cance to an admission of genuineness blurs the distinction between it and an admission of truthfulness. Accordingly,

It is ordered, That the proceeding be, and it hereby is, remanded to the examiner for the further consideration, in the light of this order, of respondent's objections to the requests for admissions.

PACIFIC MOLASSES COMPANY ET AL.

Docket 7462. Order and Opinion, July 20, 1964

Order denying request for reopening of Sec. 2(a) Clayton Act proceeding, modification of the desist order not being warranted by reason of "changed conditions."

Opinion on Respondents' Request for Reopening

On May 21, 1964 [65 F.T.C. 675], the Commission issued its opinion and order in this proceeding, modifying and adopting the hearing examiner's initial decision that respondents had discriminated in favor

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the authors of a few of them that I want to explore and cross examine them. That cross examination isn't a part of our case. We have that right—

"HEARING EXAMINER BENNETT: That of course, is not what I am saying, sir. What I am saying is that if you have such a document, I will understand and approve your saying as to that document that we cannot concede the authenticity of this document, because we believe that the statements made on the face of the document are not correct. And we will insist that a witness be called. But I want you to do that at the time these documents come before you for authentication. I don't want you to wait until the day when counsel hands you a list of documents that he proposes to offer and then say, oh no, you can't have that document, because it's going to throw off his entire order of proof and I'm never going to be able to understand him. So the time to do that is at the time when this document is given to you for you to authenticate it. And you say, I cannot admit it for the reasons that John Jones who wrote this document has told me—I'm not suggesting that you need to go all through this—that he didn't mean what he said, or it was a joke, or something of that nature, and that I am going to insist upon his being put on the stand." (Tr. 422–23.)

of certain of their customers and against certain others in violation of Section 2(a) of the amended Clayton Act, 15 U.S.C. 13. Respondents Pacific Molasses Company and James M. Ferguson [1] now request a reopening of the proceeding for consideration of their contentions that the order was made applicable to James M. Ferguson, as an individual, on the basis of an erroneous "finding" that he was "guilty" of a "crime"; that our order prohibiting future price discrimination by respondents should be set aside because Pacific's principal competitor, Southwestern Sugar & Molasses Company, which is under a somewhat similar Commission order, has now left the business and has been replaced by another company, National Molasses Company, "against whom there is no cease and desist order"; and that the Commission erred in its earlier opinion in concluding that there was no denial of due process in the examiner's failure to follow a pretrial order requiring counsel supporting the complaint to give respondents a list of his witnesses and exhibits 15 days in advance of the hearing.

I

First, we note that respondents have been less than diligent in exhausting their administrative rights. Under § 3.25 of the Federal Trade Commission's Rules of Practice, any party may file, within 20 days after service upon it of any Commission decision, a "petition for reconsideration" of that decision. Respondents filed no such petition. (Their present request was filed on June 30, 1964, 30 days after service upon them (June 1, 1964) of the Commission's decision and order to cease and desist, and thus not within the 20 days provided for the filing of such a petition for reconsideration.)

Having failed to request reconsideration under § 3.25, respondents now ask for a reopening of the matter under § 3.27. Here, interestingly enough, they are premature. That section provides for a reopening "either on the Commission's own initiative or on the request of any party to the proceeding," but § 3.28 provides that it is only upon the Commission's own initiative that a matter may be reopened prior to the expiration of the statutory 60-day period allowed for the filing of a petition for review in the appropriate court of appeals; reopening at the request of a party is provided for only after a Commission decision has become "final," either by court affirmance or by expiration of the statutory period for seeking review. Here, that statutory 60-day period would not be up until August 1, 1964, 30 days after respondents filed the instant request for reopening under § 3.27.

[1] No request is made on behalf of Bascom Doyle, the other officer against whom the order was directed.

II

But putting aside the question of timeliness, there is no merit in respondents' request, whether we treat it as a petition for reconsideration under § 3.25 or for reopening under §§ 3.27 and 3.28. Under the first, there must be some showing of error in the Commission's prior decision. Under the second, it must appear that a modification or setting aside of the order is warranted by reason of "changed conditions of fact or law or the public interest." None of these tests are met here. Respondents' contention with regard to the examiner's failure to follow the pretrial order was considered fully in our prior decision. As we said there, these respondents never had a constitutional "right" to a list of complaint counsel's witnesses and exhibits; certainly there is nothing in the authorities pointed to by respondents that converts every agency rule of practice into a "right" of constitutional proportions. The question in such cases is whether there has been a loss of a substantial right, one that genuinely prejudices the party's cause. Here, there could have been no such prejudice to respondents in view of the 40-day continuance they were given to investigate and prepare their case, together with the right to recall and cross-examine as adverse witnesses any of the witnesses previously called by the Commission's attorney. We do not understand how respondents could now benefit by a remand of the case to the hearing examiner for a second presentation of the same evidence.

Respondents' argument with regard to our inclusion in the cease-and-desist order of respondent James M. Ferguson, president of respondent Pacific Molasses Company, is even more difficult to follow. The Commission's hearing examiner, in his initial decision, had found that Mr. Ferguson personally participated in and directed the discriminatory pricing found unlawful. This was, of course, a factual "finding." However, the examiner was of the opinion that, as a matter of law, such personal participation in the offense was not sufficient basis for including him, as an individual, in the order to cease-and-desist. In our earlier opinion, we disagreed with this legal conclusion, explaining our reasons and referring to, among other cases, *United States* v. *Wise*, 370 U.S. 405, 409, 416 (1962). Respondents challenge this ruling, quoting the following from our prior opinion, and characterizing these three sentences as "findings":

> James M. Ferguson, President of respondent Pacific Molasses testified that he personally ordered the discriminatory pricing.
>
> The Clayton Act, like the Sherman Act, should be construed "in its commonsense meaning to apply to all officers who have a responsible share in the proscribed transaction," including the officer who "*authorizes, orders,* or *helps perpetrate* the crime—regardless of whether he is acting in a representative capacity." *United States v. Wise*, 370 U.S. 405, 409, 416 (1962).

We see no reason why these two corporate officers, having once been found guilty of deliberate and purposeful price discrimination that seriously injured others in the industry, should be left free to give and execute the same kind of unlawful orders on behalf of some other molasses company.

Respondents then go on to "assume" that "all three findings are necessary to support the opinion."

The first of these quoted statements, that respondent Ferguson "personally ordered the discriminatory pricing," is not challenged here, as indeed it could not be.[2] But they contend that the second one wrongfully accuses Ferguson of a "crime," and that the third one is unfounded.

The second of those sentences was not a "finding," as is plainly apparent on its face. We do not understand how a quotation of a proposition of law from an opinion of the Supreme Court of the United States could be construed as a "finding" of fact by an administrative agency. Since the Sherman, Clayton, and Federal Trade Commission Acts are in *pari materia*, *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 688–693 (1948), the Court's declaration in the *Wise* case[3] that individual criminal punishment is appropriate for the cor-

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[2] Mr. Ferguson testified as follows:

Q. * * * What authority did Mr. Doyle have in the Gulf area with respect to Pacific Molasses' pricing policies?

A. Well, Mr. Doyle's authority was such authority as I might have granted to him. His responsibility was to execute the policies, prices, sales procedures that I established. I would provide him, after discussing with him the general molasses situation, I would provide him with a sales price * * *.

We maintained at that time a very close working relationship by correspondence and also by telephone. He would keep me informed of demands and competitors' activities and I would then make the determinations as to what action Pacific should take. I would say that he had no authority other than the authority that I personally gave to him regarding prices or sales policies.

HEARING EXAMINER LEWIS: Are you saying that he never established any price without first discussing it with you, a particular price?

THE WITNESS: Yes, sir.

HEARING EXAMINER LEWIS: There never was a price change without discussing it with you?

THE WITNESS: Right, Tr. 946–947.

The negotiation and granting of the discriminatory price concessions of some $24,487.70 to Pacific's largest and most favored customer, Fort Worth Molasses Company, was described by Ferguson as follows:

* * * I was in New Orleans in early January of 1955 and Mr. Doyle and I discussed the Fort Worth Molasses Company account, and it was agreed that on my return to San Francisco I would visit with Mr. Hill [of Fort Worth Molasses] at Amon Carter Field which is the Fort Worth Air Field. And we telephoned Mr. Hill and he agreed to come out to the airport and see me for the 45 minutes or hour between our connecting planes * * *.

* * * We were admittedly interested in trying to arrange a long-term contract with Fort Worth Molasses Company, and we were trying to present Fort Worth with the best possible offering that we could make. And, in discussing this with Mr. Hill, I did present to him in the way that it is shown here * * *.

So when I returned to San Francisco, I prepared this letter agreement of January 13 [CX 17], and sent it to him. Tr. 971, 973.

[3] See also *United States* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963), holding that the indictment's charge of discriminatory and unreasonably low prices for the purpose of destroying competition in violation of Section 3 of the Robinson-Patman Act, 15 U.S.C. 13(a), was not unconstitutionally vague and indefinite. On remand, a jury found

porate officer who "authorizes, orders, or helps perpetrate" a violation of a criminal provision of the antitrust laws makes it, we believe, an *a fortiori* proposition that an individual cease-and-desist order is not inappropriate for the officer who "authorizes, orders, or helps perpetrate" a violation of one of those related statutes. As the court said in *Pati-Port, Inc.* v. *Federal Trade Commission*, 313 F. 2d 103, 105 (4th Cir. 1963), "it would seem in cases of this sort to be a futile gesture to issue an order directed to the lifeless entity of a corporation while exempting from its operation the living individuals who were responsible for the illegal practices."

Respondents misread our comment that Ferguson and Doyle had engaged in "deliberate and purposeful price discrimination that seriously injured others in the industry." This was to make it clear that the discrimination was practiced knowingly, not inadvertently, and that its effects were serious, not minimal. While an "intent" to injure competitors is certainly relevant in any price discrimination case, *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 552 (1960), *Forster Mfg. Co.*, Dkt. 7207, at 7 (January 3, 1963) [62 F.T.C. 852, 893], it is not a necessary element in a finding of unlawful price discrimination under the statutory provision involved here and is thus not a necessary predicate of an order requiring both corporate and individual offenders to cease their unlawful conduct. In other words, we found only that respondent Ferguson was a knowing participant in the unlawful acts; whether he also "intended" the consequences [4] that did in fact flow from them makes no difference to our determination that he should be individually prohibited from repeating those violations of the statute.

III

Respondents' contention that the Commission should reopen this proceeding to "consider the advisability and public interest of an order in this case" because of the fact that a competitor against whom a cease-and-desist order had also been entered by this Commission has apparently gone out of business and been replaced by a new company

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both National Dairy and Mr. Wise guilty of violating both the Sherman and Robinson-Patman Acts. On June 22, 1964, the company was fined $380,000 and Mr. Wise was fined $52,500 and given a 3-month suspended jail sentence. 5 CCH Trade Regulation Reporter Par. 45,059 (Case 1479).

[4] Under Section 2(a) of the Clayton Act, the provision involved here, it is enough that the act is done and that its results have in fact been, or will probably be, injurious to competition; it is not necessary that the discriminator intend either the act itself or the harmful results. Section 3 of the Robinson-Patman Act, on the other hand, in making sales at discriminatory or unreasonably low prices "for the purpose of destroying competition or eliminating a competitor" a *criminal* offense, requires a showing of an "intent" both to do the act and to "achieve a *result*—destruction of competition * * *," all "in furtherance of that design or purpose." *National Dairy, supra* at 35 (emphasis by the Court).

"against whom there is no cease and desist order" is patently unsound. First of all, no determination has been made as to whether the new competitor, as a "successor" to a corporation with an order outstanding against it at the time of the acquisition, is also bound by that order. Secondly, however, respondents' contention is erroneous as a matter of law. It is true, of course, that the Commission, as a matter of policy and discretion, attempts to deal with industrywide violations on an industrywide basis. Respondents, however, have not alleged industrywide violations of Section 2(a), or even that the one new competitor they mention is engaged in such violations. Obviously, the public interest in preventing members of an industry already found to have violated the law from repeating those offenses would not be served by setting aside outstanding orders the moment a new competitor appears. See *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411 (1958).

Respondents have made no showing that warrants either a reconsideration of our prior decision and order, or a reopening of the matter. Their request will be denied.

Commissioner Elman did not participate.

ORDER DENYING REQUEST FOR REOPENING

Respondents Pacific Molasses Company and James M. Ferguson having filed, on June 30, 1964, a request for a reopening of this proceeding, and counsel supporting the complaint having filed an answer in opposition thereto; and

The Commission, having considered respondents' request as a petition for reconsideration of the Commission's decision and order of May 21, 1964 [65 F.T.C. 675], and as a petition for reopening, and having determined that the same should be denied:

It is ordered, That respondents' request be, and it hereby is, denied.

Commissioner Elman not participating.

IN THE MATTER OF

FALSTAFF BREWING CORPORATION ET AL.

Docket 8618. Order, July 20, 1964

Order denying respondents' request that this proceeding be settled by the consent order procedure.