price of 30.9 cents, and in any event not within one cent of competitive private brands.

The election offered was only in theory and not in reality. Clearly there was no real choice between accepting commission consignment and economic failure. Instead of assisting the dealers as claimed, the program forced them to bear part of the costs of the plan to increase Sun's gallonage. Because of the power inherent in Sun as a result of its sales contracts and leases with its dealers, as well as their inability to compete with Sun at its lower prices if they purchased gasoline at the prevailing tankwagon price, the dealers were economically coerced into accepting commission consignment. Under somewhat similar circumstances in the *General Motors* case,⁹ the court found a conspiracy among General Motors and its independent

⁹ *United States v. General Motors Corp.*, 121 F. 2d 376 (7th Cir. 1941).

dealers to use GMAC financing to the exclusion of all others, because the economic power of General Motors over its dealers left them no other choice. It is concluded and found that the agency plan was not adopted in good faith to assist the dealers.

In the light of the decisions of the Supreme Court, it makes little difference whether this arrangement be construed as a contract, agreement or conspiracy to fix resale prices, or as a plan or combination without agreement to fix prices achieving the same result. The Court has held both to be violations of the Sherman Act and unfair methods of competition in violation of § 5, because of their dangerous tendency unduly to lessen competition. If the agency consignment agreement be regarded as a fiction or subterfuge and in fact an agreement to fix prices, such agreements are illegal *per se*. As the Supreme Court stated in *Socony-Vacuum*:¹⁰

* * * Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference.

* * * * *

Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price-fixing as used in the *Trenton Potteries* case has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used. * * * Hence, prices are fixed within the meaning of the *Trenton Potteries* case if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon * * *.

As far back as 1911, before the Supreme Court's decisions in the *Standard Oil* and *American Tobacco* cases,¹¹ the precursors of modern antitrust law, the Court in *Dr. Miles*¹² found a similar agency consignment arrangement between a manufacturer and its dealers an agreement to fix resale prices. In that case a manufacturer of patent medicines entered into contracts with its wholesalers and retailers purporting to make them agents, consigning the goods to them and fixing minimum resale prices. The manufacturer required each "agent" to resell at fixed prices whether the products were secured

¹⁰ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

¹¹ *Standard Oil Company v. United States*, 221 U.S. 1 (1911), and *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

¹² *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373 (1911).

from the manufacturer or obtained from other wholesalers or retailers. The Court found the arrangement to be a sale and not an agency, and hence a restraint of trade in violation of the Sherman Act.

If the agency consignment agreement be regarded as a plan or combination designed to fix resale prices, without any agreement, express or implied, to do so, such a plan or combination has been held to be an unfair method of competition and indeed a violation of the Sherman Act. Probably the most pertinent and controlling reference is the Supreme Court's decision in *Beech-Nut*,¹³ where the Court found a plan or policy to control resale prices of dealers, without any agreement, express or implied, an unfair method of competition in violation of the Act. In that case the manufacturer adopted a program or policy designed to control the resale prices of its dealers at minimum levels fixed by the manufacturer. The parties expressly stipulated that there was no contract or agreement. The Court held that such a plan or policy had the same effect as an agreement to fix resale prices, and was against public policy as expressed in the Sherman Act. The Court stated:

If the "Beech-Nut System of Merchandising" is against public policy because of its "dangerous tendency unduly to hinder competition or create monopoly", it was within the power of the commission to make an order forbidding its continuation. We have already seen to what extent the declaration of public policy, contained in the Sherman Act, permits a trader to go. The facts found show that the Beech-Nut system goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the *Colgate Case* was held to be within the legal right of the producer.

The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the antitrust acts to maintain. In its practical operations it necessarily constrains the trader, if he would have the products of the Beech-Nut Co., to maintain the prices "suggested" by it. * * *

From this course of conduct a court may infer, indeed cannot escape the conclusion, that competition among retail distributors is practically suppressed, for all who would deal in the company's products are constrained to sell at the suggested prices. * * * Nor is the inference overcome by the conclusion stated in the commission's findings that the merchandising conduct of the company does not constitute a contract or contracts whereby resale prices are fixed, maintained, or enforced. The specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose.

¹³ *FTC v. Beech-Nut*, 257 U.S. 441 (1922).

It seems clear and is found that Sun's commission consignment plan herein constituted a scheme or device, by which respondent was enabled to control and fix the resale price of its products, "quite as effectual as agreements express or implied intended to accomplish the same purpose". As in *Beech-Nut*, that competition among retailer distributors was practically suppressed is an inescapable conclusion.

Several subsequent decisions of the Supreme Court have noted that the plan or policy in the *Beech-Nut* case was there found to be a combination in violation of the Sherman Act as well as an unfair method of competition. In the recent *Parke, Davis* case¹⁴ the Court found a similar plan of maintaining or fixing the resale prices of the company's products a combination in violation of the Sherman Act, absent any agreement express or implied to do so. The Court stated:

The Court [in *Beech-Nut*] held further that the nonexistence of contracts covering the practices was irrelevant since "the specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers which are quite as effectual as agreements express or implied intended to accomplish the same purpose."

The Court further stated:

That *Beech-Nut* narrowly limited *Colgate* and announced principles which subject to Sherman Act liability the producer who secures his customers' adherence to his resale prices by methods which go beyond the simple refusal to sell to customers who will not resell at stated prices, was made clear in *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 722 * * *.

In other words, an unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declaration to sell to a customer who will not observe his announced policy. * * * Thus, whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used.

In addition to the principles already discussed, the Supreme Court has made it clear that agreements, conspiracies, or combinations which give a party or the parties the power to fix, maintain or stabilize prices, as distinguished from agreements to fix, maintain or stabilize prices, are also in violation of the Sherman Act and illegal *per se*. In the *Ethyl Gasoline* case,¹⁵ the defendant patent holder licensed the various oil companies to make and sell ethyl gasoline at fixed prices, a right of a patent holder. However, the defendant also entered into a system of licenses with all jobbers as well, without which they could not purchase, so that the defendant was enabled to

¹⁴ *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

¹⁵ *Ethyl Gasoline Co. v. United States*, 309 U.S. 436 (1940).

control their purchases and resale prices of ethyl gasoline by refusing or cancelling licenses. The jobber licenses fixed no prices but gave the defendant the power to do so, which power was used to stabilize resale prices. The Court held that such agreements giving one the power to fix or control resale prices were illegal *per se*, just as were agreements actually fixing such prices.

In the *Socony-Vacuum* case¹⁶ the Court held that any agreement which affects prices in any way, such as raising, lowering, stabilizing or tampering with them, is illegal *per se* whether or not it fixes any prices specifically or at set levels. There the defendant oil companies entered into an agreement to buy spot market distress gasoline in order to stabilize spot market prices, with a consequent firming up of jobber and retail prices. The agreement did not fix any specific jobber or retail prices, but had the effect of stabilizing them or preventing their decline. Even though it was found that there was still price competition in jobber and retail sales, the agreement was held illegal *per se*. In the present case it is clear that the agency consignment agreements, in addition to constituting both agreements to fix resale prices and a combination designed to achieve the same purpose, also gave Sun the power to fix resale prices.

Respondent contends that its commission consignment agreements constitute bona fide agency contracts and hence are not unfair methods of competition, in reliance upon the *Curtis Publishing* and *General Electric* decisions¹⁷ of the Supreme Court, principally the latter. If the agreements constituted bona fide agencies the gasoline would, of course, be Sun's. Admittedly, a trader has a right to select or fix the prices at which he sells his own product, absent other considerations not here pertinent. The *Curtis* case involved contracts between Curtis and its distributors, formerly wholesalers and retailers, under which they were made agents for the sale of the respondent's publications. The charge involved was exclusive dealing in violation of § 3 of the Clayton Act. The Supreme Court found that the arrangement was a bona fide agency and hence could not be in violation of § 3.

In the *General Electric* case, the company, holding patents on its light bulbs, entered into agreements with its former dealers, making them *del credere* agents and consigning its products to them to sell as agents. The Court held that there was no evidence that the agency was not created in good faith and actually maintained. In both the *General Electric* and *Curtis* cases, as distinguished from the

¹⁶ Footnote 10, *supra*

¹⁷ *FTC v. Curtis Publishing Co.*, 260 U.S. 568 (1923); and *United States v. General Electric*, 272 U.S. 476 (1926).

situation here, the former dealers had handled many products other than those of the respondent and clearly had a bona fide economic choice whether to remain independent dealers in such other products or become agents for the respondent. Here, as in the *General Motors* case, the dealers had no economic alternative except to go out of business.

In a more recent decision, the Supreme Court found an agency system designed to fix prices, similar to that established in *General Electric* and herein, an agreement or conspiracy to fix prices in violation of the Sherman Act.¹⁸ Masonite, the holder of a patent on hardboard, entered into agency agreements with competitors under which they were made *del credere* agents, the product was shipped on consignment, title remained in Masonite, and Masonite established the prices at which the product was to be sold. The Court disregarded the agency and found an agreement to fix prices in violation of the Sherman Act. The Court stated, *inter alia*:

So far as the Sherman Act is concerned, the result must turn not on the skill with which counsel has manipulated the concepts of "sale" and "agency" but on the significance of the business practices in terms of restraint of trade.

While *Masonite* involved competitors rather than vertical customers, unlike *General Electric* and the present case, the Supreme Court has stated clearly that the elimination of competition among retail distributor purchasers by price-fixing is illegal *per se*, just as is such price-fixing among competitors.

In the *Richfield Oil* case,¹⁹ involving exclusive dealing agreements and a contention by the defendant that its dealers were agents, Judge Yankwich cited and relied upon the decision in *Masonite* in finding that the dealers were not in fact agents. He stated:

In interpreting this and other statutes, we must eschew the tyranny of words or labels. We must, in each case, get behind the facade which the organization has created—as did the Supreme Court in the *Masonite* case, when it went behind a *del credere* agency which, at first blush, seemed to be a fiduciary relationship established by the concern for its own purposes, and found, instead, a means for monopolization. The Court did not then hesitate to declare the agency a mere cloak for restraints.

Granted that a business may create its own outlets, it can do so only by making them *its agents in truth and fact*. It cannot do so by creating a well-recognized legal estate, superimpose on it oral limitations, the object of which is to restrain trade, and then claim legitimacy for this very restraint.

It is concluded and found that the agency consignment agreement was a fiction or subterfuge, not a bona fide agency, and in fact con-

¹⁸ *United States v. Masonite*, 316 U.S. 265 (1941).

¹⁹ *United States v. Richfield Oil Co.*, 99 F. Supp. 280 (S.D. Cal. 1951); *aff'd. per curiam*, 343 U.S. 922 (1952).

stituted an agreement or conspiracy among Sun and its dealers to fix resale prices, and to give Sun the power to do so, in violation of the Act. It is further concluded and found that such an agency consignment agreement, absent any agreement express or implied to fix resale prices, constituted an unlawful plan or combination to do so and an unfair method of competition in violation of the Act.

II. The Alleged Predatory Pricing Practice

As noted above, Count II of the complaint alleged that Sun, assuming that title to the gasoline remained in it as a result of the agency contracts, engaged in predatory price-cutting by reducing its retail prices to one cent above the prevailing retail prices of the private-brand operators, with the tendency or effect of increasing Sun's sales and unduly lessening competition. There is no allegation in the complaint or proof in this record that this pricing was discriminatory or in violation of § 2(a) of the Clayton Act, and accordingly there is no issue of price discrimination. Apparently this count is based upon the policy enunciated in § 3 of the Robinson-Patman Act, which prohibits, *inter alia*, selling goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Absent discrimination or predatory price-cutting prohibited by § 3 of the Robinson-Patman Act, it is not unlawful for a seller to reduce his price and thereby increase his sales or share of the market. This is ordinary price competition which the antitrust laws are designed to protect. Obviously a seller who reduces his prices normally will enjoy increased sales unless and until his price is met by his competitors. Such action, the very essence of competition, might well have the effect of reducing the sales of his competitors, although, as found above, this record does not establish that the private-brand operators lost any sales and in fact there is substantial evidence that the price reduction of Sun did not affect the private-brand operators competitively. Counsel supporting the complaint cite no cases, and it is believed there are none, which prohibit a trader from making a nondiscriminatory, unilateral, non-predatory price reduction. As the Supreme Court observed in *Line Material*,²⁰ a case involving a price-fixing conspiracy:

* * * Whatever may be the evil social effect of cutthroat competition on producers and consumers through the lowering of labor standards and the quality of the product and the obliteration of the marginal to the benefit of the surviving and low-cost producers, the advantages of competition in opening rewards to management, in encouraging initiative, in giving labor in each

²⁰ *United States v. Line Material Co.*, 333 U.S. 287 (1948).

industry an opportunity to choose employment conditions, and consumers a selection of product and price, have been considered to overbalance the disadvantages.

An analysis of the court decisions dealing with predatory price-cutting, including the primary line or area price discrimination cases which involve area price reductions which adversely affect the price-cutter's local competitors, reveals that in such cases the courts uniformly have found the presence of price-cutting in a local area, below one's own or one's competitor's costs with the object or effect of driving such competitor out of business, and the financing of such local losses by means of profits derived from other areas. No case holds that unilateral, nondiscriminatory and non-predatory price reductions are illegal. Predatory pricing refers to selling at unreasonably low prices for the purpose of destroying competition or eliminating a competitor, as prohibited in § 3 of the Robinson-Patman Act. The courts in such cases have construed "unreasonably" low prices to mean selling below one's own costs or a competitor's costs, which necessarily if continued would drive the competitor out of business.²¹

Counsel for respondent argue that § 3 of the Robinson-Patman Act is a criminal, not an antitrust, statute, and hence a violation thereof would not be an unfair method of competition. It seems clear that if violations of the Clayton and Sherman Acts are unfair methods of competition, which has been held several times by the Supreme Court, because such Acts reflect the public policy of the Congress, certainly a method of competition which has been declared by Congress to be criminal is against public policy and *a fortiori* an unfair method of competition. In fact, the courts have held such predatory price-cutting to be in violation of the Sherman Act and "unfair methods of competition". Even before the passage of the Federal Trade Commission Act and the use of the term "unfair method of competition", the Supreme Court in 1911 in the *Standard Oil* case,²² *supra*, at page 43, specifically held local price-cutting to suppress competition an "unfair method of competition". During the same term the Court, in the *American Tobacco* decision,²³ at page 160 described lowering the price of tobacco below cost as "ruinous competition". At page 182 the Court stated:

* * * the conclusion of wrongful purpose and illegal combination is overwhelmingly established by the following considerations:

²¹ *E.g.*, *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234 (2d Cir. 1929); *Muller Company v. FTC*, 142 F. 2d 511 (6th Cir. 1944); *Moore, v. Mead's Bread Co.*, 348 U.S. 115 (1954); and *Maryland Baking Co. v. FTC*, 243 F. 2d 716 (4th Cir. 1957).

²² Footnote 11, *supra*.

²³ Footnote 11, *supra*.

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(b) * * * the acts which ensued justify the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination—a purpose whose execution was illustrated by the plug [price] war which ensued and its results. * * *

In the *Porto Rican American Tobacco* case,²⁴ a classic illustration of a primary-line price discrimination designed to drive a local competitor out of business, the Court observed:

Ruinous competition by lowering prices has been recognized as an illegal medium of eliminating weaker competitors (citing both *Standard Oil* and *American Tobacco*.)

It is concluded and found that predatory price-cutting (selling at unreasonably low prices, such as selling below either one's costs or a competitor's costs) for the purpose of destroying competition or eliminating a competitor, is an unfair method of competition in violation of the Act. However, as found hereinabove, there is no reliable, probative and substantial evidence in this record that respondent engaged in such predatory price-cutting.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce, and engaged in the above-found acts and practices in the course and conduct of its business in commerce, as "commerce" is defined in the Act.

2. The acts and practices of respondent hereinabove found in Section III C are all to the prejudice and injury of the public and competition, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Act.

3. As a result thereof, substantial injury has been done to competition in commerce.

4. Respondent has not, as alleged in the complaint, engaged in predatory pricing practices.

5. This proceeding is in the public interest and an order to cease and desist from the above-found acts and practices should issue against respondent.

ORDER

It is ordered, That respondent Sun Oil Company, a corporation, its officers, directors, agents, representatives or employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of its products in commerce, as

²⁴ Footnote 21, *supra*.

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"commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Entering into, continuing, cooperating in, or carrying out, or attempting so to do, any planned common course of action, understanding, agreement, contract, or conspiracy with any person or persons not parties hereto, including without limitation its independent lessee dealers, either to attempt to, or create the power to, or to establish, fix, adopt, maintain, adhere to, stabilize, or affect, by any means or method, prices at which said products are to be resold;

B. Establishing, maintaining, continuing, cooperating in, or carrying out, or attempting so to do, any plan, policy, program, or combination, or any other equivalent means, for the purpose or with the effect of enabling respondent to establish or fix the prices at which its products are to be resold.

It is further ordered, That the allegations of the complaint that respondent engaged in predatory pricing practices be, and hereby are, dismissed.

OPINION OF THE COMMISSION

MAY 15, 1963

By MACINTYRE, *Commissioner*:

This matter is before the Commission upon respondent's appeal from the hearing examiner's initial decision holding that respondent violated Section 5 of the Federal Trade Commission Act as charged in Count I by entering into an agreement or combination with its retail dealers to fix resale prices. The examiner entered an order to cease and desist such practices. He further ordered the charges under Count II of the complaint dismissed, from which action no appeal has been taken.

Respondent appeals from the initial decision contending (1) that it was not unlawful to market its gasoline directly to the consuming public under commission consignment arrangements with dealers, (2) that the retail sales through dealers operating under consignment arrangements did not constitute sales "in commerce" under Section 5 of the Federal Trade Commission Act, and (3) that, if a violation is found by the Commission, the order in the initial decision is too broad.

The facts in the case are not in substantial dispute. Respondent, Sun Oil Company, is a corporation organized and doing business under the laws of the State of New Jersey. Its principal office and place of business is located at 1608 Walnut Street, Philadelphia, Pennsylvania. Respondent operates an integrated petroleum com-

pany engaged in the production, purchase and sale of crude oil, the refining of crude oil and its derivatives, and the sale and distribution of gasoline and other petroleum products in various states of the United States and foreign countries. It has refineries at Marcus Hook, Pennsylvania, and Toledo, Ohio. Respondent distributes gasoline under the brand name "Blue Sunoco" through approximately 8,900 outlets in various states of the United States and in Canada. In 1956, respondent's gross sales of petroleum products exceeded \$731,000,000. Respondent markets its products through wholesale distributors, company-owned and operated stations and independent dealer stations.

The market area involved in this proceeding is comprised of the metropolitan areas and surrounding contiguous territory of the Cities of Norfolk, Portsmouth and Virginia Beach, Virginia (sometimes referred to hereafter as the Norfolk area). The period covered by the complaint is November 1956 through April 1959.

In the Norfolk area there were a number of military exchanges selling major-brand gasoline at prices substantially below the prevailing prices in the market. This gasoline was available only to authorized military personnel and dependents. In addition, in this market there were 21 private-brand stations (sometimes also referred to as independents) in 1956 which normally posted prices below the major-brand prices. The Norfolk area was an unstable market in which depressed prices occurred spasmodically.

Respondent entered the Norfolk area market in 1946, selling its gasoline exclusively through a wholesale distributor, Taylor Oil Company. In July 1954, Taylor was operating 34 retail stations and selling respondent's gasoline at prices equal to the lowest posted by private-brand operators. Taylor, in July 1954, sold a volume of 723,275 gallons per month, or an average of 21,272 gallons per station. Sun took over from Taylor in 1954, opening its own stations and leasing stations to independent dealers. Respondent operated as a major-brand seller with its dealers and company-operated stations generally posting the prices prevailing at the stations of other majors. Respondent by October 1956, through 29 stations, was selling 391,177 gallons per month or an average of 13,488 gallons per station.

When respondent took over distribution in the Norfolk area from the Taylor Oil Company, it endeavored to have its product accepted as a major brand at the prices posted by the major brands. Respondent, however, was handicapped, as the examiner found, by the public concept that its accustomed price was that of the unbranded stations and below prevailing major-brand prices. During the period

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covered by the record, respondent never did attain the percentage of the market it enjoyed formerly when selling through the Taylor Oil Company.

In October of 1956, a price war broke out in the upper Hampton Boulevard area near military exchange stations. A number of major-brand stations posted prices three cents below the generally prevailing major price. On or around November 5, 1956, respondent's district manager, Samuel O. Southard, called respondent's dealers into meetings to discuss the price war situation and the methods to be used to enable the dealers to compete price-wise in the market. Mr. Southard testified concerning such meetings as follows:

Q. Did you hold any meetings, Mr. Southard, prior to the inauguration of the consignment plan in November of 1956 with your dealers?

A. We had three meetings at the time. I explained the commission consignment plan to them, yes.

Q. And at the same time weren't they asked to sign up?

A. No. It was offered to them. Their signature was entirely their own privilege.

Q. Yes. But I will ask you this: Did any of them sign up at those meetings?

A. Yes.

Q. And did you have eight or ten or twelve at each meeting, would you say?

A. The first two meetings I would think there would be eight or ten at each meeting.

Q. Where were these meetings held?

A. In my office.

Q. That was at the Sun Oil Company Offices here in Norfolk?

A. Yes.

Q. Were they held at night?

A. In the day time.

Q. What did you tell them at that time about the consignment plan?

A. I explained the consignment plan to them and how it operated.

Q. Well, now, you explain to us just like you explained it to them, will you? What did you say to them at that time?

A. You want as best I can recall what I said to them during the meeting?

Q. Yes.

A. As I recall I mentioned that the gasoline gallonage at our stations in Norfolk had not been as high or had not reached the potential, and that in analyzing the situation that it was evident that considerable gallonage was being sold by the Government PX Service Station at a much lower price, and that also the independent stations posting a price of two cents generally under the posted price of what is termed "house brand gasoline", together with giving premiums, and with the tremendous gallonage that they were doing, indicated that our price was wrong so far as the consumer was concerned because he wasn't buying our products.

And that a price situation had developed on Hampton Boulevard.

And in order not to penalize any of our dealers we were going to be forced to meet that price with a dealer on Hampton Boulevard which would effect, perhaps our dealers in the Wards Corner area.

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And that the commission consignment plan was the only method whereby we could assist them in a situation of this kind.

And that if they felt assistance was necessary or would be necessary, that they could have the commission consignment plan, and make their own decision.

I believe also at that meeting I had mentioned that our price being two cents higher than independents, and with the independents doing tremendous gallonage, indicating our price was wrong, and maybe some time we may have to attempt to sell gasoline at perhaps a one-cent differential rather than a two-cent differential.

I believe that is about all I can recall at the moment.

Impressions of various dealers about these meetings are disclosed in part by items of testimony such as the following:

Witness James J. Helth

Q. Now, Mr. Helth, you were on consignment in April of 1956. Did there come a time when you again began operating your station on a consignment basis?

A. Yes. In November of 1956.

Q. Now, prior thereto, did you attend any meeting or meetings where this plan was discussed?

A. The meeting that Mr. Southard held in his office around—I guess it was around the fourth of November, or the fifth of November.

Q. Who, if anyone, spoke at this meeting?

A. Mr. Southard, and I believe Mr. Lillianthal was there, the salesman.

* * * * *

Q. What did Mr. Southard say at this meeting? Do you recall?

A. Well, he explained this consignment plan to us.

And he told us what we would be guaranteed in order to meet the competitive prices on the house side with the unbranded people. I believe to stay within one penny of that.

Q. Did he say that was the reason for asking that you go on consignment?

A. Well, that I guess—there were I guess eight or ten dealers there. And the business I think in general was bad all over as far as the dealers were concerned.

Witness David Sawyer

Q. Now, did there come a time, Mr. Sawyer when you went on what is known as a consignment plan of operation?

A. Yes, sir.

Q. Now, immediately prior thereto on or about that time did you attend a meeting at the offices of the Sun Oil Company at which time this plan of operation was discussed and explained?

A. Yes, sir.

Q. Did anyone from the Sun Oil Company address that meeting?

A. Yes, sir. Mr. Southard.

Q. Mr. Southard?

A. Yes.

Q. And at that time what did Mr. Southard have to say about this plan of operation?

A. Well, as well as I remember it, the main thing that we were interested in were the unbrandeds. And I myself at the time had been staying within a

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penny of the unbrandeds. And I don't think I made myself very popular by doing so.

But Mr. Southard said at the time that when we went on this consignment that we would stay within a penny of the unbrandeds no matter how low we got. And if my recollection is correct, I think he said no matter if it went to a nickel we would stay within one penny of the unbrandeds.

Of course he said if we got that low, that we would get the 4½—we wouldn't get the four and a half cent that they said we would get on consignment.

That was my big argument. I have always thought we should stay within a penny of the unbrandeds.

Witness William J. Mountjoy

Q. What was said by anyone at that meeting?

A. Well Mr. Southard explained to us that we were going to get competitive with unbranded stations and we were going to stay one cent above them, and he told us that Mr. Lillianthal had papers for us to sign to go back on consignment, and just more or less explained to us and it came down to that.

Accordingly, it is clear that on or about November 5, 1956, respondent and various or all of its dealers met and discussed arrangements for fixing and maintaining retail gasoline prices in the Norfolk area, and that a combination or conspiracy was organized to take action with respect to maintaining such prices. As a result of the meetings all dealers of the respondent accepted its commission consignment plan except Mr. Williams, a dealer in Portsmouth, Virginia. The plan was later also accepted by Mr. Williams.¹

Thus respondent's consignment contracts were not separately and individually negotiated with each of its dealers. Rather the dealers were called together in groups. Sun then acted as a necessary conduit and clearing house through which the dealers among themselves and in each other's physical presence could and did pledge to fix prices *horizontally*; Sun, in the presence of the dealers, pledged to fix prices *vertically*.

The dealers attending and participating in the meetings, at least tacitly, agreed among themselves and with respondent to the taking of specific action on the maintaining of retail prices in the market. Indeed one dealer reported that the Sun representative stated that "when we went on this consignment * * * if it [the retail price] went to a nickel we would stay within a penny of the unbrandeds."

¹ The commission consignment agreement was an amendment to the dealers' purchase agreement whereby all provisions of the latter agreement relating to the purchase and sale of motor fuel were suspended. By the terms of the consignment agreement, respondent agreed to deliver gasoline to the dealers, to which it was to retain title. Sales were to be made by the dealer, for which he received a commission. The dealer was required to sell the gasoline at the prices designated by respondent. All risk of loss, damage or shortage was upon the dealer. The consignment agreement was terminable on five days notice except for default, which made it terminable upon twenty-four hours notice. It provided that upon termination the dealer was to deliver to respondent any gasoline left in his tanks.

Thus there is no doubt that Sun *and its dealers* wished and agreed to hold steadfastly to a uniform price line. In order to achieve this end, Sun, unlike *United States v. General Electric Co.*, 272 U.S. 476 (1926), did not content itself with unilateral vertical arrangements but instead joined with its dealers in horizontal arrangements which wiped out any slight opportunity for independent market action through price variances of any of its retail dealers. The purpose of the action to be taken, at least in important part, was to capture sales volume from independent dealers. It is conceded by the respondent that part of the purpose of the commission consignment was to rebuild volume and to regain a share of the business which respondent had previously held. (See page 13 of the respondent's brief on appeal.)

The meetings organized by the respondent provided the focal point for the dealers to gather and enter into at least a tacit or implied agreement with other participants as to the fixing of retail gasoline prices. There was an interdependence in the dealers' decisions to participate in respondent's consignment plan. For instance, to the extent that a uniform reduction to within one cent of the independents was to be maintained, cooperation and participation by all was necessary.

A combination or conspiracy was instituted even though dealers were not uniformly desirous of entering into the arrangement proposed by the respondent. This is true even though they may not have intended concerted action. "Acceptance by conspirators, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939). The Court, in *United States v. Masonite Corp.*, 316 U.S. 265 (1942) held that a price fixing combination was formed although in negotiating and entering into the first agreements, each participant, other than Masonite, acted independently of the others, negotiated only with Masonite, desired agreement regardless of the action that might be taken by any of the others, did not require as a condition of its acceptance that Masonite make such an agreement with any of the others, and had no discussion with any of the others. As the Supreme Court stated in the *Masonite Case*, "the result [of this case] must turn not on the skill with which counsel has manipulated the concepts of 'sale' and 'agency' but on the significance of the business practices in terms of restraint of trade."

Here too, the stigma of price fixing cannot be removed by merely waving the verbal wand of "consignment."

Thus we hold that in the circumstances shown in this proceeding respondent and its dealers, at the meetings held on or about November 5, 1956, entered into a combination or conspiracy to fix and maintain the retail prices at which respondent's gasoline was to be sold by dealers to the purchasing public. A means or a method for effecting the price fixing scheme so formed was the consignment method of operation. The consignment arrangement was a fiction and a subterfuge in that it was simply a device by which the unlawful price fixing arrangement was to be implemented. This price fixing, horizontal as well as vertical, makes the case distinguishable from the decision in the *General Electric Co.* case. Respondent also cites in its defense *Federal Trade Commission v. Curtis Publishing Company*, 260 U.S. 568 (1923), but we find nothing in that case which would be in conflict with our holding of a violation in this proceeding.

Under these circumstances we hold that respondent's consignment plan was unlawful not because it did not constitute a genuine consignment under the law of agency, but because the proof showed it to be a *vertical* and *horizontal* price fixing device in violation of the Federal Trade Commission Act.

We conclude that the practice shown constitutes an unfair method of competition and unfair practice in violation of the Federal Trade Commission Act.

Respondent next argues that the retail sales through dealers operating under consignment arrangements did not constitute sales "in commerce" within the meaning of the term in the Federal Trade Commission Act.

The examiner found that in the course and conduct of its interstate business, respondent transports its gasoline in tank cars, tankers and trucks from its different refineries, terminals, and distribution points, located in various states of the United States, to retail dealers in the Norfolk area and in other states of the United States. He held, in effect, that the agreement or combination between respondent and its dealers fixing the retail prices was engaged in the course of such business and, therefore, in interstate commerce. We agree.

Respondent's principal place of business was at the time of this hearing and is in Philadelphia, Pennsylvania, and the dealers with which it entered into an agreement or combination as to prices were in Virginia. Respondent shipped gasoline to such dealers from

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points outside the State of Virginia. This clearly was the sale of gasoline in interstate commerce. *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951). It was in connection with and in the course of such commerce that respondent engaged in the practices found to be unlawful.

The fact that the retail sales made pursuant to the price fixing scheme were local sales is not the controlling factor. In this case, it is the price fixing scheme which was charged and found to be unlawful. This scheme concerning parties in different states and a product transported across state lines was in our view an interstate scheme or course of conduct and subject to the regulatory powers of the Commission under the Federal Trade Commission Act. Cf. *Holland Furnace Company v. Federal Trade Commission*, 269 F. 2d 203 (7th Cir. 1959), cert. denied 361 U.S. 932; *General Motors Corporation et al. v. Federal Trade Commission*, 114 F. 2d 33 (2nd Cir. 1940); *Ford Motor Company v. Federal Trade Commission*, 120 F. 2d 175 (6th Cir. 1941), cert. denied 314 U.S. 668; *United States v. Food and Grocery Bureau of Southern California*, 43 F. Supp. 966, 972 (U.S.D.C. S.D. Cal. 1942). We hold that respondent engaged in an unfair method of competition and practice in commerce.

Respondent lastly challenges the scope of the order. Specifically, it contends (a) that the order should relate only to the sale of gasoline rather than all products respondent sells, and (b) that the order should specifically state that respondent may "Fair Trade" its gasoline under state laws.

Since there has been no showing that the practices herein challenged were used as to products other than gasoline and there being no further showing of a likelihood that they might be used with respect to other products, we will limit the order to gasoline.

Respondent's further request, that a provision be included in the order, as in the matter of *Sun Oil Company*, Docket 6641 (55 F.T.C. 955), excepting from the order contracts entered into in conformity with Section 5 of the Federal Trade Commission Act as amended by the McGuire Act, is granted, and the initial decision will be so modified.

The respondent's appeal is granted to the extent indicated in this opinion and it is otherwise denied. It is ordered that the initial decision be modified in conformity with the views expressed herein and, as so modified, adopted as the decision of the Commission. An appropriate order will be entered.

Commissioner Anderson concurs in the result.

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OPINION, CONCURRING

MAY 15, 1963

By ANDERSON, *Commissioner*:

I concur in the result. I am not sure that the majority opinion spells out in positive fashion the assurance that the time-honored business practice of consignment selling is not interdicted. It should be clearly understood that the general practice of consignment selling is not attacked by the Commission because of the practices of respondent in this case. This case should stand for this case only.

Consignment selling is a lawful business method. I don't think it is necessary for the Commission to take business enterprisers on its lap and explain how honest "consignment selling" should be carried on, but it should at least say that the practice is not generally condemned.

ORDER MODIFYING AND ADOPTING INITIAL DECISION AND PROVIDING FOR THE FILING OF OBJECTIONS TO PROPOSED FINAL ORDER AND REPLY*

MAY 15, 1963

The Commission having rendered its decision in this matter, granting in part and denying in part the respondent's appeal, and having ordered that the initial decision be modified in accordance with the Commission's views expressed in the accompanying opinion and, as so modified, adopted as the decision of the Commission; and

The Commission having further determined that the proposed order to cease and desist contained in the initial decision, as modified, is subject to § 4.22(c) of the Commission's Rules of Practice:

It is ordered, That the initial decision including the order, as modified in the manner shown by the proposed order set forth herein, be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That the order to cease and desist contained in the initial decision be modified as shown by the following proposed order of the Commission and that respondent may, within twenty (20) days after service upon it of this order, file with the Commission its objections to the changes so made in the order to cease and desist contained in the initial decision, together with a statement of the reasons in support of their objections and a pro-

* Proposed Final Order is omitted in printing since it was issued as the Final Order of the Commission.

Final Order

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posed alternative form of order appropriate to the Commission's decision.

FINAL ORDER

NOVEMBER 22, 1963

Pursuant to § 4.22(c) of the Commission's Rules of Practice, published May 16, 1962, 27 Fed. Reg. 4600, 4621 (superseded August 1, 1963), respondent was duly served with the Commission's decision upon respondent's appeal from the hearing examiner's initial decision and with an order affording it the opportunity to file within twenty (20) days any exceptions it may have to the terms of the Commission's Proposed Order; and

Respondent having filed no exceptions to said Proposed Order within the twenty (20) day time allotted therefor, the Proposed Order becomes, and is hereby issued as, the Final Order of the Commission:

It is ordered, That the respondent Sun Oil Company, a corporation, its officers, directors, agents, representatives or employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of its gasoline in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, arrangement, agreement, contract or conspiracy with any person or persons not parties hereto, to establish, fix, adopt, maintain, adhere to, or stabilize by any means or method, prices, terms or conditions of sale at which its gasoline is to be sold.

2. Establishing, maintaining, continuing, cooperating in, or carrying out, or attempting so to do, any plan, policy, program, or any consignment policy in combination with any other person or persons not parties hereto, for the purpose or with the effect of enabling respondent to establish or fix the prices, terms or conditions of sale at which its gasoline is to be resold by a dealer after purchase from respondent.

Provided, however, That nothing herein contained shall be construed to limit or otherwise affect any resale price maintenance contracts which respondent may enter into in conformity with Section 5 of the Federal Trade Commission Act, as amended by the McGuire Act (Public Law 542, 82nd Cong., 2nd Session, approved July 14, 1952).

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Complaint

It is further ordered, That the allegations of the complaint that respondent engaged in predatory pricing practices be, and they hereby are, dismissed.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with the order set forth herein.

By the Commission, Commisisoner Anderson concurring in the result.

IN THE MATTER OF

THE ATLANTIC REFINING COMPANY

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

Docket 7471. Complaint, Apr. 13, 1959—Decision, Nov. 22, 1963

Order requiring a major integrated petroleum products marketing company to cease coercing its independent lessee-dealers in the "Delmarva Peninsula" area of Delaware, Maryland and Virginia, during a local price war, to sell its gasoline at uniform and non-competitive prices by means of a so-called "temporary consignment contract"; conspiring with such retail dealers to fix and maintain the uniform prices through the medium of the "consignment contracts"; and conspiring with its independent wholesale distributors to maintain the uniform consumer resale prices by granting the co-conspiring distributors certain rebates to be passed on to their dealer customers maintaining the uniform prices.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Atlantic Refining Company, Inc., a corporation, hereinafter referred to as respondent, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C., Sec. 45), 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 with respect thereof as follows:

COUNT I

PARAGRAPH 1. Respondent, The Atlantic Refining Company, Inc.,* is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with

* Respondent's correct name is The Atlantic Refining Company.

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Complaint

It is further ordered, That the allegations of the complaint that respondent engaged in predatory pricing practices be, and they hereby are, dismissed.

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* Respondent's correct name is The Atlantic Refining Company.

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its principal office and place of business located at 260 South Broad Street, Philadelphia 1, Pennsylvania. Respondent is a major oil company, and is now and for several years last past, has been, among other endeavors, primarily engaged in the offering for sale, sale and distribution of gasoline and other petroleum products throughout a seventeen state marketing area. Said gasoline is advertised and sold under the brand names of "Atlantic Gasoline" and "Imperial Gasoline", ("Atlantic" being the regular brand and "Imperial" being the hi-test or ethyl). Said gasoline enjoys wide public acceptance wherever it is marketed and is considered a major brand product. Respondent, one of the nation's leading producers and marketers of gasoline and other petroleum products, comprises an integrated unit in the petroleum industry in that it is engaged in the acquisition and exploitation of oil producing properties located in the United States as well as in foreign lands; the refining of crude oil and the subsequent manufacture therefrom of various petroleum products including gasoline; and the subsequent distribution and marketing at wholesale and retail of the products of its refineries in the United States and foreign lands. Respondent owns and operates refineries at Philadelphia, Pennsylvania, and Atreco, Texas. It owns or controls approximately twenty-five ocean-going tankers, as well as various pipe-line systems used for the transportation of crude oil and refined petroleum products. Furthermore, it owns and operates water terminals and bulk plants in different marketing areas from which its petroleum products are delivered to the various marketing outlets for subsequent sale to the consumer. In 1956 the gross sales, including petroleum products, of the respondent and its consolidated subsidiaries amounted to \$544,864,558.

PAR. 2. Respondent markets its gasoline and petroleum products through its owned and operated service stations; through independent lessee-dealer service stations; and through independent distributors who in addition to supplying gasoline to service stations operated by them also sell to independent lessee-dealer service stations.

Respondent, in the delivery and sale of its gasoline to its various marketing outlets located in a seventeen state area, and in particular in eastern Pennsylvania and that area termed the "Delmarva" peninsula—said peninsula being comprised of portions of the three states, Delaware, Maryland and Virginia—has entered into agreements, contracts and/or leases, now in force, whereby respondent delivers and sells to independent distributors and independent lessee-dealers all of their respective requirements of respondent's brands of gasoline during the terms of such contracts. In the course of supplying said

customers and making deliveries pursuant to the terms of said agreements, contracts and/or leases, respondent ships its gasoline from its refineries across state lines to bulk stations and other terminal or distributing facilities located in or near the various marketing areas. From these points it is delivered to independent distributors and/or independent lessee-dealers, for subsequent sale to members of the purchasing public. There is now, and has been at all times mentioned herein, a continuous stream of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act, of said gasoline between respondent's refineries, terminals and bulk stations and said independent distributors and/or independent lessee-dealers in the areas set forth herein. All of said deliveries from respondent, and the receiving, as well as the purchases and resale by the said independent distributors and/or independent lessee-dealers have been in the course and furtherance of such commerce.

PAR. 3. Except to the extent that competition has been hindered, frustrated, lessened, manipulated and eliminated as set forth in this complaint, respondent has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the distribution and sale of gasoline in commerce as that term is defined in the Federal Trade Commission Act.

PAR. 4. Certain conditions which create or contribute to temporary disturbances of the retail price structure of gasoline at the service station level, occur and have occurred on various occasions and at various times in the areas in which respondent markets its gasoline. These are sometimes referred to as "price disturbances", or as "depressed prices" but more commonly they are referred to and known as "price wars". "Price wars" may originate from any one of a number of casual factors. During such occasions, respondent has, under the guise and pretext of giving assistance to its lessee-dealers, conceived, adopted and put into operation certain plans or methods for the purpose, and with the effect, of controlling the prices at which gasoline is sold at respondent's lessee-dealer service stations.

In the "Delmarva Peninsula" area, as well as elsewhere, respondent has a number of retail outlets through which its refined petroleum products, including gasoline, are sold to the consuming public. A substantial number of such outlets are operated by independent businessmen, or who would be in the absence of the power and control exercised over them by respondent, who lease or sub-lease their service station properties from respondent and who have entered into supply contracts for gasoline and certain other requirements with respondent.

By means of various provisions in the leases, sub-leases and supply contracts and through a system of policing the business operations of the said independent lessee-dealers by constant inspection and surveillance, the respondent is able to and does, to a substantial extent and degree, dominate and control the manner in which said lessee-dealers operate the service stations leased or sub-leased from respondent. The power resident in respondent through such domination and control is exercised, exerted and used by respondent to persuade, influence, coerce and induce said independent lessee-dealers to abide by, agree to, adhere to, follow or acquiesce in, various plans, policies or methods of doing business which may be suggested by respondent or which respondent may desire or elect to place in effect and operation. At all times the independent lessee-dealer is conscious and aware of the power of respondent and is influenced by such power in the everyday decisions made by him in the conduct of his business.

Beginning in or about May 1967, respondent conceived, adopted and put into operation in the "Delmarva Peninsula" area a device, plan or scheme to enable it to fix the retail prices of the gasoline sold by its lessee-dealers to the consuming public.

To effectuate and carry out the plan, respondent, relying on the power and control it possesses and exerts over its independent lessee-dealers in the conduct of their business, influenced, persuaded or otherwise induced or caused its independent lessee-dealers to enter into agreements with it which are designated or commonly referred to and known as "temporary consignment contracts". By the use of such temporary contracts uniformity of price is achieved as between lessee-dealers of respondent and said uniformity of price contributes to a manipulation and/or stabilization of price competition in the market during a period of price disturbance as described above. In most, if not all, instances the said dealer was an unwilling party to the arrangement, having been coerced, pressured or otherwise persuaded or induced by various means and methods employed by respondent, to enter into such consignment contracts. Said contracts have been, and are now being, entered into and carried out with complete indifference as to an individual dealer's competitive situation, or need. During the period the agreement remains in effect, respondent is ceded the right by the lessee-dealer to establish the resale price of the gasoline to the purchasing public. Said dealer receives a certain designated commission on each gallon of gasoline sold at his service station but forfeits his customary margin of profit. In most instances, if not in all, the commission received

by a dealer is not equal in amount to said usual and customary margin of profit. The amount of said commission to be paid is computed by a specific formula, operating in relation to the retail price or prices posted and the amount of the temporarily established consignment tank wagon cost (i.e., temporary wholesale price). To those dealers who do not participate in the consignment plan operation, the tank wagon price to them is more than is the cost to a participating dealer.

Respondent, through and by virtue of said plan is able to, and does, control the prices at which gasoline is sold at retail by its lessee-dealers and thus tends to, and does, during the period the plan is in operation, manipulate, eliminate, frustrate and prevent price competition between its lessee-dealers and with others. Such power and control removes any probability or possibility of price competition, thus, tending to insure uniformity of prices despite the presence of factors in the market which would, in the absence of this artificial restraint and control, encourage competition.

Respondent, in addition to its lessee-dealers, also sells its gasoline to wholesale distributors in this area, as well as in others. Said distributors in some instances operate service stations of their own and also sell to and have as customers other service stations selling respondent's brand of gasoline. Said distributors conduct their businesses and sell within established exclusive territories, said exclusive territories having been previously established by contract between the parties. In order to assure that the consignment plan of operations would achieve the aims and purposes intended, respondent, by various means and methods, caused the distributors to maintain the retail prices at their own stations as well as those posted at their dealer-customer stations in conformity with the prices posted by respondent's lessee-dealers operating under the aforesaid consignment plan. Furthermore, at times and on various occasions, respondent, acting on its own initiative, through various means and methods, attempted to and did cause the dealer customers of said distributors to post and maintain their retail price or prices in conformity with the price being posted by respondent's lessee-dealers operating under the aforesaid consignment plan.

PAR. 5. The acts and practices of respondent as herein alleged have a dangerous tendency to and have hindered, suppressed and restrained the sale and distribution of gasoline, in commerce, among and between the various States of the United States and the District of Columbia, and hindered and prevented normal, free and unrestrained competition in the sale of gasoline in commerce; have a

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dangerous tendency and capacity to repose, and do repose, in respondent the power and control sufficient to stabilize or contribute to the stabilization of prices in the area or areas where it markets its gasoline; created and continue to create an artificial price structure in which the free play of market forces is suppressed, hindered and prevented; make for price uniformity at the wholesale and retail levels of sale and distribution to the detriment of the purchasing public; and deprive the public and its lessee-dealers and others of the advantage of competition in price and otherwise which they would enjoy under a condition of normal, free and unrestrained competition.

PAR. 6. The acts and practices of the respondent as herein alleged are all to the prejudice of the public, and its lessee-dealers and the competitors of its lessee-dealers and its distributors and constitute unfair acts and practices and unfair methods of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT II

PAR. 7. All of the allegations of Paragraphs 1 through 6 of Count I of this complaint are hereby adopted and incorporated herein by reference and made a part of this Count II the same as if they were repeated herein verbatim.

PAR. 8. Except to the extent that competition has been hindered, frustrated, lessened, manipulated and eliminated as set forth in this complaint, respondent, its lessee-dealers and independent distributors have been and are now in substantial competition with other corporations, individuals and partnerships engaged in the distribution and sale of gasoline in commerce as that term is defined in the Federal Trade Commission Act.

PAR. 9. Beginning in or about May 1957, respondent, acting through its agents, officers, employees and its independent lessee-dealers (said lessee-dealers are to be considered as and are herewith alleged as unnamed co-conspirators), engaged in selling respondent's gasoline and other petroleum products in the "Delmarva Peninsula" area, and other areas, for the purpose of manipulating, suppressing, preventing, hindering or stabilizing price competition in the distribution and sale in commerce of gasoline during a price disturbance period, conspired to and have entered into, maintained and carried out a combination, planned common course of action, understanding or agreement, through which the price of gasoline sold in the service stations of said independent lessee-dealers could be fixed and maintained, and was fixed and maintained, and through which the price

of gasoline being sold by others in the market could be and was manipulated, stabilized, controlled and affected.

PAR. 10. Pursuant to the conspiracy and in furtherance of the aforesaid unlawful combination, planned common course of action, understanding and agreement, respondent and the aforesaid independent lessee-dealers executed a written agreement purporting to be cast in the form of a legal consignment contract. Said contracts are cast in such form for the purpose and with the attempt to immunize and insulate a mere price manipulation scheme from the antitrust laws. Said agreements are nothing more than shams and subterfuges having as their primary purpose and function of a temporary illegal price fixing vehicle, which affects, manipulates, restrains and/or stabilizes price competition or contributes to artificial uniformity of gasoline prices in the market. The said consignment contracts as alleged herein bear no bona fide relationship to the business needs and requirements of either the respondent or its independent lessee-dealers, and in substance the status of gasoline purchaser and vendor did and does exist as between respondent and its independent lessee-dealers notwithstanding the representation by form to the contrary. Furthermore, in most, if not all, instances each dealer was an unwilling party to the arrangement, having been coerced, pressured or otherwise persuaded and induced, through various means and methods employed by respondent, to enter into such agreements.

PAR. 11. The unlawful planned common course of action as herein alleged is singularly unfair, oppressive and to the prejudice of the public and respondent's competitors, distributors and retailers of gasoline, as well as to the competitors of respondent's lessee-dealers, in the "Delmarva Peninsula" area, as well as other areas where so employed, and has a dangerous tendency to and does unreasonably restrain, manipulate, hinder, suppress, and/or stabilize competition in the "Delmarva Peninsula" area, and other areas, between and among respondent's lessee-dealers; respondent's lessee-dealers and respondent's owned and operated service stations; respondent's lessee-dealers including its own service stations and the respective retail dealers of respondent's independent distributors; respondent's lessee-dealers including its own service stations and those distributors which market at retail; respondent's lessee-dealers including its own service stations and the retail dealers of other gasoline marketers; and between and among respondent and its independent distributors.

It has unreasonably restrained, manipulated, hindered, suppressed and/or stabilized competition therein in the distribution and sale of gasoline in commerce within the meaning of the Federal Trade

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Commission Act and constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT III

PAR. 12. All of the allegations of Paragraphs One through Six of Count I and Paragraphs Nine through Eleven of Count II of this complaint are hereby adopted and incorporated herein by reference and made a part of this Count III the same as if they were repeated herein verbatim.

PAR. 13. Except to the extent that competition has been hindered, frustrated, lessened, manipulated and eliminated as set forth in this complaint, respondent, its independent distributors and lessee-dealers have been and are now in substantial competition with other corporations, individuals and partnerships engaged in the distribution and sale of gasoline in commerce as that term is defined in the Federal Trade Commission Act.

PAR. 14. Beginning in or about May 1957, respondent acting through its agents, officers, employees, and its independent distributors (said independent distributors are to be considered as and are herein alleged as unnamed co-conspirators) engaged in selling respondent's gasoline and other petroleum products to independent service stations as well as through their own service stations in the "Delmarva Peninsula" area, and other areas, for the purpose of manipulating, suppressing, preventing, hindering or stabilizing price competition in the distribution and sale in commerce of gasoline and for the further purpose of aiding, abetting and in furtherance of the consignment plan of distribution as alleged in Count I herein as well as the price manipulation, fixing and/or stabilization scheme as alleged in Count II Paragraph 9 hereof, conspired to and have entered into, maintained and carried out a combination, planned common course of action, understanding and agreement, through which they would maintain and fix, and did maintain and fix, the price at which gasoline was sold or would be sold at the wholesale level, as well as at retail in the gasoline service stations owned and operated or sold to by said distributors.

PAR. 15. Pursuant to the conspiracy and in furtherance of the aforesaid unlawful combination, planned common course of action, understanding and agreement respondent in conspiracy and combination with the aforesaid independent distributors, adhered to, performed and did the following acts and things:

(1) Agreed to and did grant certain allowances, discounts or rebates from the tank wagon price to the distributors' customers

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on the condition that the dealer customer would conform his retail price to a price dictated by respondent.

(2) Agreed to and did provide to its distributors certain allowances, discounts or rebates from the distributors' cost upon the condition, understanding and agreement that said distributors provide their customers with certain allowances, discounts or rebates and further provided, that said customers of the distributors would adhere to and post the retail price or prices dictated by respondent.

(3) Pressured, threatened, coerced and otherwise persuaded and induced said dealer customers of said distributors to post and adhere to retail prices dictated by respondent from time to time.

PAR. 16. The unlawful planned common course of action as herein alleged is singularly unfair, oppressive and to the prejudice of the public and respondent's competitors, distributors and retailers of gasoline, as well as to the competitors of said distributors, in the "Delmarva Peninsula" area, as well as other areas where so employed, and has a dangerous tendency to and does unreasonably restrain, manipulate, hinder, suppress and/or stabilize competition in the "Delmarva Peninsula" area, and other areas; between and among the independent retail customers of a distributor and the retail outlets owned and/or operated by a distributor; the retail customers of the distributors; the retail customers of the distributors and the independent lessee-dealers of respondent as well as those retail outlets owned and/or operated by respondent; the retail customers of the distributors including distributor owned and/or operated outlets and the retail dealers of other gasoline marketers; respondent's independent distributors; respondent's independent distributors and the distributors of other gasoline marketers; and between and among respondent and its independent distributors.

It has unreasonably restrained, manipulated, hindered, suppressed and/or stabilized competition therein in the distribution and sale of gasoline in commerce within the meaning of the Federal Trade Commission Act and constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Rufus E. Wilson and Mr. Alan Weber for the Commission.

Mr. Edward F. Howrey and Mr. Harold F. Baker of Howrey, Simon, Baker & Murchison, Washington, D.C., and

Mr. Roy W. Johns and Mr. Joel L. Carr of the Atlantic Refining Company, Philadelphia, Pa., for the respondent.

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INITIAL DECISION BY EVERETT F. HAYCRAFT, HEARING EXAMINER

March 7, 1962

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PRELIMINARY STATEMENT

The Commission, on April 13, 1959, issued a complaint against the respondent The Atlantic Refining Company (erroneously described as The Atlantic Refining Company, *Inc.*). The complaint has three counts.

Count I charges the respondent, which is described as a major oil company, with violating Section 5 of the Federal Trade Commission Act in the marketing of its gasoline and petroleum products through its owned and operated service stations; through independent lessee-dealer service stations; and through independent distributors, who, in addition to supplying gasoline to service stations operated by them, also sell to independent lessee-dealer service stations. It is alleged that respondent in the delivery and sale of its gasoline to its various marketing outlets, particularly in the territory known as "Delmarva Peninsula", comprised of portions of the States of Delaware, Maryland, and Virginia, has entered into agreements whereby respondent delivers and sells respondent's brands

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of gasoline to independent distributors and lessee-dealers in interstate commerce.

It is alleged under Count I that during disturbed market conditions in the retail sale of gasoline known as "price wars", under the guise and pretext of giving assistance to its lessee-dealers, respondent has put into operation certain plans or methods for the purpose and with the effect of controlling the prices at which gasoline is sold at respondent's lessee-dealer service stations. In this connection, it is alleged that by means of various provisions in the dealer leases, and through a system of policing the business operations of said independent lessee-dealers, the respondent, to a substantial extent, dominates and controls the operation of the service stations leased or subleased from respondent.

It is specifically alleged that, beginning in or about May 1957, respondent put into effect in the "Delmarva Peninsula" area such a device or plan to enable it to fix the retail prices of the gasoline sold by its lessee-dealers to the consuming public, and to effectuate and carry out said plan, respondent influenced, persuaded or otherwise induced or caused its independent lessee-dealers to enter into agreements with it designated and known as "temporary consignment contracts", by the use of which uniformity of price was achieved as between the lessee-dealers of respondent; and that said uniformity of price contributed to a stabilization of price competition in the market during a period of price disturbance hereinbefore mentioned. It is further alleged that in most instances the said dealers were unwilling parties to the arrangement, having been coerced by various means and methods employed to enter into such consignment contracts; that, under said contracts, the lessee-dealers received a certain designated commission on each gallon of gasoline sold at his service station, but forfeited his customary margin of profit; and that, in most instances, the commission received is not equal in amount to the dealer's usual and customary margin of profit. It is also alleged that those dealers who do not participate in the said consignment contract operation are charged the tank wagon price which to them is more than is the cost to a participating dealer.

It is further alleged in Count I that respondent, through and by virtue of said consignment contract plan, controls the prices at which gasoline is sold at retail by its said lessee-dealers and prevents price competition between said lessee-dealers and with others, thus tending to insure uniformity of prices despite the presence of factors in the market which would, in the absence of such artificial restraint and control, encourage competition.

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It is further alleged under this Count that, in addition to said lessee-dealers, respondent also sells its gasoline to wholesale distributors in the "Delmarva Peninsula" area, which said distributors in some instances operate service stations at retail and also sell to retail customers selling respondent's brand of gasoline; and that in order to insure the success of the consignment agreement plan of operation and to achieve the aims and purposes hereinbefore mentioned, respondent, by various means and methods, caused the said distributors to maintain the retail prices of their own retail stations, as well as the dealer-customer stations, in conformity with the prices posted by respondent's lessee-dealers operating under the aforesaid consignment agreement plan.

Finally, it is pleaded under Count I that the said acts and practices of respondent have a dangerous tendency and have hindered, suppressed, and restrained the sale and distribution of gasoline in interstate commerce and hindered and prevented free competition in the sale of gasoline in such commerce, and reposes in the respondent the power and control sufficient to stabilize prices in the said areas where it markets gasoline at wholesale and retail levels of distribution and deprives the public and the lessee-dealers and others of the advantage of competition in price which they otherwise would enjoy under the condition of normal, free and unrestrained competition.

Under Count II, all the allegations of Count I are adopted and incorporated by reference. In addition, it is specifically alleged that, beginning in or about May 1957, respondent, acting through its agents and independent lessee-dealers as unnamed co-conspirators engaged in selling respondent's gasoline and other petroleum products in the "Delmarva Peninsula" area and other areas, conspired and carried out a combination or planned common course of action through which the price of gasoline sold in the service stations of said independent lessee-dealers was fixed and maintained as well as the price at which gasoline was sold by others in that market.

It is further alleged under Count II that, pursuant to such conspiracy and planned common course of action, the respondent and the aforesaid independent lessee-dealers executed written agreements purporting to be consignment contracts which were nothing more than shams and subterfuges, having as their primary purpose and function a temporary, illegal price-fixing vehicle: that the said consignment contracts bear no bona fide relationship to the business needs and requirements of either the respondent or its independent lessee-dealers and that in most instances each dealer was an unwilling party to the arrangement, having been coerced through

various means and methods employed by respondent to enter into such agreements.

Finally, it is alleged that said planned common course of action has a dangerous tendency to, and does unreasonably restrain and suppress or stabilize, competition in the "Delmarva Peninsula" area and other areas between and among respondent's lessee-dealers and between such dealers and respondent's owned and operated service stations and the respective retail dealers of respondent's independent distributors.

Under Count III, all the allegations of Counts I and II are incorporated by reference. In addition, it is specifically alleged that, beginning in or about May 1957, respondent, acting through its agents, officers, employees, and its independent distributors, and in furtherance of said consignment agreement plan of distribution, and the price-fixing agreement as hereinbefore alleged, conspired and entered into and carried out a combination and planned common course of action to maintain and fix the price at which gasoline was sold at the wholesale level, as well as at retail, in the gasoline service stations owned and operated by respondent's said distributors.

It is further alleged that, pursuant to said conspiracy and planned common course of action, respondent performed certain specific acts and things as follows:

(1) Agreed to and did grant certain allowances, discounts or rebates from the tank wagon price to the distributors' customers on the condition that the dealer customer would conform his retail price to a price dictated by respondent.

(2) Agreed to and did provide to its distributors certain allowances, discounts or rebates from the distributors' cost upon the condition, understanding and agreement that said distributors provide their customers with certain allowances, discounts or rebates and further provided, that said customers of the distributors would adhere to and post the retail price or prices dictated by respondent.

(3) Pressured, threatened, coerced and otherwise persuaded and induced said dealer customers of said distributors to post and adhere to retail prices dictated by respondent from time to time.

Finally, it is alleged under Count III that the said unlawful, planned common course of action has a tendency to and does unreasonably restrain, suppress, and stabilize competition in the "Delmarva Peninsula" area and other areas, between and among the independent retail customers of respondent's distributors and the retail outlets owned and operated by such distributors, between the retail customers of the said distributors and between the retail customers of the distributors and the independent lessee-dealers of respondent, as well as those retail outlets owned or operated by respondent.

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Before respondent answered said complaint, an interlocutory plea in abatement was filed by respondent's counsel on June 16, 1959. This plea alleged that The Atlantic Refining Company was incorporated in 1870 in the State of Pennsylvania and has never been called or known as The Atlantic Refining Company, Inc., as alleged in the Commission's complaint; that at one time there was a company known as Atlantic Refining Company, Inc., a subsidiary of The Atlantic Refining Company, but that this company had not been in existence for many years.

Counsel, in support of the complaint filed an answer to respondent's plea in abatement on June 19, 1959, accepting the designation of The Atlantic Refining Company as the correct name of respondent. The Hearing Examiner, on June 24, 1959, entered an order denying the plea in abatement and fixing the date and place of the first hearing to be held July 20, 1959 in Georgetown, Delaware.

On June 30, 1959, counsel for respondent filed with the Commission an appeal from the order of the Hearing Examiner denying respondent's pleas in abatement. On the same date, counsel for respondent filed with the Commission a motion to dismiss Counts I and II of the complaint for lack of jurisdiction and brief in support thereof, and at the same time filed with the Hearing Examiner a motion for an extension of time within which to answer or otherwise plead until fifteen days after determination by the Commission of respondent's motion to dismiss Counts I and II of the complaint or respondent's appeal from the order of the Hearing Examiner denying respondent's plea in abatement, whichever date is later; also to postpone the date of July 20, 1959, now set for the initial hearing, to a date not less than twenty days after answer.

On June 30, 1959, the Hearing Examiner extended the time for respondent to file answer from July 1, 1959 to July 15, 1959.

On July 6, 1959, counsel in support of the complaint filed with the Commission his answer to respondent's appeal from the Hearing Examiner's order denying respondent's plea in abatement.

On July 8, 1959, counsel in support of the complaint filed with the Hearing Examiner an answer to respondent's motion for extension of time within which to answer or otherwise plead and postponement of the hearing date.

On July 10, 1959, counsel in support of the complaint filed with the Commission an answer to respondent's said motion to dismiss Counts I and II of the complaint for want of jurisdiction.

On July 13, 1959, the Hearing Examiner entered an order denying the motion for further extension of time within which to answer

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or otherwise plead and denying request for postponement of initial hearing.

On July 15, 1959, the Commission entered an order denying the interlocutory appeal of respondent from the Hearing Examiner's order denying respondent's plea in abatement. On the same date, the Commission denied respondent's motion to dismiss Counts I and II of the complaint.

On July 14, 1959, counsel for respondent filed a motion for a Bill of Particulars and memorandum in support thereof with the Hearing Examiner. No formal action was taken on said motion but, at the first hearing on July 20, 1959, the Hearing Examiner questioned counsel in support of the complaint with respect to the subject matter of the motion for a Bill of Particulars (Tr. 3-18), and the issues were somewhat clarified as a result. For instance, it was made respondent's lessee-dealers and "others", the word, "others", referred clear that in the allegation with respect to price competition between to dealers of major competitors of respondent. Also, as to the allegation of maintenance of prices and price competition, reference was made to the "Delmarva Peninsula" area, and that all price competition in that area would include both the retail and wholesale levels between the dealers of respondent and dealers of its major competitors. Where reference is made to the word, "distributors", in the complaint, reference is made to wholesalers who, however, operate some service stations of their own. It was also indicated by counsel in support of the complaint at the hearing that proof would be offered for the period of time subsequent to about April or May 1957. It was also stated by complaint counsel that all evidence with respect to the consignment agreement plan of operation would be restricted to the "Delmarva Peninsula" unless otherwise indicated in the course of the trial with sufficient notice in advance for respondent to be prepared.

Respondent finally filed its answer to the complaint on July 29, 1959, denying the material allegations thereof. It admitted, however, that price wars originated from time to time in various localities, including the "Delmarva Peninsula", and that it had from time to time sold its products to a number of independent service station dealers in the "Delmarva Peninsula", and had from time to time entered into consignment agreements for gasoline for certain of these dealers, whereby the said dealers sold respondent's gasoline to consuming motorists, receiving thereon a commission on each gallon of gasoline sold; and that, when it marketed its gasoline through dealer agents, it set the price at which its gasoline is so sold. It also admitted that it sold gasoline to wholesale distributors in

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the "Delmarva Peninsula", but denied all the allegations with respect to such sales. It admitted generally that it is in competition with other gasoline marketers and that its dealers competed with the dealers of competitors of the respondent in the distribution and sale of gasoline to the consuming public.

Respondent, in its answer, affirmatively alleged that it does many things to assist its dealers to compete with the dealers of other marketing oil companies and encourages its dealers to provide efficient service to motorist consumers; that the activities of respondent all result from competition from competing oil companies, many of which are much larger and better known than respondent; that price is one of the many elements bearing upon competition for consumer motorists patronage; that, because of intense competition which exists in the marketing of gasoline, price wars are common occurrences; that during such price wars retail gasoline prices often are driven so low that respondent's dealers cannot stay in business and are faced with business failure unless they receive assistance from respondent; that, in such circumstances, respondent is faced with the decision whether to let its independent dealers fail, which could eliminate both respondent and its dealers as competitors, or to buy out its independent dealers and market its products directly at retail through company-owned and operated service stations or to assist its dealers so that they may be competitive price-wise with other brands of gasoline.

Respondent also alleged in its answer that, as a result of the foregoing situation, it has entered into a policy of offering and providing assistance to its dealers—one, by means of its local representatives respondent keeps itself informed of competitive conditions in each of its trading areas; two, when information is obtained in this way and market surveys show that the level of competitive prices is threatening to drain a substantial volume from its dealers, respondent offers to enter into consignment agreements with its dealers under which respondent agrees to assume the risks inherent in a price war situation in the retail marketing of gasoline. The purpose of this consignment method of marketing gasoline is to keep service station dealers in business and prevent business failures of dealers and at the same time allow respondent to remain as a competitive factor in the marketing of gasoline in competition with other and larger competing oil companies.

Respondent also affirmatively alleged that it has adopted the policy and practice of offering to all dealers in an affected area the option of becoming consignees of respondent when competitive

conditions, based upon price surveys by respondent, require action by it to keep its dealers solvent and competitive.

Further testimony was taken in support of the allegations of the complaint during July and October 1959 and May 1960. On May 24, 1960, complaint counsel closed his case-in-chief. At that time an adjournment was taken to reconvene in Philadelphia on February 1, 1961, for the purpose of taking testimony in opposition to the allegations of the complaint. On October 14, 1960, motion was filed by counsel for respondent requesting this hearing be cancelled because he was engaged in the trial of another Federal Trade Commission case with another Hearing Examiner at that time and would be tied up until after May 16, 1961, with the trial of the other proceeding. On October 19, 1960, the Hearing Examiner entered an order granting the motion for the cancellation of the hearing date.

The Hearing Examiner retired, effective December 24, 1960, and returned to the employ of the Commission on May 2, 1961. The respondent, on August 18, 1961, requested an opportunity to avail itself of the privilege of disposing of the case by consent. However, nothing was accomplished and the case was set down for hearing by the Hearing Examiner on September 22, 1961, for October 24, 1961. In the meantime, on October 18, 1961, counsel for respondent filed a motion to strike the testimony of Howard T. Morris, beginning at line 9, page 764, and ending at line 18, page 765, of the transcript. This testimony related to the matter of exclusive dealing which was not involved in the complaint. Accordingly, the Hearing Examiner, on October 23, 1961, granted the motion and struck the testimony over the opposition of counsel in support of the complaint. On October 25, 1961, counsel for respondent rested his case, and, there being no further testimony offered in rebuttal, the Hearing Examiner closed the record for the taking of testimony and both counsel were allowed until January 15, 1962 within which to file their proposed findings. On the request of counsel for respondent for good cause shown, this time was extended to January 30, 1961.

On February 12, 1962, oral argument was held before the Hearing Examiner on the proposed findings.

Consideration has been given to the proposed findings submitted by counsel and the said oral argument and all the reliable probative and substantial evidence in the record upon all the material issues of fact, law, or discretion. Each of those proposed findings, which had been accepted, has been in substance incorporated into this initial decision. All proposed findings not so incorporated are herein rejected.

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The Hearing Examiner, being of the opinion that some of the allegations of the complaint have been proven by substantial and reliable evidence, and that the Commission should take remedial action with respect thereto, appropriate Findings as to the Facts and Conclusions are hereinafter set forth.

FINDINGS AS TO THE FACTS

I. DESCRIPTION OF RESPONDENT

Respondent, The Atlantic Refining Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 260 South Broad Street, Philadelphia, Pennsylvania. For a number of years last past respondent has been primarily engaged in the production, sale, and distribution of gasoline and other petroleum products throughout a 17 State marketing area, including eastern Pennsylvania, Delaware, and the eastern shore of Maryland and Virginia, known as the "Delmarva Peninsula" region. Said respondent advertises and sells its regular gasoline under the brand name of "Atlantic", and its high test under the brand name of "Imperial".

Said respondent owns and operates refineries at Philadelphia, Pennsylvania, and in Atreco, Texas. It also owns or controls various transportation facilities for the transportation of crude oil and refined petroleum products, including tankers and pipeline systems. It also owns and operates certain water terminals and bulk plants in different marketing areas from which it delivers gasoline and other petroleum products to various marketing outlets for subsequent sales to consumers.

In 1956, respondent's gross domestic sales of petroleum and chemical products, including its consolidated subsidiaries, amounted to approximately \$379,000,000.

II. METHODS OF DISTRIBUTION

(a) *Wholesale Distribution*

In a portion of the area known as the "Delmarva Peninsula", particularly in Sussex County, it sells its gasoline and other petroleum products to independent wholesale distributors, who, in turn, sell said products to large consumers and to small retail dealers located in villages off the main highways who, in turn, sell to the consuming public through dispensing equipment which sometimes is owned by the distributor and sometimes by the respondent or both.

(b) *Retail Distribution*

Respondent markets most of its gasoline and petroleum products through (1) independent dealers who own and operate their own stations and (2) lessee-dealers who operate stations leased to them by the owners. In some instances, respondent owns the station or land and building on which it is located and is under lease contract with the dealer.

(c) *Interstate Commerce*

Respondent, in the delivery and sale of its gasoline and other petroleum products to the aforesaid marketing outlets located in the "Delmarva Peninsula", usually enters into an agreement and contracts for the delivery of specific requirements of respondent's brands of gasoline. During the term of such contracts, it ships or transports gasoline and other petroleum products from its refineries by tankers and tank trucks through terminal centers in Norfolk, Virginia, Newark, New Jersey, and through its bulk distribution centers in Salisbury, Maryland, and Wilmington, Delaware, to the storage tanks maintained by said distributors, independent dealers and lessee-dealers located in the "Delmarva Peninsula", so that there is now, and has been at all times mentioned herein, a continuous stream of gasoline and other petroleum products in commerce as "commerce" as defined in the Federal Trade Commission Act, between respondent's refineries, terminals, bulk stations, and other distribution centers hereinbefore mentioned and said independent distributors, lessee-dealers, and other Atlantic dealers located in the "Delmarva Peninsula", and through said distributors, dealers and lessee-dealers to the consuming public.

III. COMPETITION IN THE INDUSTRY

The principal competitors of the respondent in the "Delmarva Peninsula" area during the time involved herein, 1956 and subsequently, were Standard Esso, Tydol Oil Company, Gulf Refining Company, Sun Oil Company, American Oil Company, Sinclair Oil Company, Socony Vacuum Oil Company, and The Texaco Company, who operate directly or indirectly through retail outlets located principally along the main highways running north and south in the States of Delaware, Maryland, and Virginia, and in resort cities in those States along the Atlantic coast.

IV. PRICE WARS

It is alleged in the complaint and the evidence in the record indicates that, during the year 1957, temporary disturbances of the

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retail price structure of gasoline at the service station level have occurred at various times in the "Delmarva Peninsula" market area served by respondent. Such price disturbances are usually referred to in the trade as "price wars".

Respondent, from time to time during the year 1957, made surveys of competitive conditions in the "Delmarva Peninsula", including New Castle County, Kent County, and Sussex County in Delaware, and Wicomico County in Maryland. On June 3, 1957, such a survey showed that in Area 1, which is in New Castle County in the northern part of the State of Delaware, in which Atlantic had 49 stations out of a total of 262, 166 stations reporting, 2 independent stations, Spur and Saveway, were selling regular gasoline at 24.9¢ per gallon; 15 other stations, including Esso, Gulf, Sun, Amoco, Calso, Sinclair, Spur, Texaco, and Tydol, were selling at 25.9¢ per gallon; 29 stations, including Esso, Gulf, Mobil Gas, Sun, Calso, Cities Service, Shell, Sinclair, Texaco, and Tydol, were selling at 26.9¢ per gallon; 119 stations, including 33 Atlantic stations, 26 Esso, 15 Gulf, 4 Mobil Gas, 17 Sun, 4 Amoco, 4 Calso, 1 Cities Service, 2 Sinclair, 9 Texaco, and 4 Tydol, were selling at 27.9¢ per gallon.

This same survey also showed that in Area 2, also in New Castle County, which had 21 retail gasoline stations, 4 stations were selling at 26.9¢ and 8 stations at 27.9¢. Only 2 of these stations in that area were Atlantic stations.

In Area 3 (Kent County) with a total of 71 stations of which 9 were Atlantic, the survey showed that out of a total of 44 stations reported, 2 were selling at 25.9¢ 24 at 26.9¢, 17 at 27.9¢, and 2 at 28.9¢. All of the Atlantic stations were on consignment and they posted a price of 27.9¢ on regular gasoline.

In Area 4 (Sussex County) which had 41 stations, 6 of which were Atlantic; out of a total of 15 competitive stations reported, 1 station was selling at 26.9¢, and 14 at 27.9¢. Of the 14 stations, Esso, Gulf, Mobil Gas, Sun, Calso, Pure Oil, Sinclair, Texaco, and Tydol were included. At that time, Atlantic Refining Company had put into effect its contract sales plan or consignment contract (which will hereinafter be further discussed) in Areas 1, 2, and 3 of the "Delmarva Peninsula", but had taken no action with respect to Area 4 (Sussex County; CX 230 A-E).

On June 25, 1957, the Atlantic Refining Company made another survey of the "Delmarva Peninsula" area, and it was found that the majority of the well known brand competitors in the northern part of the area in Areas 1, 2, and 3 were still posting retail prices at 26.9¢ on regular gasoline, and the recommendation was made by the official making the investigation that Atlantic reduce its post-

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ings on contract sales consignment operation from 27.9¢ to 26.9¢ per gallon, which was made effective on June 26, 1957 (CX 274).

According to a survey made by respondent of Area 4 (Sussex County) on or about July 1, 1957, 52 out of 55 competing retail gasoline stations reported were selling regular gasoline at 26.9¢ per gallon. They included 11 Esso stations, 2 Gulf stations, 2 Mobil (Socony) stations, 5 Sunoco stations, 7 Amoco stations, 4 Cities Service stations, 8 Pure Oil stations, 3 Shell stations, 4 Sinclair stations, and 5 Texaco stations. Some of the retail dealers received rebates off of their tank wagon price. It was reported that the Sun Oil Company was operating on a commission agreement plan similar to respondent's. On the basis of this report, respondent put into operation its contract sales or consignment agreement plan (CX 229A and B). This survey shows 96 stations in the area of which 16 were Atlantic. There is no explanation in the record of the variance between this exhibit and the previous exhibit as to the number of stations.

Prior to June, 1957, the normal retail price of regular gasoline by Atlantic stations located on Routes 13 and 113 in Sussex County, State of Delaware, in and around Seaford and Georgetown was 29.9¢ per gallon, although, as hereinbefore indicated, most competitors were selling at 26.9¢ per gallon. The Atlantic dealers and lessee-dealers were paying respondent a tank wagon (truck) price of 24.3¢ per gallon, giving the dealer a margin of slightly more than 5¢ per gallon. The Atlantic dealer at Rehobeth Beach was selling this grade for 30.9¢ per gallon and was paying Atlantic 25.3¢ per gallon.

Atlantic dealers and lessee-dealers could not compete with such low retail prices of their major competitors. They appealed to the respondent for relief. Representatives of the respondent contacted their dealers and offered to put into effect what was known as a "Contract Sales Plan", which included a "consignment agreement" as hereinbefore indicated. This plan had been theretofore extended to the Atlantic dealers in Eastern Pennsylvania and in the northern areas (New Castle and Kent Counties) of the State of Delaware and was in effect at that time. The record contains a statement of respondent's gasoline pricing policy to dealers at or about this time (CX 151 A-C).

V. RESPONDENT'S CONSIGNMENT AGREEMENT POLICY

In the statement of policy in effect prior to and early in April 1957, it is recognized by the respondent that its primary method of marketing gasoline to dealers is by tank wagon delivery at prices

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competitive with those of major competitors, and that the success of their dealers depended on their promptly meeting the retail prices of competitive stations and marketing gasoline through comparable outlets in the same area. According to this policy, when price war conditions prevail in a given competitive trade area, so that the spread between the dealer price of Atlantic gasoline and the prevailing service station price at comparable service stations in a competitive trade area is less than four cents per gallon, all Atlantic dealers will have the choice of the following alternative courses of action:

- (a) Continue to buy their gasoline at prices applicable under normal dealer operation; or
- (b) Execute a Contract Sales Agreement which is also known as a consignment agreement and become consignee of the respondent for the retail sale of Atlantic owned gasoline; or
- (c) Terminate all existing contractual relations with the respondent.

Under the provisions of this consignment agreement, the dealer was to receive a commission of 3.25¢ per gallon on Atlantic regular gasoline and 3.75¢ on Atlantic Premium Imperial gasoline.

This consignment agreement provided for a consignment inventory, replenishment delivery equal to the amount of gasoline sold out of consignment inventory and constituted the dealer as trustee of the proceeds from the sale of Atlantic gasoline. It also granted the dealer total commissions from the sale of respondent's gasoline of at least \$400 per month, provided the dealer's average monthly gasoline gallonage for the preceding nine calendar months exceeds 5,999 gallons. Title to the gasoline delivered from time to time to the dealer to replenish or augment the original consignment inventory did not pass to the dealer, but was considered as though such gasoline had been a part of the original consignment inventory.

It was also provided in the original consignment agreement that, upon the termination of the agreement, the gasoline on hand in the dealer's tanks should be returned to Atlantic, or at the dealer's option he might purchase such gasoline at Atlantic's prevailing dealer price applicable at that location on the date of termination.

The foregoing policy in effect in April 1957, was superseded by another policy quite similar, except that, instead of a flat commission per gallon, the dealer's commission was computed upon the basis of 23% of the service station price, including taxes, and adjusted to the nearest one tenth cent per gallon on Imperial gasoline and one-half cent per gallon on Atlantic regular gasoline (CX 157A-H).

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Further changes were made in the respondent's policy with respect to consignment contracts on July 9 and July 18, 1957 (CX 167A-B and CX 171A-H). Important conditions of the plan in effect in July 1957 at the time of the said price war in Sussex County were as follows:

1. The Company will place gasoline on consignment with the dealer subject to prior approval by the Credit Department. At the time of each replenishment delivery, the volume of gasoline on consignment is to be brought to its original level. The dealer will settle in cash at the time of replenishment for the number of gallons equal to the replenishment delivery on the basis of Atlantic's posted service station price at the time at which the gasoline was sold, less a commission for Atlantic gasoline, representing 23% of the service station price for the product, excluding all taxes.

2. Atlantic will specify the service station price of gasoline posted by the dealer during the period of the consignment plan agreement, the dealer to be trustee of proceeds of sale.

3. Title to gasoline constituting any replenishment delivery shall not pass to the dealer.

The form used to obtain the acquiescence of the dealer, as finally adopted in July 1957 for dealers located in depressed price areas, is as follows (CX 173-F):

Your Salesman has explained to you Atlantic's Pricing Policy dated July 9, 1957, for Dealers located in depressed price areas.

Atlantic offers you two choices in accordance with said price policy.

(1) Continue to buy Gasoline at Atlantic's dealer price for your area.

(2) Sign a Consignment Plan Agreement and become our Consignee for the retail sale of Atlantic owned Gasolines.

Please sign the original copy of this letter indicating your choice in the space provided.

Cordially yours,

District Manager

I select choice No. _____. I understand that if I selected Choice No. 1 and wish to change my selection, it is my obligation to notify Atlantic and that my right of selection continues only as long as the above designated Pricing Policy remains in effect in the area in which I operate.

Date _____ Dealer _____

VI. THE CONSIGNMENT AGREEMENT IN OPERATION

One of respondent's lessee-dealers was located at Rehobeth Beach, Delaware, Mr. Raymond D. Crevison, who began to operate for Atlantic in March 1957. In June 1957, he was purchasing the regular brand of gasoline from respondent at 25.3¢ per gallon, which was the tank wagon price in that area at that time, and 28.8¢ per gallon for Imperial. He first entered into a consignment agree-

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ment which was in effect on July 1, 1957, as hereinbefore described, and later agreements were entered into in October 1957, June 1958, and August 1958. The consignment agreement was terminated by mutual consent on November 12, 1958, after Mr. Crevison asked to be released in a letter dated November 1, 1958. Mr. Crevison first heard of the price war from his customers when it was about 28 miles north near Milford in Kent County in June 1957. It was beginning to hurt his business as he couldn't lower his prices to meet the lower prices upstate.

Mr. Crevison was told by the Atlantic representative, a Mr. Martin, when the price war hit his community that, if he went on consignment, it would take care of the price war, that "it was a way of protecting me so that I could lower my prices". He was told he could stay on the plan as long as the price condition prevailed.

The record contains a copy of a Credit Memorandum, dated July 23, 1957, of The Atlantic Refining Company, crediting the account of Raymond D. Crevison with the value of gasoline in his inventory at the time of going on the Consignment Agreement on July 1, 1957, as follows: Atlantic regular gasoline 2,062 gallons at 25.3¢ per gallon, and Atlantic Imperial 786 gallons at 28.8¢ or a total credit of \$748.06 (CX 119-A).

The storage tanks operated by Mr. Crevison have a capacity of 9,000 gallons, and they were normally checked once a month. After he went on consignment, at the time of each delivery he paid for the amount of gasoline that was delivered to replenish or replace the gasoline that had been sold. Beginning on July 5, 1957, gasoline was delivered to Mr. Crevison under the consignment agreement plan, and, according to invoices or delivery slips, which at first were in the same general form as the sales slips theretofore used, Mr. Crevison paid the new reduced retail price of 26.9¢, less tax of 8¢ State and Federal, and less 4.3¢ commission, or a net price, including tax for regular gasoline thus delivered, of 22.6¢ per gallon which he was instructed by Mr. Martin to sell at 26.9¢ per gallon to the public. At the same time, under a similar procedure, he paid 26.1¢ per gallon for Imperial, his commission being 4.8¢ per gallon. This arrangement continued on through the year 1957 until September 16, 1957 when he was required to raise his price to the public to 29.9¢ per gallon on regular gasoline. On the basis he was operating, his commission on sales on September 29, 1957 was 5¢ per gallon on regular gasoline, and 5.5¢ on Imperial gasoline. He was issued a Credit Memorandum on September 30, 1957 to account for the increase in price of consignment gallons between inventory and

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approved consignment level sold on contract sales plan prior to the price change on September 16, 1957. The gasoline was delivered by the same tank drivers, and he made payments to the driver for gasoline delivered, the drivers "sticking" the tanks before and after delivery to determine the exact quantity to be paid for.

During the time that Mr. Crevison was on consignment in July 1958, he ran out of regular gasoline and obtained permission from Mr. Martin to purchase some Atlantic regular gasoline from the wholesale distributor in that area, a Mr. Marsh, operating under the name of the Atlantic Oil Company, at Georgetown. This was the only time that he was allowed to make any gasoline purchases on behalf of The Atlantic Refining Company. According to the sales slip in the record, he paid the same price to the wholesaler for the regular gasoline delivered by the wholesaler that he had been paying Atlantic for the same gasoline, which at that time was 23.9¢ per gallon, which was then being sold at retail at 28.9¢ per gallon. The purchase from the wholesale distributor was made on June 29, 1958, and the next delivery of gasoline by Atlantic, according to delivery slips in the record, was on July 3, 1958 (CX 127-J).

While Mr. Crevison was operating on consignment, he made no changes in his signs at his place of business, which read, "R. D. Crevison, Proprietor". He carried his own liability insurance on his stock and equipment, except gasoline, kept the money from all sales in his cash register and did not keep monies from gasoline sales separate from his other sales in the cash register or in the bank, and did not keep a separate set of books for the sale of gasoline although the gasoline is entered as a separate item on the books. During the year 1958, he received the sum of \$7,621 from The Atlantic Refining Company as gross commissions under his consignment contract on which he paid an income tax.

Another Atlantic lessee-dealer, who had a somewhat similar experience, was Mr. Howard T. Morris of Georgetown, Sussex County, Delaware. His service station was on Route 113. The respondent's consignment plan was first brought to his attention during the price war in July 1957 by respondent's salesman, Mr. Martin, who told him that the respondent was going to do something about the price war and try to help the dealers out. Mr. Morris entered into a consignment agreement with the respondent on July 2, 1957, which provided, among other things, that Mr. Morris would sell respondent's gasoline "at posted service station price designated by Atlantic from time to time." At the time that Mr. Morris went on consignment, all of the Atlantic dealers in that area were on consignment, except

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some small dealers, usually grocery stores, with one or two pumps and who were being sold gasoline by a wholesale distributor. Mr. Morris remained on consignment until the agreement was cancelled by mutual consent as of September 27, 1958.

The record contains a list of thirty-seven Atlantic dealers who were on consignment in Area No. 4 in 1957-1958, two of which were in Maryland and six of these replaced others (CX 406 A-C).

On September 13, 1957, respondent issued a price change on dealer retail posting on consigned dealers on gasoline in Delaware and Maryland, effective September 16, 1957, as follows (CX 258-A and B):

DELAWARE

New Castle County:

Above C&O Canal—no change—will remain at 26.9¢

Below C&O Canal to Kent County line—the retail posting on Atlantic will change from 26.9¢ to 27.9¢

Kent County:

Including entire city of Milford—the retail posting on Atlantic will change from 26.9¢ to 27.9¢

The new dealer spread will be 4.6¢ on Atlantic and 5.1¢ on Imperial.

Sussex County:

The dealer retail price will change from 26.9¢ to 29.9¢

The new dealer spread will be 5¢ on Atlantic and 5.5¢ on Imperial.

Delmar, Maryland will carry the Sussex County retail posting of 29.9¢.

However, due to tax structure, their spread will be 4.8¢ on Atlantic and 5.3¢ on Imperial.

MARYLAND

Wicomico County

The special tank wagon price for Salisbury, Pittsville and Bivalve will be removed. The tank wagon price will revert to normal of 17.5¢ for Atlantic.

Consignment will be removed at Bishop and Bishopville.

Thereafter the dealer costs in the respective areas were as follows:

New Castle County (Area 1).....	22.6¢
(Area 2).....	23.3¢
Kent County.....	23.3¢
Sussex County.....	24.9¢

In those same areas, the regular dealer tank wagon prices thereafter were as follows:

New Castle County (Area 1).....	24.6¢
(Area 2).....	24.6¢
Kent County.....	24.6¢
Sussex County.....	25.3¢

Representatives of the respondent called upon their consignment dealers on September 16, 1957 and changed the price of regular

gasoline on the service station pumps from 26.9¢ to 29.9¢ throughout Sussex County, Delaware, and from 26.9¢ to 27.9¢ in Area 2 of New Castle County and Kent County, Delaware (CX 281-E), and in Area 1 of New Castle County no change was made (CX 342-A).

It will therefore be seen from the foregoing that, while apparently the price war was over in Sussex County, lower retail prices were still being posted by Atlantic on regular gasoline in New Castle County and Kent County.

Although most of the evidence in the record relates to the price war in Sussex County, which apparently ended on September 16, 1957, as hereinbefore indicated, one dealer located in Odessa, Delaware, which is in New Castle County, continued to sell at the higher price of 29.9¢ per gallon, and paid the regular tank wagon price throughout the Summer of 1957 and the Spring of 1958 when apparently the price war ended in that County, which is the northernmost County in Delaware. This dealer operated a small store and an auto salvage yard, and did not depend as much on the retail sale of gasoline as some of the other dealers. Mr. Carlisle was more independent than some of the others, and declined the offer of the respondent to go on the consignment agreement plan. Finally, in the Spring of 1958, he did cut the price just before the price war was over, and, at the request of representatives of the respondent, entered into a mutual agreement to cancel out his dealership. He then became a dealer for Texaco.

VII. THE WHOLESALER COOPERATION

In order to uphold the prices established by the respondent through its dealers operating on consignment agreements located along Routes Nos. 13 and 113 in Sussex County around Seaford and Georgetown, Delaware, an attempt was made by representatives of the respondent to secure the cooperation of respondent's wholesale distributors and the retail dealers sold by them in maintaining the prices established by the respondent during the time of the price war and subsequently. This was done by respondent creating a fictitious or constructed dealer tank wagon price, which was the price the wholesale distributor was to charge its dealers and was computed by using the fixed retail price, excluding tax, for respondent's consumer lessee-dealers in the affected area less 23%. The respondent then rebated two-thirds of the difference between the fictitious dealer tank wagon price and what would be the normal dealer price. The wholesale distributor absorbed the remaining one-third. In order

for the wholesale distributors to obtain this rebate from the respondent, however, they had to satisfy three conditions:

(1) They must sell at the fictitious or reduced dealer tank wagon prices to those retail dealers located in a depressed or price-war area.

(2) They must furnish respondent evidence of such sale in an application for the rebate on forms previously supplied to them by the respondent. On these forms, they must indicate the dates and total gallonage sold at the reduced price and a list of the dealers to whom they gave the rebate.

(3) Upon receipt of the forms, the respondent calculated the amount of the rebate and remitted to the distributor, but only for the number of gallons sold to those dealers who had resold at respondent's fixed retail price established for its consignment lessee-dealer stations. The distributor had to sustain the full loss for sales to those dealers for whom the respondent disallowed the rebate.

As a matter of practice, it had been customary for many of the small dealers located off the main highways, who were being sold and serviced by respondent's distributors, particularly the Atlantic Oil Company in Georgetown, Delaware, to sell their gasoline to the public at a differential of 2¢ per gallon lower than the price at which the gasoline was sold by respondent's dealers and lessee-dealers on the main highways and in Rehobeth Beach and Georgetown. From July of 1957 until September 1957, the posted retail price for Atlantic regular gasoline at its consignment dealer stations was 26.9¢. In September 1957, as hereinbefore indicated, respondent increased this retail price to 29.9¢ per gallon, and the cooperation of the wholesaler distributors was sought and obtained by respondent to get all of Mr. Marsh's dealers to post this increase in price. Four small dealers would not post this higher retail price and respondent in October 1957 refused to rebate to the wholesale distributor on their purchases (CX 108A-H). After checking the retail prices of these dealers, representatives of the respondent called upon them, along with Mr. Marsh, the distributor, in an effort to get them to raise their price on regular gasoline to the same as that of the consignee dealers of the respondent in that general area. These representatives went so far as to threaten to revoke Mr. Marsh's franchise if these dealers did not cooperate, and Mr. Marsh was urged to pull their equipment, which he owned, and to send in their contracts to determine whether they could be broken. Mr. Marsh did not pull any of the equipment, but he did send in to respondent contracts with two of the dealers, but nothing happened to them as they could not be broken.

As a result of the pressure that was used by respondent's representatives and other retail dealers in the area and on the main highway, these four dealers did finally raise their prices to conform to the price being posted by respondent's lessee-dealers operating under the consignment plan, but only for a short time, as the necessary result of such compliance was the loss of sales. Subsequently, they dropped their price on regular gasoline back to 27.9¢ per gallon. As one witness testified, he was hurt by the gasoline war in the Summer of 1957, as he could not sell as much then because the consignment dealers on the highway were selling at the same low price. His margin of profit was so low he could not reduce his price further and, when the Atlantic consignment dealers advanced their prices on regular gasoline to 29.9¢ per gallon and this dealer did likewise, it was necessary for him to again reduce his price to 27.9¢ per gallon in order to maintain a volume necessary to continue in business. He estimated that, when he put his price up to 29.9¢, his regular gasoline sales fell off 45%.

Respondent was not successful in its attempt to get *all* the small dealers purchasing from wholesale distributors to maintain the posted retail prices at which its consignment dealers were selling gasoline in the Fall of 1957. However, since respondent allowed a rebate to Mr. Marsh based on Atlantic's posted price on date of delivery, and that it refused to make such a rebate allowance for only four dealers out of twenty, whose names and gallonage had been submitted to respondent for rebate, it may be inferred that the other sixteen dealers were maintaining the posted retail prices. In Commission's Exhibit 108-E, the definite statement is made that "we will not refund on his accounts not posting 29.9¢."

VIII. THE VOLUME OF ATLANTIC GASOLINE SOLD AT RETAIL AND WHOLESALE IN EASTERN PENNSYLVANIA REGION AND WILMINGTON, DELAWARE, DISTRICT

1. *Retail Sales*

(a) *In Eastern Pennsylvania Region*

As hereinbefore indicated, most of the evidence in this case relates to competitive conditions in Area 4 or Sussex County of Delaware. However, there is evidence in the record indicating that the other areas of the Wilmington, Delaware, District of the Eastern Pennsylvania Region were a part of respondent's general plan of operation. This Eastern Pennsylvania Region had separate Districts in Williamsport, Reading, Harrisburg, Wilkes Barre, and

Allentown, in addition to the Wilmington District in which Sussex County is located as Area 4. In order to get some idea of the ultimate probable effect of the practices disclosed in the record and discussed in this decision, consideration should be given to the total operation in that region and in the Wilmington District. For instance, in 1956, in the Eastern Pennsylvania Region approximately 1600 service stations, either dealer-owned and operated or owned and leased by Atlantic, dispensed Atlantic gasoline and the volume of sales of gasoline in that region was approximately 132,000,000 gallons. In 1957, there were approximately 1700 Atlantic service stations in that area, and the total volume of sales was approximately 94,000,000 gallons, and in 1958 there were approximately the same number of service stations and the volume of sales was approximately 76,000,000 gallons.

(b) *In Wilmington District*

In 1956, the total number of Atlantic service stations in the Wilmington District was approximately 204; in 1957, 208; and in 1958, 209. The total retail sales of gasoline in the Wilmington District in 1956 amounted to 20,000,000 gallons; in 1957, 11,800,000 gallons; and in 1958, 9,200,000 gallons (CX 205 and 206).

2. *Deliveries to Consignment Dealers*

During the years 1957 and 1958, the approximate volume of delivery of gasoline to service station dealers, pursuant to consignment agreements, in the entire Region was 48,500,000 gallons in 1957, and 71,900,000 gallons in 1958. In the Wilmington District, alone, in 1957, the volume was 8,600,000 gallons, and in 1958, 11,800,000 gallons (CX 210).

3. *Sales to Distributors*

During the years 1956, 1957, and 1958, the approximate sales of Atlantic to distributors in the entire Eastern Pennsylvania Region were as follows: In 1956, 81,800,000 gallons; in 1957, 72,700,000 gallons; and in 1958, 71,700,000 gallons. In the Wilmington District, alone, the sales to distributors were as follows: In 1956, 12,000,000 gallons; in 1957, 11,100,000 gallons; and in 1958, 10,600,000 gallons (CX 207).

IX. THE VOLUME OF REBATES OR ALLOWANCES TO DISTRIBUTORS

With respect to the gallons of gasoline upon which rebates or allowances were given by Atlantic to its distributors and the approximate dollar amounts in the total Eastern Pennsylvania Region

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during the period of time from January 1, 1957 to April 13, 1959, the totals were as follows: The gallons were 8,968,800, and the dollars were \$126,915. In the Wilmington District, alone, the gallons were 605,400 and the dollars were \$6,700. (CX 211.)

In addition to Charles Marsh at Georgetown and Frankford, and Walter Lister at Seaford, both in Sussex County, other distributors handling Atlantic gasoline in Delaware in the Wilmington District in July 1957 were the Clements Supply Co., Clayton, Delaware, and Hammond & Taylor, Wilmington, Delaware. Other distributors in that area were in Maryland.

CONCLUSIONS

It is concluded from a thorough consideration of the facts, as set forth in the foregoing findings as to the principal allegations of Counts I and II, that the respondent has utilized a legal method of procedure in meeting the competitive situation with which it was confronted in July 1957 in the "Delmarva Peninsula" in protecting its dealers from the price war that was prevalent in that area. The policy, which it adopted in the use of consignment contracts with its dealers making them its agents, brings the respondent within the principles laid down in the *United States v. General Electric Co.* case, 272 U.S. 476, decided in 1926, and legally gives the respondent control over the prices at which its gasoline is sold through its dealers and lessee-dealers to the consuming public.

The important features of the consignment agreement, which bring it within the principles of the *General Electric* decision, are:

1. Title to the gasoline is reserved to Atlantic, and it has the right to determine the amount of the consignment in the inventory of the dealer at any time.
2. All gasoline in inventory in the dealer's tanks remains the property of Atlantic until sold, and money received for the sale of gasoline by the dealer is held in trust for the Atlantic account.
3. Atlantic fixes the price at which the gasoline is to be sold by the dealer in all instances.
4. Atlantic is obligated to bear all expenses of delivery and removal of consigned gasoline.
5. Upon termination of the consignment agreement, the consignee has option of returning the consigned gasoline or purchasing it from Atlantic.
6. The consignee dealer is required to pay over proceeds of sales less fixed commission at regular intervals.
7. Atlantic assumes all risk of casualty loss where negligence or willful act of the dealer has not contributed to the loss.

8. Atlantic assumes all taxes on consigned stock.

Although it is contended by complaint counsel that these dealers were coerced, and that they had no alternative but to enter into the consignment agreements to stay in business, it is not believed that there is sufficient evidence of any form of coercion to destroy the validity of the agency relationship which is brought about by the signing of the consignment agreement and the posting of the retail prices by the respondent. So far as the record is concerned, it is clear that in all instances the respondent offered to help the dealer meet an impossible competitive situation. In each instance, the dealer was able to continue operation throughout the price war with commission allowances which enabled him to stay in business. It was to the interest of respondent that these dealers be kept in business to continue as a conduit for the dispensing of respondent's gasoline and other petroleum products to the consuming public. Complaint counsel contend that there is no absence of coercion in this case and no arm-length dealing—"you either sign or go out of business." On the other hand, the assurance is given the dealer that, if he will sign, he may remain in business. There was mutuality, both in the entering into the contract and in the termination of the contract. This is illustrated by the experience of Mr. Crevison, a Rehobeth, Delaware, dealer, which is set forth in considerable detail in the foregoing findings.

Although there is no decision of either the Court of Appeals or the United States Supreme Court passing specifically on the legality of consignment agreements by oil companies in meeting competitive situations in price wars, there is some indication in some of the decisions that such an agreement would be lawful. See *Standard Oil Company v. U.S.*, 337 U.S. 293, 296.

The experience of the one dealer in New Castle County that did not sign the consignment agreement and continued to handle Atlantic gasoline throughout the period of the price war in the Summer of 1957 is evidence that there was no coercion used. That dealer probably would not have survived except for the fact that his principal means of livelihood were other than from the sale of gasoline which he purchased at the usual tank wagon price. Even when the price war was about over and this dealer finally reduced his retail price out of spite, he was not compelled to break his lease or go out of business, but, as the record shows, there was mutual consent to terminate the lease. This dealer then became a Texaco dealer.

With respect to the allegations of Count III of the complaint, however, the record shows that the respondent was not satisfied to

control the retail price of Atlantic gasoline in the large stations located on the main highways of the "Delmarva Peninsula", but deemed it necessary, in order to have one posted Atlantic retail price, to control, insofar as it was possible, the retail price of small dealers that were being sold by wholesale distributors of Atlantic gasoline. This respondent attempted to do by securing the cooperation of the wholesale distributors in selling retail dealers at prices suggested by Atlantic and in compelling their retail dealers to sell Atlantic gasoline at the same prices as respondent had posted at the service stations of the dealers that had signed consignment agreements. There were two wholesale distributors in Sussex County; one, the Atlantic Oil Company operated by Mr. Marsh in Georgetown, Delaware, on Route 113, who sold principally east of that highway; and the other was Lister Oil Company operated by Walter H. Lister, located at Seaford, Delaware, on Route 13, who sold principally west of that highway and between that highway and Route 113. By securing the cooperation of these two wholesale distributors, respondent attempted to fix and control the retail price of Atlantic gasoline in all retail gasoline stations in Area 4—Sussex County—and, admittedly, this was its purpose. Mr. Marsh, the owner of Atlantic Oil Company, was an unwilling conspirator, but he did cooperate to the extent indicated in the foregoing findings, and, although respondent was not successful in all instances in getting these small retail dealers to post retail prices which coincided with those fixed by the respondent under the consignment agreements, it was successful in most instances. Certainly the coercive methods used by representatives of the respondent to obtain the cooperation of the wholesale distributors and to compel their small dealer customers to raise their prices in September 1957 to coincide with the prices fixed by respondent in the service stations of the dealers on the main highways, are evidence of an intention to conspire with the wholesale distributors to fix uniform retail prices of Atlantic gasoline in that area.

Counsel for the respondent made the point in his oral argument that "it takes two to tango", suggesting thereby that there was no conspiracy, since there must be two or more parties to a conspiracy. That may be true, but sometimes an unwilling partner may be compelled to cooperate, and that is the situation in which Mr. Marsh found himself when representatives of the respondent took him with them to call upon his retail gasoline dealer customers to get them to raise their prices. He didn't want to do it, but he was threatened with the loss of his own franchise if he did not cooperate. His presence gave the customers the impression that he was consenting

to the activities of respondent's representatives, even though he said nothing. It was a joint call and the respondent's representatives were the voice of the conspiracy. It is believed that the allegations of this Count have been substantially sustained by competent and reliable evidence in the record.

The contention of counsel for respondent that the activities of respondent to secure the cooperation of wholesale distributors to maintain prices of gasoline by retail dealers sold by them are not in interstate commerce is rejected for the reason that such activities are a part of the over-all conspiracy to fix and maintain wholesale and retail prices and involves the sale of a product by the wholesaler and retailer which took on interstate character when it was loaded in the tank car or tank truck at Salisbury, Maryland, and did not lose that character until it was put in the automobile of the customer in the retail gasoline station, since the only break in the continuous and regular flow of the product was a temporary one in the tank of the wholesaler and the tank of the retailer, only long enough to serve the ultimate purchaser.

It is unrealistic to cut the flow of the product in two or three segments to deprive the Commission of jurisdiction over the activities of the respondent to keep the sale of the product from unlawful interference by agreements to fix the wholesale and retail prices at which it is sold to the consuming public.

Assuming, as has been concluded above, that respondent has legally fixed the prices at which it sells gasoline at retail through dealers on consignment, it does not follow that it can protect that price by securing the cooperation of wholesale distributors and retail dealers sold by them whereby the wholesalers sell at prices suggested by respondent and whereby the retail dealers agree to sell and do sell at the prices fixed and posted by respondent. Such activities on the part of respondent constitute an illegal restraint on the sales activities of such cooperating wholesalers and retailers and, since the Atlantic retail price sought to be protected admittedly is a sale by respondent in interstate commerce, the agreement or cooperative activity is also in such commerce.

Counsel for respondent cite and rely upon *Standard Oil Co. v. FTC*, 340 U.S. 231, and footnote 6 on page 238, as authority for their contention that the transactions involved in this case in Count III are not in interstate commerce and the Commission does not have jurisdiction. At best, this reference is dicta, since the transaction involved in that case was a sale to the retail dealer.

The facts in the present case bring it more in line with the principle enunciated in the case of *Walling v. Jacksonville Paper Com-*

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pany, 317 U.S. 564, at pp. 568-9. That case involved the Fair Labor Standards Act and employees of a wholesale paper company who are engaged in the delivery, from company warehouses in the State to customers within the same State, after a temporary pause at such warehouses, of goods procured outside of the State upon prior orders from or pursuant to contracts with such customers. It was held that such goods retain their interstate commerce character until finally delivered to the customer; and they are not divested of that character by the temporary pause at the warehouse, or *by the fact that title to them passes to the company upon their delivery at the warehouse*. Also, where the customers are recurrent as to the kind and quantity of merchandise, and the manager can estimate with precision the needs of his trade, such transactions would be included in the group held to be "in commerce".

So, in the present case, applying the rule of that case, where the retail dealer holds the gasoline in his tank for sufficient length of time to make deliveries by pumps to regular customers even though title passes to the retail dealer upon delivery to his tank, the gasoline is still in interstate movement until delivery is made to the automobile owner—the ultimate consumer.

In view of the foregoing, it is therefore concluded that respondent, acting through its agents, officers, and employees, and its wholesale distributors, engaged in selling respondent's gasoline and other petroleum products to independent service stations in the "Delmarva Peninsula" area for the purpose of suppressing, preventing, hindering, and stabilizing price competition in the distribution and sale in commerce of Atlantic gasoline at retail, as well as wholesale, has entered into and carried out a planned common course of action, understanding and agreement with its said wholesale distributors to maintain and fix the price at which Atlantic gasoline was sold or would be sold at the wholesale level, as well as at retail, in gasoline service stations sold to by said distributors, all in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That the respondent, The Atlantic Refining Company, a corporation, its officers, directors, agents, representatives, or employees, directly or through any corporate or other device in, or in connection with, the offering for sale, sale, or distribution of its gasoline or other petroleum products, in commerce as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from coercing, persuading, inducing, or otherwise unduly influencing, directly or indirectly, its independent wholesale dis-

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tributors to enter into, cooperate in, or carry out any planned common course of action, understanding, arrangement, agreement, combination, or conspiracy to establish, fix, stabilize, maintain, or adhere to, by any means the wholesale price at which said products are sold by said wholesale distributors or the retail prices at which its said products are to be resold by retail service stations owned and operated by said distributors and/or retail dealer customers of said wholesale distributors.

OPINION OF THE COMMISSION

MAY 16, 1963

By MACINTYRE, *Commissioner*:

This matter is before the Commission upon the cross appeals of respondent and counsel supporting the complaint from the hearing examiner's initial decision in part sustaining and in part dismissing the charges of the complaint.

The complaint alleges that respondent,* a major petroleum products marketing company, individually and in combination with others, engaged in practices which had the purpose and effect of unlawfully fixing and maintaining the resale prices of gasoline in violation of Section 5 of the Federal Trade Commission Act. Although the complaint deals with essentially a single basic factual situation, it is divided into three counts. In Count I it is alleged that the respondent individually violated the Act by coercing and forcing its lessee-dealers through means of a system known as a "temporary consignment contract", to sell at uniform and non-competitive prices. Count II of the complaint incorporates all of the allegations of Count I by reference. This Count, however, charges a conspiracy between respondent and its unnamed lessee-dealers to fix and maintain uniform and non-competitive prices. The medium through which the alleged conspiracy was allegedly effected is the aforesaid "temporary consignment contracts" between respondent and the co-conspirator lessee-dealers. Count III incorporates all of the allegations of Counts I and II, and in addition charges a conspiracy between the respondent and its unnamed independent wholesale distributors of gasoline. The alleged vehicle of this conspiracy differs somewhat from that charged as existing between respondent and its lessee-dealers. Count III charges that uniform consumer resale prices were fixed and maintained by grant-

* Respondent's correct name is The Atlantic Refining Company.

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ing the co-conspiring distributors certain allowances or rebates which they were to pass on to their dealer customers who would agree to adhere to the prices fixed by respondent in its illicit practices involving its lessee-dealers.

The hearing examiner found that only Count III of the complaint had been sustained, and issued an order which directed the respondent to cease and desist from fixing or maintaining the "wholesale price" at which its products are sold by "wholesale distributors" or the retail price at which its products are to be resold by retail service stations owned or served by wholesale distributors. Complaint counsel are appealing the dismissal of Counts I and II of the complaint, and respondent is appealing the finding and order with respect to the allegedly illegal practices charged in Count III.

* * * * *

The respondent is a Pennsylvania corporation, primarily engaged in the production, sale and distribution of gasoline and other petroleum products throughout a 17-state marketing area. Its "regular" gasoline is sold under the brand name "Atlantic", and its high test fuel under the name "Imperial". Respondent owns and operates refineries at Philadelphia, Pennsylvania, and Atreco, Texas. In 1956 its gross domestic sales of petroleum and chemical products, including sales of its consolidated subsidiaries, amounted to approximately \$379,000,000.

The respondent markets its gasoline in two ways. It sells directly to the operators of retail gasoline service stations who either own and operate their own stations, or lease the premises from the respondent or others. The second marketing system entails sales to wholesale distributors who in turn resell to retail service station dealers. In the geographic area with which the facts of this case are concerned, respondent used both systems.

The controversy in this case centers chiefly in an area referred to by the examiner as the "Delmarva Peninsula". As a glance at the map will show, the Delmarva Peninsula is that body of land which separates the Chesapeake Bay from the Delaware Bay and Atlantic Ocean. It acquires its name from the fact that it lies within the boundaries of the States of Delaware, Maryland and Virginia. In 1957 a gasoline price war erupted on the Peninsula. The allegedly unlawful acts and practices of this respondent were performed in connection with this price war.

The practices engaged in by the respondent in the Delmarva price war were not spur of the moment expedients but constituted the implementation of pre-determined company policy. The respondent

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states "under price war conditions it is the policy and practice of respondent to assist its retail dealers to remain in business. It is likewise the policy and practice of respondent to assist its distributors in order that they may, in turn, sell to their retail dealers at a price which allows such retail dealers to be generally competitive and thus not suffer economically and competitively or be forced out of business."

* * * * *

Since, as aforesaid, the respondent utilized two methods of distribution, their "assistance" to dealers in a price-war area, was accomplished in different fashions. As alleged in Counts I and II of the complaint, on direct sales to retail service stations, the respondent utilized temporary consignment contracts. This procedure was devised and implemented by the company in early 1956. It provided: "When price war conditions prevail in a given competitive trade area so that the spread between the dealer [tank wagon] price of Atlantic gasoline and the prevailing service station price at comparable service stations is less than 4¢ per gallon, all Atlantic dealers * * *" will be offered the opportunity to "execute a contract sales agreement and become our contractors for the retail sale of Atlantic-owned gasoline".

It is important to note that the company's program as planned and implemented, did not entail forcing dealers, including lessee-dealers, operating on company-owned premises, to execute the consignment agreements but under the circumstances, such overt control was unnecessary. Any dealer faced with a price-war situation was offered the consignment program or nothing. In other words, the company would not reduce its prices to him to enable him to independently set his own resale price and thereby meet competition as he saw fit. He was offered, in effect, "Hobson's Choice" of continuing to buy at the normal dealer price, entering a consignment agreement, or terminating all existing contractual relations with the respondent. As several of the dealer-witnesses testified, it was a case of either signing the consignment contract or going out of business. Respondent argues that the only coercive force present in the situation was engendered by the price war market conditions, which the record shows it did not create. But this is no answer. One cannot justify offering a hot poker to a drowning man by averring that the water was to blame. To the extent that the lessee-dealers had no alternative but economic death to entering a consignment-agreement with respondent, it must be found that they were pressured or coerced to enter such contracts and the hearing examiner's finding to

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the contrary is in error. However, there does not appear to be any evidence in this record that the respondent used its position of economic power over its lessee dealers to force them into entering the contract. Under the business conditions which existed, such pressure was unnecessary.

The basic charge made in Counts I and II of the complaint is that the consignment program as practiced by the respondent, resulted in illegal price fixing. The factual complex in which the allegedly illegal scheme was utilized is described by the hearing examiner at pages 1426 and 1427 of the initial decision. In summary, he found that from time to time during early 1957, the respondent surveyed the consumer prices charged by various gasoline companies' outlets in the Delmarva Peninsula. The survey disclosed that in respondent's areas 1 and 2, both in Newcastle County, Delaware, the major marketing companies' outlets were selling regular gasoline at prices ranging from 25.9 to 27.9 cents per gallon. In Kent County, Delaware (respondent's area 3), prices ranged from 25.9 to 28.9 cents. In Sussex County, Delaware (respondent's area 4), there were only two prevalent prices, 26.9 cents and 27.9 cents.

By June 1957 the respondent had already placed its consignment program into effect in its areas 1, 2 and 3 but had taken no action in this respect with respect to the Sussex County area.

In June 1957, Atlantic made another survey of the Delmarva Peninsula area and found that the majority of the major brand competitors in the areas 1, 2 and 3 were posting retail prices at 26.9 cents per gallon on regular gasoline. Effective June 26, 1957, respondent reduced the consumer price at its contract sales consignment stations in these areas from 27.9 to 26.9 cents per gallon.

By July 1, 1957, it appeared that most of the gasoline stations in the Sussex County area were then posting a price of 26.9 cents per gallon for regular gasoline. The examiner found that the stations selling at this price included "11 Esso stations, 2 Gulf stations, 2 Mobil (Socony) stations, 5 Sunoco stations, 7 Amoco stations, 4 Cities Service stations, 8 Pure Oil stations, 3 Shell stations, 4 Sinclair stations, and 5 Texaco stations. Some of the retail dealers received rebates off of their tank wagon price. It was reported that the Sun Oil Company was operating on a commission agreement plan similar to respondents."

At this time the Sussex County lessee-dealers were paying respondent 24.3 per cent per gallon for regular gasoline. The examiner found that at this cost price, "Atlantic dealers and lessee-dealers could not compete with such low retail prices of their major competitors. They appealed to the respondent for relief." In response

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to this appeal, the respondent's representatives contacted the dealers and offered them the consignment agreement which respondent refers to as its "contract sales agreement."

There is no dispute concerning the basic details of the consignment program. The hearing examiner succinctly explains it at page 1429 of his initial decision, in the following terms:

1. The Company will place gasoline on consignment with the dealer subject to prior approval by the Credit Department. At the time of each replenishment delivery, the volume of gasoline on consignment is to be brought to its original level. The dealer will settle in cash at the time of replenishment for the number of gallons equal to the replenishment delivery on the basis of Atlantic's posted service station price at the time at which the gasoline was sold, less a commission for Atlantic gasoline, representing 23% of the service station price for the product, excluding all taxes.
2. Atlantic will specify the service station price of gasoline posted by the dealer during the period of the consignment plan agreement, the dealer to be trustee of proceeds of sale.
3. Title to gasoline constituting any replenishment delivery shall not pass to the dealer.

The record reveals that respondent entered consignment agreements with 37 of its dealers in its area number 4 during 1957 and 1958. Two of these dealers were located in Maryland and the remainder in Delaware. Although the price war was over in Sussex County, Delaware, by September 13, 1957, dealers in that County remained under the consignment program until as late as September 1958. The price war continued for a longer time in Newcastle and Kent Counties in Delaware, and there too the consignment-agreements remained in effect during 1958.

There can be no doubt but that respondent, through the operation of this consignment program as above described was able to, and did, in fact, fix uniform retail prices for gasoline sold to consumers by its lessee-dealer service stations in its areas 1, 2, 3 and 4, located on the Delmarva Peninsula. But in order to maintain the prices established by the respondent through the consignment program, it was necessary to secure the compliance of these dealers who did not buy directly from respondents but through an intervening wholesale distributor. Respondent's announced policy on pricing is:

There will be only one retail price at all times in any given pricing area. This will be called Atlantic's posted retail price.

A reasonable relationship will always be maintained between posted retail price, posted dealer tank wagon price, and posted consumer tank wagon price.

Since the dealers buying from a wholesale distributor were his customers and not those of the respondent, control over their prices could only be maintained and secured by enlisting the cooperation

of the wholesale distributor who served them. The hearing examiner found that the respondent did secure the cooperation of its sometimes unwilling distributors, and thereby conspired with them to fix prices as charged in Count III of the complaint and in violation of Section 5 of the Federal Trade Commission Act.

The system pursued was to grant the wholesale distributor a lower price to enable him to in turn sell at a lower price to such dealers as would maintain the consumer price set and fixed by respondent for its direct buying dealers operating under the consignment plan. The simple mechanics of the pricing procedure utilized are explained in an Atlantic bulletin to its district managers, as follows:

A fictitious dealer tank wagon price will be computed by using the retail price, excluding tax, that we have established on contract sales operation less 23%. For example, if we are on contract sales operation at 26.9, the fictitious dealer tank wagon price for use by the distributor would be 13.8. This is the price which we would expect distributors to charge their dealers within the area where we are on contract sales operations * * *.

If a wholesaler sold to a dealer at the "fictitious dealer tank wagon price" under certain conditions prescribed and enforced by the respondent, he would, upon application to respondent, be rebated two-thirds of the difference between the price he charged the dealer and what would be a normal dealer price. He was required to absorb the remaining one-third. The conditions prescribed by the respondent for a wholesaler to meet in order to secure his rebate, were:

(1) They must sell at the fictitious or reduced dealer tank wagon prices to those retail dealers located in a depressed or price-war area.

(2) They must furnish respondent evidence of such sale in an application for the rebate on forms previously supplied to them by the respondent. On these forms, they must indicate the dates, gallonage sold and list the dealers to whom they gave the rebate.

(3) Upon receipt of the forms, the respondent calculated the amount of the rebate and remitted to the distributor, but only for the number of gallons sold to those dealers who had resold at respondent's fixed retail price established for its consignment lessee-dealer stations. The distributor had to sustain the full loss for sales to those dealers for whom the respondent disallowed the rebate.

The way in which respondent's pricing plan worked with distributors is indicated by the experience of the Atlantic Oil Company of Georgetown, Delaware, one of respondent's distributors in Sussex County, Delaware. Charles B. Marsh, the witness representing this distributor, testified that the company had around 18 dealer customers. During the price wars in Sussex County in 1957, respondent assisted the Atlantic Oil Company in aiding the latter's

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dealers by granting refunds (in effect a lower tank wagon price) on sales. Atlantic Oil Company sold its dealers at a reduced price and in turn applied to the respondent for refunds based on the dealer assistance.

These compensatory refunds were granted by the respondent to Atlantic Oil Company on the understanding, the evidence shows, that the distributor would lower its prices to dealers and that the dealers in turn would post pump prices suggested by the respondent.

Mr. Marsh testified that J. White, an employee of respondent, checked on the pump prices of Marsh's dealers and reported this information to Marsh. This same employee also accompanied Marsh on inspection tours of Marsh's dealers. At such times White asked the dealers to raise their price to the figure recommended by respondent. Most of Marsh's dealers posted uniform pump prices during the 1957 price wars but there were four notable hold-outs. These were: Bunting, Frankfort, Delaware; Burton, Georgetown, Delaware; R. J. Campbell, Frankfort, Delaware; and McGee & West, Somerville, Delaware. When these dealers refused to sell at the pump prices specified by respondent, Atlantic Oil Company was denied compensatory refunds on transactions with them. This is revealed by the testimony as well as documentary evidence.

Various employees of respondent, such as Mr. White and Mr. Hughes, contacted witness Marsh about the four nonconforming dealers and insisted that they raise their prices. Mr. White recommended as possible action against these dealers, if they refused to conform to the recommended prices, that Marsh take out their pumps and insignia. Marsh was also threatened with the loss of his franchise if he did not bring these dealers into line. Mr. Zinn, District Sales Manager of respondent, requested from Marsh and received the contracts that this distributor had with such dealers. Mr. Marsh testified that the explained purpose of obtaining the contracts was to see if they could be broken. However, no such action was taken. The four recalcitrant dealers all thereafter raised their prices, although some did this only as a temporary measure and shortly returned to their prior prices.

* * * * *

As aforesaid, the hearing examiner dismissed Counts I and II of the complaint, dealing with the consignment program. The dismissal is based upon his belief that the decision of the Supreme Court in *United States v. General Electric Co.* (272 U.S. 476, 1926), "legally gives the respondent control over the prices at which its gasoline is sold through its dealers and lessee-dealers, to the consuming public."

Before embarking on a discussion of this phase of the hearing examiner's decision, it must be clearly understood that the Commission, by discussing consignment separately, is not adopting and endorsing the seriatim treatment afforded this matter by the hearing examiner. The Commission considers the respondent's consignment program to be an integral and inseparable part of its overall pricing policy. In restraint of trade matters, and particularly those involving conspiracies, the legality of conduct is not to be judged by dismembering the evidence and viewing it as separate and distinct entities. *United States v. Patten*, 226 U.S. 525, 554 (19); *American Tobacco Co., et al v. United States*, 147 F. 2d, 93, 106 (6th Cir. 1944). Separate discussion is here afforded the consignment plan solely because of the unique and separate defense entered with respect to it.

The obvious point of departure in any discussion involving price fixing is *Socony-Vacuum Oil Co. v. United States* (310 U.S. 150, 222-223 (1940)) wherein it was held that any device which has the purpose and effect of fixing prices is an illegal restraint of trade. It is illegal, per se, without regard to whether prices were actually fixed or whether the device was completely unsuccessful in that regard. It is the act of conspiracy or combination itself which is unlawful, and no further showing need be made.

Without doubt this record shows that respondent did agree, conspire and combine with its lessee-dealers through the medium of this consignment program to fix and stabilize the consumer price of gasoline in the area under consideration. Under the *Socony-Vacuum* doctrine such a course of action is clearly unlawful unless the respondent is afforded shelter within the aegis of the *General Electric* case. It is the Commission's view that *General Electric* does not afford the respondent the needed shelter and that the hearing examiner's contrary finding that it does was in error, and must be reversed.

There is a clearcut distinction between the facts presented by the *General Electric* litigation and the instant matter. During the period prior to 1926, General Electric had managed to purchase all of the outstanding patents necessary for the manufacture of incandescent lamps. It, in turn, licensed other corporations, including competitors such as Westinghouse, to manufacture and sell lamps produced through the General Electric patent. All licensees were required to adhere to an agency-type distribution plan set up by General Electric, and were permitted to sell only at the prices set by General Electric.

In 1924 the government filed a petition against General Electric and others charging that the agency system of lamp marketing employed by them was violative of the Sherman Act. The case was tried in 1925 in the United States District Court for the Northern District of Ohio, and the Government's petition was dismissed (15 F. 2d 715). This decision was appealed to the Supreme Court, which in 1926 affirmed the District Court (272 U.S. 476). The Supreme Court decided that the agency method of distribution employed by the defendant was in fact a valid agency and not a disguised purchase-and-sale arrangement, and that General Electric as the owner of the patent, entirely controlling the use and sale of incandescent lamps, was within its rights in imposing upon its licensees conditions that their sales should be at prices fixed by General Electric.

As we see it, there is a wide difference between General Electric's permanently implemented and universally applied agency distribution of products produced under its patent and the activity of the respondent as demonstrated by this record. In this case, respondent attempted to make its dealers genuine agents, but the change made was merely of form and not of substance. Dealers continued to operate their businesses after entering into consignment agreements in practically the same manner as before, except that they could not determine their own gasoline resale prices to consumers. They commingled money from the sale of gasoline with their receipts from the regular sale of products other than gasoline. They continued to hold themselves out as full proprietors of their stations. They received gasoline and paid out money for its value, and they then sold it at retail as before.

A dealer entering the consignment program did not receive actual payment for his gasoline inventory. The value of the gasoline was put into an escrow account. If more gasoline was needed to bring the dealer's inventory up to the pre-determined consignment level, the dealer also paid for this, and this sum was put into escrow. When the inventory was replenished, the dealer supposedly was paying for gasoline already sold, but in actual fact he was paying for gasoline delivered at the time of payment.

Unlike General Electric, the agency distribution program was not respondent's regular method of selling its products. The system is only used at irregular intervals and in certain markets during price wars. The temporary nature of the program and the shifting back and forth of customers from dealer status to so-called agency status, emphasizes that the consignment plan is a device to fix and stabilize prices, rather than a good faith marketing method.

Furthermore, decisions subsequent to the *General Electric* case have made it clear that where the antitrust acts are involved, the crucial fact is the impact of the particular practice upon competition, not the label it carries. For example, in *United States v. Masonite Corp.* the Supreme Court held that the result must turn not on the skill with which counsel has manipulated the concept of "sale" and "agency", but on the significance of the business practices in terms of restraint of trade (316 U.S. 265, 280; 1942). Judge Yankwich, in *United States v. Richfield Oil Corp.*, 99 F. Supp. 280 (U.S.D.C. S.D. Cal. 1951), *affirmed per curiam* 343 U.S. 922 (1952), stated:

We must in each case, get behind the facade which the organization has created,—as did the Supreme Court in the *Masonite* case when it went behind a *del credere* agency, which, at first blush, seemed to be a fiduciary relationship established by the concern for its own purposes, and found, instead, a means for monopolization. The Court did not then hesitate to declare the agency a mere cloak for restraints * * *. (99 F. Supp. 289).

It is apparent from the facts that respondent very clearly desired to stifle price competition among Atlantic dealers and it sought the complete control of Atlantic retail prices in the price war area. Respondent utilized the consignment system of marketing as a device to control prices admittedly to avoid the impact of the Clayton and Sherman Acts. Doubtless the respondent felt that it had devised a consignment program valid in that it met all of the criteria of consignment as prescribed in the law of agency and it may well be that for purposes other than antitrust law enforcement this consignment program could be upheld. But, as here employed, to effect and participate as an integral unit of a horizontal and vertical price fixing scheme, the respondent's consignment program must be held as a violation of the Federal Trade Commission Act.

Insofar as Count III of the complaint alleging a conspiracy involving respondent and its wholesale distributors is concerned, we agree with the hearing examiner's finding that this Count has been sustained.

In *United States v. Bausch & Lomb Optical Co., et al.*, 321 U.S. 707, 723 (1944), the Court said: "Whether this conspiracy and combination was achieved by agreement or by acquiescence of the wholesalers coupled with assistance in effectuating its purpose is immaterial." See also *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960). Here the participation of distributors in the scheme is shown. Distributor Marsh cooperated by following the procedures established by respondent for the fixing and the control of prices. Marsh also accompanied respondent's representatives on inspection tours of dealers' stations for the purpose of influencing such dealers

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to follow respondent's recommended resale prices. That this was effective is shown by the fact that four recalcitrant dealers changed their prices following such visits, although only temporarily in some cases. Such was acquiescence by the distributor in the illegal scheme coupled with assistance in effectuating its purpose. The hearing examiner found that distributor Marsh was an unwilling conspirator, but that fact is no defense where the party actually participates in the conspiracy. See *United States v. Line Material Co.*, 333 U.S. 287 (1948). There is also evidence of the participation of distributor Lister. Thus, a combination or conspiracy to maintain resale prices was organized in violation of the Federal Trade Commission Act.

The consignment agreement arrangement was an integral part of the plan to fix and maintain resale price levels in the price war areas in the "Delmarva Peninsula". Through such agreements respondent was able to generally maintain a uniform level of prices on sales made through its dealers. This uniformity along with the actions resulting in the fixing of prices on gasoline sold to dealers buying through distributors gave to the respondent general control of price levels among dealers dispensing Atlantic gasoline in the affected areas. The consignment agreements are unlawful as a part of the whole unlawful course of conduct. They were essential to the success of the price fixing scheme just as it was necessary to the success of the venture for the dealers buying through distributors to maintain recommended prices. Where the whole course of conduct is illegal, specific practices, although in themselves lawful, may be prohibited as part of the illegal whole. Cf. *United States v. Bausch & Lomb Optical Co., et al.*, 321 U.S. 707 (1944). In the *Matter of Snap-On-Tools Corporation*, Docket No. 7116 (Decision of the Commission, November 1, 1961) [59 F.T.C. 1035]. We hold in the circumstances that respondent is in violation of the law as charged in Counts I, II, and III of the complaint.

Respondent argues that its practices which the examiner found to be unlawful were not in interstate commerce. The position taken is that the commerce involved in the sale of gasoline at wholesale and at retail, with which the acts and conspiracies charged in the complaint are concerned, were purely local sales and not in interstate commerce. Section 5 prohibits unfair methods of competition in (interstate) commerce and unfair or deceptive acts or practices in (interstate) commerce. Our determination of the question turns on whether or not the course of conduct found to be unfair has been engaged in in interstate commerce.

Respondent clearly does business in interstate commerce and the gasoline involved in the resale price maintenance scheme moved in

interstate commerce. Respondent shipped its gasoline from its refineries through terminal centers in Norfolk, Virginia, Newark, New Jersey, and its bulk distribution centers in Salisbury, Maryland, and Wilmington, Delaware, to storage tanks maintained by distributors, and lessee-dealers in the "Delmarva Peninsula". Respondent, with main offices in Philadelphia, Pennsylvania, and with its regional office covering the "Delmarva Peninsula" area in East Reading, Pennsylvania, entered into sales contract agreements with lessee-dealers in several states, including Delaware and Maryland.

The methods and practices used by respondent in obtaining the acquiescence and cooperation of its wholesale distributors in the price fixing scheme and their assistance in effectuating its purpose were engaged in interstate commerce. The parties themselves, that is, respondent on the one hand and distributors on the other, were located in different states and contracts between them involved interstate commerce. Various documents used to carry out the scheme were transmitted across state lines. For instance, requests for refunds by distributors for dealer assistance were made on forms sent to Reading, Pennsylvania. Other evidence of the interstate character of the transactions relating to the price fixing scheme includes correspondence, bulletins and other matter which moved across state lines.

Thus, there was a transaction or a scheme of an interstate character, regardless of the nature of the commerce involved in the local distribution of the gasoline. Cf. *Holland Furnace Company v. Federal Trade Commission*, 269 F. 2d 203 (7th Cir. 1959), cert. denied 361 U.S. 932; *General Motors Corporation, et al v. Federal Trade Commission*, 114 F. 2d 33 (2nd Cir. 1940); *Ford Motor Company v. Federal Trade Commission*, 120 F. 2d 175 (6th Cir. 1941), cert. denied 314 U.S. 668; *United States v. Food and Grocery Bureau of Southern California*, 43 F. Supp. 966, 972 (U.S.D.C. S.D. Cal. 1942). We hold, therefore, that the methods of competition, acts and practices herein found to be unfair were engaged in in "commerce" within the meaning of that term as used in the Federal Trade Commission Act.

The Commission is fully aware of the difficulties faced by tradesmen at all levels of commerce when price wars erupt in the sale of gasoline. It is realized that efforts often are made by some suppliers to cooperate with and assist their dealers in various ways so as to enable them to compete in the course of price wars. However, in doing so they should avoid transgressions of the antitrust laws. A seller may apply to the Commission for advice on appropriate, legal methods for meeting the problem in the particular circumstances it faces. The solution, we are sure, does not lie in the use of

price fixing schemes violating the antitrust laws. Respondent here cannot justly claim that it was acting only in self-defense or the defense of its dealers since its course of conduct went beyond any such objective and reached into the area of unlawful price fixing. Such conduct we must condemn. Even if respondent had proceeded from entirely good motives, that circumstance would be no justification here for the infractions of law disclosed. *Fashion Originators Guild of America, Inc., et al v. Federal Trade Commission*, 312 U.S. 457 (1941); *Paramount Famous Lasky Corporation, et al v. United States*, 282 U.S. 30, 44 (1930).

The examiner found in the initial decision that on the forms for refunds on dealer assistance the distributors indicate "the dates and total gallonage sold at the reduced price and a list of the dealers to whom they gave the rebate." This appears to be incorrect and, while it is not a crucial finding, we believe it should be changed. The words "total" and "sold at the reduced price" will not be adopted as part of the Commission's findings.

The exceptions to the initial decision of respondent are rejected and the exceptions of counsel supporting the complaint are sustained to the extent indicated. An appropriate order will be entered.

Commissioner Elman does not concur.

Commissioners Anderson and Higginbotham did not participate in the decision of this matter, the former for the reason that he did not hear oral argument, and the latter by reason of the fact that this matter was argued before the Commission prior to the time he was sworn into office.

ORDER PARTIALLY ADOPTING INITIAL DECISION AND PROVIDING FOR
THE FILING OF OBJECTIONS TO PROPOSED ORDER AND REPLY*

MAY 16, 1963

The Commission having rendered its decision in part allowing and in part disallowing complaint counsel's exceptions to the initial decision and disallowing all of respondent's exceptions thereto:

It is ordered, That the Findings of Fact numbered I through IX of the Initial Decision be and hereby are adopted as the Findings of the Commission, excepting that the words "total" and "sold at the reduced price" in item numbered (2) of part VII thereof are incorrect and are not adopted. Those parts of the initial decision not expressly adopted are set aside and do not constitute part of the decision of the Commission.

* Proposed Final Order is omitted in printing since it was entered as the Final Order of the Commission.

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Final Order

It is further ordered, That respondent may, within twenty (20) days after service upon it of this order and the attached Opinion of the Commission, file with the Commission its exceptions to the Proposed Final Order herein set out, a statement of its reasons in support thereof, and a proposed form of order appropriate to the Commission's decision; and that counsel supporting the complaint may, within ten (10) days after service of respondent's exceptions, file a statement in reply thereto, supporting the Proposed Final Order.

It is further ordered, That if no exceptions to the Commission's Proposed Final Order are filed within twenty (20) days, the said Order shall then become the Final Order of the Commission.

FINAL ORDER

NOVEMBER 22, 1963

Pursuant to § 4.22(c) of the Commission's Rules of Practice, published May 16, 1962, 27 Fed. Reg. 4609, 4621 (superseded August 1, 1963), respondent was served with the Commission's decision on appeal and afforded the opportunity to file exceptions to the form of the order which the Commission contemplates entering; and

Respondent having timely filed its exceptions to the order proposed, which exceptions were opposed by a reply filed by counsel supporting the complaint and the Commission, upon review of these pleadings, having determined that respondent's exceptions should be disallowed and that the order as proposed should be entered as the final order of the Commission:

It is ordered, That the respondent, The Atlantic Refining Company, a corporation, its officers, directors, agents, representatives, or employees, directly or through any corporate or other device in, or in connection with, the offering for sale, sale, or distribution of gasoline, in commerce as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, arrangement, agreement, contract, or conspiracy with any person or persons not parties hereto, to establish, fix, adopt, maintain, adhere to, or stabilize by any means or method, prices, terms or conditions of sale at which its gasoline is to be sold.

2. Establishing, maintaining, continuing, cooperating in, or carrying out, or attempting so to do, any plan, policy, program, or any consignment policy in combination with any other person or persons not parties hereto, for the purpose or with the

effect of enabling respondent to establish or fix the prices, terms or conditions of sale at which its gasoline is to be resold by a dealer after purchase from respondent.

3. Coercing, persuading, inducing, or otherwise unduly influencing, directly or indirectly, its independent wholesale distributors to enter into, cooperate in, or carry out any planned common course of action, understanding, arrangement, agreement, combination, or conspiracy to establish, fix, stabilize, maintain, or adhere to, by any means the wholesale price at which gasoline is sold by said wholesale distributors or the retail prices at which gasoline is to be resold by retail service stations owned and operated by said distributors and retail dealer customers of said wholesale distributors.

Provided, however, That nothing herein contained shall be construed to limit or otherwise affect any resale price maintenance contracts which respondent may enter into in conformity with Section 5 of the Federal Trade Commission Act, as amended by the McGuire Act (Public Law 542, 82nd Cong. 2nd Sess., approved July 14, 1952).

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

By the Commission, Commissioner Elman not concurring; and Commissioners Anderson and Higginbotham not participating, the former for the reason that he did not hear oral argument, and the latter by reason of the fact that this matter was argued before the Commission prior to the time when he was sworn into office.

IN THE MATTER OF

WINSTON SALES CO., INC.

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

Docket 8531. Complaint, Sept. 27, 1962—Decision, Nov. 22, 1963*

Order requiring a Chicago distributor to cease misrepresenting his merchandise by such practices as video demonstrations purportedly proving that a certain kitchen knife would never become dull by using it to saw a nail

* Reported as amended by Hearing Examiner's orders of Nov. 26, 1962 and Mar. 13, 1963.

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Complaint

in half, when the nail had been partially cut through prior to the demonstration and the cutting edge used in slicing a tomato to demonstrate that the sharpness had not been affected, was not the same edge used to cut the nail; and misrepresenting the regular prices for the knife and a food chopper in offering both for the purported usual price of one.

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 Winston Sales Co., Inc., a corporation, has 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 Winston Sales Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 4100 West Grand Avenue in the city of Chicago, State of Illinois.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of general merchandise, including a kitchen knife and a food chopper.

PAR. 3. In the course and conduct of its business, respondent now causes and for some time last past has caused, its said products, when sold, to be shipped from its place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and maintains and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of knives and food choppers of the same general kind and nature as those sold by respondent.

PAR. 5. In the course and conduct of its business, and for the purpose of inducing the sale of a kitchen knife and a food chopper, respondent has made representations with respect to the quality of said knife and to the regular retail selling price of said knife and of the said food chopper. Said statements and representations have been made in television broadcasts.

Among and typical of the said representations, but not all inclusive thereof, are the following:

I'd like to show you something you probably wouldn't believe if you weren't watching me with your own two eyes. Here is a regular two-inch box nail

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that I'M going to saw in half with this knife to prove absolutely that this knife will never, never get dull. I'm going to place this nail into a vise.

(A reproduction is attached hereto marked Exhibit 1 and made a part hereof.)* One thing I want you to realize and understand, you can use this knife for every job in the kitchen and one of the jobs, of course, is sawing frozen food in half. Anything thing you can use it when you're carving chicken or turkey and you come across a bone. You have no problem when it comes to cutting through it.

(A reproduction is attached hereto marked Exhibit 2 and made a part hereof.)* You notice one thing, it isn't too easy to cut a nail in half but this knife does it exactly the same as a saw and yet you have a knife that's just as sharp as when I started.

(A reproduction is attached hereto marked Exhibit 3 and made a part hereof.)* As sharp as a razor.

(A reproduction is attached hereto marked Exhibit 4 and made a part hereof.)* Proof positive is right here. Here's balance of a tomato and I'm going to show you that this knife still goes through that tomato just exactly the same as a hot knife going through butter.

(A reproduction is attached hereto marked Exhibit 5 and made a part hereof.)* Here's the offer we have for you, the stainless steel edged knife, regular retail price \$3.00, all we ask you to spend is \$2.98. If you spend \$2.98 at no additional cost you get our regular \$2.98 food chopper. In other words you get both items for \$2.98 if you order now.

PAR. 6. Through the use of the aforesaid television commercial, including the video demonstration, respondent has represented directly or by implication that:

- (a) Its kitchen knife will never get dull;
- (b) That said demonstration proves that its kitchen knife will never get dull;
- (c) The said demonstration proves the ability of its kitchen knife to cut through a regular two-inch box nail;
- (d) The said demonstration proves that the sharpness of the cutting edge of its kitchen knife is unaffected after having cut through a regular two-inch box nail.

PAR. 7. Respondent, by means of the aforesaid television commercial also represents that the usual and regular retail price for the kitchen knife regularly retails at \$3 and that the regular retail price for the food chopper is \$2.98.

PAR. 8. In truth and in fact:

- (a) The kitchen knife will become dull as a result of normal use.
- (b) The said demonstration does not prove:
 - 1. That the kitchen knife will never get dull.
 - 2. The ability of its kitchen knife to cut through a regular two-inch box nail. Prior to the demonstration the nail used had been partially cut through.

* Pictorial exhibits are omitted in printing.

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3. The sharpness of the cutting edge of its kitchen knife after having cut through a regular two-inch box nail. The cutting edge used to demonstrate that the sharpness had not been affected by cutting through the two-inch box nail was not the same cutting edge used to cut through said nail.

(c) \$3.00 is substantially in excess of the usual and regular retail price of said kitchen knife in the trade areas in which it is offered for sale.

(d) \$2.98 is substantially in excess of the usual and regular retail price of said food chopper in the trade areas in which it is offered for sale.

Therefore, the statements and representations referred to in Paragraph 5 were, and are, false, misleading and deceptive.

PAR. 9. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of respondent's products, by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of the respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Charles J. Connolly and *Mr. Walter T. Evans* supporting complaint.

Mr. Eli E. Fink and *Mr. Herbert L. Nudelman*, for respondent.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

The Federal Trade Commission issued its complaint on September 27, 1962, charging respondent with violation of the Federal Trade Commission Act by reason of alleged false, misleading, and deceptive representations constituting unfair methods of competition and unfair and deceptive acts and practices in commerce.

A pre-hearing conference was held November 23, 1962 at which certain television advertising was viewed and the complaint was amended. Said conference was recessed three times at the request of both parties for the purpose of granting them an opportunity to enter into a dispositive stipulation.

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On January 14, 1963, the parties stipulated, and on January 21, 1963, counsel supporting the complaint moved for an Initial Decision on the basis of said stipulation. Respondent opposed the immediate entry of an Initial Decision and requested time within which to prepare proposed findings, conclusions, a brief and an order. On January 29, 1963, the hearing examiner, by order, granted the motion of counsel supporting the complaint for judgment and made the January 14, 1963, stipulation the record in the case. Said order also granted both parties until February 27, 1963, to file proposed findings of fact, conclusions, a brief, and a proposed order. At the request of both parties, the time for filing was extended to March 15, 1963.

Prior to the filing of proposed findings, counsel supporting the complaint by motion filed March 8, 1963, sought reopening of the proceeding, to amend the complaint and to introduce further evidence. He also sought to enlarge the filing time to March 29, 1963. On the representation that counsel for respondent had no objection thereto, orders were issued reopening the record, admitting additional evidence, amending the complaint and extending the time for filing.

Proposed findings, conclusions, briefs, and orders were filed March 29, 1963.

Counsel for respondent, in his proposed findings dated March 25, 1963, stated:

Inasmuch as the stipulations of facts did, in effect, admit the truth of all of the facts alleged in the Complaint, it is assumed that the Hearing Examiner will enter findings of fact herein substantially in accordance with the well pleaded facts as set forth in the Complaint.

The sole issue remaining is a question of law as to the appropriate breadth of an order to be issued in this matter.

After considering the entire record, the hearing examiner makes the following findings, conclusion and order. All findings and conclusions not made in terms or in substance are rejected as immaterial or erroneous.

FINDINGS OF FACT

1. Respondent Winston Sales Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 4100 West Grand Avenue in the City of Chicago, State of Illinois.

2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of general merchandise, including a kitchen knife and a food chopper.

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3. In the course and conduct of its business, respondent now causes and for some time last past has caused, its said products, when sold, to be shipped from its place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and maintains and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of knives and food choppers of the same general kind and nature as those sold by respondent.

5. In the course and conduct of its business, and for the purpose of inducing the sale of a kitchen knife and a food chopper, respondent has made representations with respect to the quality of said knife and to the regular retail selling price of said knife and of the said food chopper. Said statements and representations have been made in television broadcasts.

Among and typical of the said representations, but not all inclusive thereof, are the following:

I'd like to show you something you probably wouldn't believe if you weren't watching me with your own two eyes. Here is a regular two-inch box nail that I'm going to saw in half with this knife to prove absolutely that this knife will never, never get dull. I'm going to place this nail in a vise.

(A still photographic reproduction of the video action at this point is attached to the complaint and marked Exhibit 1.)*

One thing I want you to realize and understand, you can use this knife for every job in the kitchen and one of the jobs, of course, is sawing frozen food in half. Another thing you can use it when you're carving chicken or turkey and you come across a bone. You have no problem when it comes to cutting through.

(A still photographic reproduction of the video action at this point is attached to the complaint and marked Exhibit 2.)*

You notice one thing, it isn't too easy to cut a nail in half but this knife does it exactly the same as a saw and yet you have a knife that's just as sharp as when I started.

(A still photographic reproduction of the video action at this point is attached to the complaint and marked Exhibit 3.)*

As sharp as a razor.

(A still photographic reproduction of the video action at this point is attached to the complaint and marked Exhibit 4.)*

* Pictorial exhibits are omitted in printing.

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Proof positive is right here. Here's balance of a tomato and I'm going to show you that this knife still goes through that tomato just exactly the same as a hot knife going through butter.

(A still photographic reproduction of the video action at this point is attached to the complaint and marked Exhibit 5.)*

Here's the offer we have for you, the StaKeen Edge knife, regular retail price \$3.00, all we ask you to spend is \$2.98. If you spend \$2.98 at no additional cost you get our regular \$2.98 food chopper. In other words you get both items for \$2.98 if you order now.

6. Through the use of the aforesaid television commercial, including the video demonstration, respondent has represented directly or by implication that:

- (a) Its kitchen knife will never get dull;
- (b) That said demonstration proves that its kitchen knife will never get dull;
- (c) The said demonstration proves the ability of its kitchen knife to cut through a regular two-inch box nail;
- (d) The said demonstration proves that the sharpness of the cutting edge of its kitchen knife is unaffected after having cut through a regular two-inch box nail.

7. Respondent, by means of the aforesaid television commercial also represents that the usual and regular retail price for the kitchen knife regularly retails at \$3 and that the regular retail price for the food chopper is \$2.98.

8. In truth and in fact:

- (a) The kitchen knife will become dull as a result of normal use.
- (b) The said demonstration does not prove:
 - (1) That the kitchen knife will never get dull.
 - (2) The ability of its kitchen knife to cut through a regular two-inch box nail. Prior to the demonstration the nail used had been partially cut through.
 - (3) The sharpness of the cutting edge of its kitchen knife after having cut through a regular two-inch box nail. The cutting edge used to demonstrate that the sharpness had not been affected by cutting through the two-inch box nail was not the same cutting edge used to cut through said nail.

(c) \$3 is substantially in excess of the usual and regular retail price for the said knife in the trade areas in which it is offered for sale.

(d) \$2.98 is substantially in excess of the usual and regular retail price of the food chopper in the trade areas in which it is offered for sale.

Therefore, the statements and representations referred to in Paragraph Five were, and are, false, misleading and deceptive.

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9. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of respondent's products, by reason of said erroneous and mistaken belief.

CONCLUSION

1. The aforesaid acts and practices of the respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

2. The only question presented in this proceeding is the form of the order to be issued. Paragraphs Four and Five of the form of order attached to the complaint are substantially the same as those contained in the Commission's order issued December 29, 1961, *In Matter of Colgate*, Docket No. 7736 [59 F.T.C. 1452]. After remand from the Circuit Court, the Commission, in its opinion dated February 18, 1963 [62 F.T.C. 1269], stated that such portion of the order " * * * appear[s] to have been wanting in the necessary clarity." Accordingly, a different form of proposed order was issued. The proposed order issued after remand is therefore adopted with appropriate modification to fit the facts in this proceeding. Respondent's other proposal to limit misrepresentation as to savings to those arising from statements of price is without merit.

ORDER

It is ordered, That respondent Winston Sales Co., Inc., a corporation, and its officers, and respondent's agent, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of kitchen knives and food choppers, or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication that respondent's kitchen knives will not become dull;
2. Using the term "retail price" or any other words of similar import or meaning to describe a price higher than the usual and customary retail price of any such merchandise in the trade area or areas where the representation is made;

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3. Misrepresenting in any manner the savings available to purchasers of respondent's merchandise;

4. Advertising any product by presenting a visual test or demonstration represented to be actual proof of a claim made for the product, where the test or demonstration does not constitute actual proof because of manipulating the product in a misleading manner, tampering with the object on which it is demonstrated, or employing any other misleading illusion.

5. Advertising respondent's knives or any other hardware product by claiming for it qualities or merits that the product does not in fact possess.

ORDER MODIFYING AND ADOPTING INITIAL DECISION

This matter has been heard on respondent's appeal from the initial decision of the hearing examiner, filed April 2, 1963. The Commission has determined that respondent's appeal should be granted with respect to paragraph 5 of the order contained in the initial decision, and denied in all other respects. Accordingly,

It is ordered, That the initial decision be, and it hereby is, modified by deleting the language of paragraph 5 of the order contained therein and substituting for such language the following:

"Misrepresenting, in any manner, directly or by implication, the quality or merits of respondent's knives."

It is further ordered, That the initial decision and the order contained therein, as modified, be, and they hereby are, adopted as the decision and final order of the Commission.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form in which respondent has complied with this order.

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Complaint

IN THE MATTER OF

THE PROCTER & GAMBLE COMPANY

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7
OF THE CLAYTON ACT

Docket 6901. Complaint, Sept. 30, 1957—Decision, Nov. 26, 1963

Order requiring the leading producer in the United States of soap and detergent products and a major producer of food products, toilet goods and paper products—sold both as consumer household brands and in bulk quantities, to laundries, hotels, institutions, the baking industry and other industrial users—to divest itself absolutely, within one year, of all assets, properties, rights and privileges, tangible and intangible, acquired as a result of its acquisition in August 1957 of the Nation's leading manufacturer of household liquid bleach, whose annual sales before the acquisition represented almost 50 percent of the national total—the divestiture to be subject to the provisions in the order below set forth and upon terms and conditions approved by the Commission.

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 Section 7 of the Clayton Act (U.S.C., Title 15, Sec. 18) as amended and approved December 29, 1950, hereby issues its complaint, pursuant to Section 11 of the aforesaid Act (U.S.C. Title 15, Sec. 21) charging as follows:

PARAGRAPH 1. Respondent, The Procter & Gamble Company (hereinafter referred to as "respondent") is a corporation organized and existing under the laws of the State of Ohio, with its office and principal place of business at The Procter & Gamble Building, 301 East Sixth Street, Cincinnati, Ohio.

PAR. 2. The Clorox Chemical Co. (hereinafter referred to as "Clorox") was, prior to August 1, 1957, a corporation organized and existing under the laws of the State of Delaware, with its office and principal place of business at 850 - 42nd Avenue, Oakland, California.