

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
SECS. 2(a) AND 2(d) OF THE CLAYTON ACT

Docket 7094. Complaint, Mar. 26, 1958—Decision, Apr. 7, 1965

Order vacating the initial decision and dismissing the complaint which charged a Chicago, Ill., manufacturer and distributor of electrical appliances with discriminating in price between competing resellers of its merchandise and paying discriminatory advertising and promotional allowances.

Complaint

67 F.T.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party named in the caption hereof and hereinafter more particularly designated and described, has violated, and is now violating, the provisions of Sections 2(a) and 2(d) of the amended Clayton Act, approved June 19, 1936 (U.S.C., Title 15, Sec. 13), hereby issues its complaint, stating its charges with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent Admiral Corporation is a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3800 West Cortland Street, Chicago 47, Ill.

PAR. 2. Respondent is now, and for many years has been, engaged in the business of manufacturing and selling television and radio receiving sets, phonographs and various combinations of the three; appliances, including ranges, refrigerators, deep freezers, air conditioners, dehumidifiers and many other products.

Respondent's gross sales for the year ending December 31, 1956, were in excess of \$182,000,000.

PAR. 3. Respondent manufactures the aforesaid products in plants variously located in the States of Illinois and Indiana, from which points the products are shipped to customers located in every State of the United States and the District of Columbia for resale and use within the United States.

Respondent sells its products to distributors and to retailers through wholly owned branches located in many States, other than the States of manufacture, and the District of Columbia. Respondent is, and at all times mentioned herein has been, engaged in interstate commerce in connection with the sale and distribution of its products.

PAR. 4. The respondent, in the course and conduct of its business, has been and is now in competition with other corporations, individuals, partnerships and firms engaged in manufacturing, selling and distributing similar products in commerce between and among the various States of the United States and the District of Columbia.

Many of respondent's purchasers are competitively engaged in the resale of its products at retail in the various cities and areas where said purchasers respectively carry on their businesses. Included among such purchasers are radio, television and appliance stores, furniture, chain and department stores.

PAR. 5. In the course and conduct of its business, as above described, respondent has sold and now sells its products to some of said retail purchasers at higher prices than it has sold and now sells such products of like grade and quality to other retail purchasers who have been and are now competing with the non-favored purchasers in the resale of respondent's products.

PAR. 6. Respondent has effected the higher prices to the non-favored purchasers by various means including higher list prices; by granting said purchasers less favorable discounts or allowances and by basing some discounts upon quantity purchases.

For example, during 1956, in Milwaukee, Wisconsin, respondent classified its retail customers as "dealers"; "M" dealers; "Key" dealers and "A.D." accounts and issued separate price lists to each type dealer. In all instances the prices charged the purchasers in the first three classifications were higher than those charged the "A.D." accounts; the prices charged the purchasers in the first two classifications were higher than those charged the "Key" dealers and generally the prices charged "Dealers" were higher than those charged the "M" dealers.

The list prices charged non-favored purchasers in the various classifications described above have resulted in prices ranging from approximately 1% to 10% higher than those charged favored purchasers. In addition, respondent has granted more favorable discounts or allowances to favored purchasers and as a result, the net prices to nonfavored purchasers have ranged from 1% to more than 16% higher than those charged the favored purchasers.

Respondent employs and has employed the same or similar pricing practices in other trading areas in various sections of the United States.

PAR. 7. The effect of such discriminations in price made by respondent, as alleged, may be substantially to lessen competition or tend to create a monopoly in the lines of commerce in which the respondent and its purchasers are respectively engaged, or to injure, destroy, or prevent competition with the respondent or its purchasers who receive the benefits of such discriminations.

PAR. 8. The foregoing acts and practices of the respondent, as alleged, violate Section 2(a) of the Clayton Act, as amended (U.S.C., Title 15, Section 13).

COUNT II

PAR. 1. Each of the allegations contained in Paragraphs One through Four, of Count I hereof, are hereby realleged and made part

of this Count as fully and with the same effect as though herein again set forth in full.

PAR. 2. In the course and conduct of its business in interstate commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by said respondent, and such payments, sometimes hereinafter referred to as promotional allowances, were not available on proportionally equal terms to all other customers competing in the distribution of its products.

PAR. 3. Included among and illustrative of, the payments alleged in Paragraph Two were credits, paid by way of allowances, or deductions from invoices, as compensation for respondent's share of the cost of various promotional services or facilities, including newspaper advertising, floor and window displays, furnished by customers, pursuant to agreement with the respondent, in connection with the offering for sale or sale of respondent's products.

PAR. 4. During 1956, and for some time prior thereto, respondent, as alleged in Paragraph Three hereof, offered to pay, and paid, some customers varying percentages of the cost of newspaper ads, furnished by such customers, in promoting the sale of respondent's products. The percentage of the cost, which respondent offered to pay, varied from 50% to 100% in Milwaukee, Wisconsin, and in various sections of the United States.

During the same period of time respondent also offered to pay, and paid, varying amounts to some customers in return for other services and facilities, including floor and window displays, furnished by such customers in promoting the sale of respondent's products.

In some instances the respondent failed to offer such allowances to all competing customers on proportionally equal terms; in some instances respondent failed to offer such allowances on any terms to competitors of the favored customers who received allowances, and in some instances respondent's terms, in connection with said allowances, were such as to preclude competitors of the favored customers from availing themselves of the opportunity to participate in such promotional programs.

PAR. 5. The acts and practices of respondent, as alleged above, violate subsection (d) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13).

Mr. Peter J. Dias and Mr. Francis A. O'Brien for the Commission. Pope, Ballard, Uriell, Kennedy, Shepard & Fowle, Chicago, Ill., by Mr. Melville C. Williams, Mr. William S. Baltz, Mr. John J. Gaskell and Mr. Benn E. G. Eilert for respondent.

INITIAL DECISION BY LOREN H. LAUGHLIN, HEARING EXAMINER

SEPTEMBER 11, 1963

General Statement of Case

In this proceeding the complaint charges that respondent has violated Sections 2(a) and 2(d) of the Clayton Act, as amended (15 U.S.C. § 13(a) and (d)). The respondent is a manufacturer of a variety of electrical products, among which are radio and television receiving sets and refrigerators. It is recognized that such products are in general demand, although some brands and certain models are more popular than others with the American consuming public.

It is charged in Count I of the complaint, in substance, that such products of respondent were sold by it in the course of interstate commerce in various trade areas to some of its favored customers competing at retail with other customers of respondent at higher prices than such products of like grade and quality were sold by respondent to such non-favored other customers, whereby respondent has violated Section 2(a). In Count II, the Section 2(d) charge of the complaint, respondent is alleged to have violated said section by having unlawfully paid or granted certain promotional allowances in the course of interstate commerce in various trade areas to some of its customers in connection with their offering for sale or selling respondent's products, which promotional allowances were not made available by respondent on proportionally equal terms to its other customers competing with such favored customers in the sale and distribution of such products.

Both of these charges of the complaint relate to the alleged effect of respondent's practices upon the retail trade, that is, to the effect thereof upon secondary competition. Since the complaint was issued under the Commission's Rules of Practice of May 1957, which did not require a proposed order to be tendered as a part of the complaint, the notice portion of said complaint states that unless respondent shows cause upon hearing, the hearing examiner shall determine the form of the order to be issued.

Respondent, in its answer, admits its corporate character and organization and its competition in interstate commerce with others in the manufacture, sale and distribution in its several lines of manufac-

Initial Decision

67 F.T.C.

tured products. Respondent specifically pleads three separate defenses to Count I of the complaint and four separate defenses to Count II thereof. Several of respondent's defenses are affirmative defenses under subsections (a) and (b) of Section 2 of the Clayton Act, as amended. In substance, respondent contends that it has violated neither Section 2(a) nor Section 2(d) as respectively charged in the two counts of the complaint.¹

More specific references to the issues framed by the complaint and answer will be hereinafter pertinently made in connection with the

¹ The material provisions of the Clayton Act, as amended, involved herein are the following: "Sec. 2(a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) * * *

(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

findings of fact relating to each count and the respective defenses thereto.

The material evidence in this proceeding primarily relates to those facts and circumstances which concern respondent's dealings with its customers in the three general trade areas of Milwaukee, Wisconsin, Washington, D.C., and New York, New York, during the years 1956 and 1957. The evidence establishes that numerous discriminatory prices and so-called "promotional allowances," as respectively charged in Counts I and II of the complaint, were made in each of such areas to and in favor of certain of respondent's customers who, as retailers, were competitively engaged with other, but non-favored-retailer customers of respondent, in the sale and distribution of certain products in each of respondent's two basic lines of such manufactured electrical products. These two lines are generally classified and described in the trade as "brown goods," that is, television and radio receiving sets, phonographs, and various combinations of such products, and the so-called "white goods," which latter line includes kitchen ranges, refrigerators, deep freezers, air conditioners, and dehumidifiers. In substance, respondent does not now dispute the existence of the facts alleged in the complaint and established by the evidence, but relies upon some of its affirmative defenses in avoidance and exculpation thereof.

It is found herein that the evidence sustains the material allegations of the complaint with respect to each charge. And since it is also found that respondent has failed to maintain any of its several defenses to either of such charges, it is concluded that respondent has violated said Sections 2(a) and 2(d) of the Clayton Act, as amended, as respectively charged in two counts of the complaint and an appropriate cease and desist order is accordingly issued herewith.

History of the Litigation

The complaint herein issued March 26, 1958, and was duly served upon respondent. Pursuant to leave granted, respondent's answer was filed on June 6, 1958. At the time the complaint issued, the Honorable Frank Hier was designated as the hearing examiner to hear and initially determine the case. At hearings held on and between September 2, 1958, and February 13, 1959, in the four cities of Chicago, Illinois, Milwaukee, Wisconsin, Washington, D.C., and New York, New York, the case-in-chief was presented to and heard by him. On said last day the Commission's case-in-chief was rested (R. 1475).²

² References herein to the transcript of the record are shown as "R.," while references to Commission's or Respondent's exhibits are respectively shown as "CX" or "RX." References to pleadings and other filings are made either by description or date of filing, or both, with more specific references to paragraphs where deemed appropriate.

During the proceedings of February 12, 1959, respondent had moved orally that certain documentary exhibits presented by complaint counsel be stricken from the record and some of these were therefrom ordered stricken. To this action complaint counsel had no objection, but on request they were given 30 days in which to show the relevance of the other exhibits attacked, and Examiner Hier deferred his ruling thereon (R. 1405-10). On March 12, 1959, complaint counsel filed their answer to said oral motion stating their reasons for the propriety of retaining such documents in the record. No ruling was made on this showing by Examiner Hier, which matter was the only one herein pending before him which was in a determinable status at the time of his death on June 10, 1959. This matter therefore subsequently required disposition by the undersigned successor hearing examiner who ruled upon it as hereinafter recited.

Following said hearing of February 13, 1959, however, there were several motions for the issuance of subpoenas duces tecum upon which Examiner Hier did rule. On February 27, 1959, respondent moved for the issuance of a number of such subpoenas for manufacturers of and dealers in various brands of relevant products competing with respondent. Examiner Hier denied this motion in part by a written order dated March 3, 1959. Respondent appealed therefrom to the Commission, which on May 29, 1959, sustained the examiner's ruling (55 F.T.C. 2078). Likewise on an appeal from his later order of April 27, 1959, confirming a verbal order made at a hearing held April 6, 1959, wherein he sustained *in toto* all motions to quash such subpoenas duces tecum, the examiner's ruling was also sustained by the Commission's order and opinion of July 15, 1959 (56 F.T.C. 1627). This, however, was subsequent to Examiner Hier's death. Applications, motions to quash, briefs, orders, and other numerous documents pertaining to such subpoenas duces tecum constitute a substantial part of the docket filings in this case.

A subsequent general, verbal motion renewing respondent's request for such subpoenas duces tecum to be issued was made at the hearing on August 21, 1961. It was objected to by complaint counsel and was denied by the undersigned examiner (R. 3014-15). All the proceedings had with reference to such subpoenas are relevant to certain of respondent's specially pleaded defenses and they are therefore hereinafter discussed in more detail in connection with the specific findings of fact made upon such issues.

As already stated, Hearing Examiner Hier died on June 10, 1959, and thereafter in due course the undersigned examiner, on October 2, 1959, was appointed in his place. Prior to any hearings before the un-

dersigned examiner, respondent on October 5, 1959, filed its motion to strike the testimony of only three witnesses out of a total of 46 who had theretofore testified before Examiner Hier. This motion was premised upon the holding in *Gamble-Skogmo, Inc. v. Federal Trade Commission*, 211 F. 2d 106 (C.A. 8, 1954), in order that the successor examiner might see such witnesses and hear their testimony in order to appropriately evaluate their credibility as required by Section 5(c) of the Administrative Procedure Act, 5 U.S.C. 1004(c). On October 9, 1959, complaint counsel filed their answer to said motion, agreeing thereto and also referring to the fact that during a telephone conference between counsel for the parties and the undersigned examiner, counsel all were agreed that there would be no objection made to the undersigned examiner passing upon the testimony and other evidence adduced during the case-in-chief, except as to the testimony of each of the three said witnesses which respondent's counsel desired to be retaken.

The examiner, therefore, on October 12, 1959, issued his order sustaining respondent's motion to strike such evidence (R. 984-1001, 1236-65 and 1340-1404), ordering it and all record made in the transcript directly connected therewith to be physically stricken and expunged from the record, setting aside the rest taken by complaint counsel only insofar as the testimonies of the said three witnesses were concerned, and setting hearings for the retaking of their testimony. These hearings occurred on October 26 and 27, 1959. These three witnesses, who were so recalled, were resworn and were fully examined and cross-examined. They were Victor S. Filler, who testified in Washington, D.C. on October 26 (R. 1495-1521), and Jacob Rothman and Charles W. Berg, who testified in New York on October 27 (R. 1530-86). During the first of such hearings confirming earlier understandings, it was definitely stipulated by counsel that, with the exception of the said three witnesses, the undersigned hearing examiner could pass upon the weight and credibility of all other testimonial evidence in the case taken before Examiner Hier as though the undersigned had heard the same (R. 1491-2).

During the retaking of the testimony of the said three witnesses, respondent requested, and was granted, permission to file reply to the answer of complaint counsel, filed March 12, 1959, setting forth the relevance of certain exhibits (R. 1522-27) under attack, which Examiner Hier had left unruléd upon. After this reply was filed, on November 23, 1959, the undersigned examiner, on January 27, 1960, not only passed upon the said deferred ruling of Hearing Examiner Hier, which was pending at the time of his death, but also denied

in toto each of four additional motions of respondent relating to evidence which had been filed on November 30, 1959. Respondent's said oral motion made before Hearing Examiner Hier on February 12, 1959 was denied by the undersigned examiner in his said order of January 27, 1960 except as to certain exhibits which had been stricken by the order of Examiner Hier on February 12, 1959, when the said motion was presented to him (R. 1405-10).

Thereafter, a series of further hearings were held at which evidence pertaining to respondent's defenses was presented on and between February 15, 1960, and April 25, 1962, on which last date respondent rested (R. 3310). Sometime prior to the conclusion of the hearings on August 23, 1961, respondent had requested leave to recall certain witnesses at further hearings to be held in Milwaukee unless this testimony could be stipulated (R. 3210). This request was denied (R. 3210-12), but the examiner permitted an offer of proof by respondent's counsel as to what the proposed recalled witnesses would testify, and upon objection, rejected the offer (R. 3212-19).

At the time respondent rested its defense on April 25, 1962, the hearings were closed conditionally as complaint counsel requested time to elect whether they would present any rebuttal evidence which request was granted (R. 3311). Within the time fixed therefor, counsel, on July 25, 1962, waived the presentation of rebuttal evidence, moved to close the case and to have time fixed for filing proposed findings and answers thereto. Subsequent thereto, and in accordance with the Commission's Rules, the hearing examiner duly fixed the times for the filing of the Proposed Findings of Fact and Conclusions of Law of the respective parties, as well as answers thereto. Due to the preoccupation of Commission's counsel with other pressing official matters, which the Commission had directed them to give priority, such times for filing were delayed on several occasions by various orders until April 11, 1963. In accordance with the Commission's practice, and by the examiner's above-mentioned, conditional order of said date, and also by his request to the Commission for an extension of time to file his initial decision, the hearing examiner finally set the times of filing of the parties' Findings of Fact and Conclusions of Law and Order as of June 17, 1963, and their respective answers thereto as of July 17, 1963. In confirmation of this order, the Commission, on April 19, 1963, extended the time of filing the examiner's initial decision to and including September 17, 1963, as he had requested.

In due course, after the order of April 11, 1963, the parties each filed their proposed Findings, Conclusions and Order, and the respec-

tive Answers to the proposals of the opposition. A further motion was filed July 21, 1963, by respondent to permit the filing of a further brief by it. This was opposed by complaint counsel's objections on July 30, 1963, and the motion was denied by the examiner's order of August 7, 1963.

GENERAL FINDINGS OF FACT

The record is replete with numerous motions, objections, arguments, and rulings, but appropriate references are made herein only to such of those matters which are material to a clear and comprehensive discussion of the entire proceeding. This initial decision has been prepared pursuant to the presently applicable Section 3.21 of the Commission's Rules of Practice for adjudicative procedures effective on and after August 1, 1963, subsection (b) of which specifically requires, among other things, with respect to findings, "specific page references to principal supporting items of evidence in the record." This rule is confirmatory of the Commission's policy declaration in its remand order of June 5, 1963, in Docket No. 7592 [62 F.T.C. 1557], *Ark-La-Tex Warehouse Distributors, Inc., et al.*, premised upon *Alhambra Motor Parts et al. v. F.T.C.* (C.A. 9, 1962), 309 F. 2d 213. The record references in a case such as this are, at best, necessarily extensive as the "principal supporting items" in a Robinson-Patman case are usually, and unavoidably, numerous and involved.

Throughout the hearings the parties were accorded, and fully exercised, their rights to examine and cross-examine the witnesses, to present documentary evidence, and to make proper record either at the hearings or by motions or other documents, filed at other times, of their respective positions and reservations on all disputed matters of evidence or procedure.

The record herein consists of a transcript of evidence of 3,312 pages and some 629 documentary exhibits. Many of the latter consisted of numerous pages, each relating to many relevant transactions. Commission's counsel identified 756 exhibits but some 351 of them were subsequently either not offered or were withdrawn or rejected. There were received in evidence 405 of such exhibits. Respondent identified 236 exhibits, of which 224 were received in evidence. Several Commission and respondent's exhibits were placed *in camera*.

Sixty-two witnesses testified in this proceeding, of which number 46 were called on behalf of the Commission. Respondent called 16 witnesses and also recalled as witnesses a number who had previously testified during the case-in-chief. These 62 witnesses consisted chiefly of certain executives and sales personnel of respondent, several ac-

countants, and a substantial number of representatives of retailers in each of the three cities in whose trade areas the discriminations involved herein occurred.

Considering the nature of the case, the record, while somewhat long, has been substantially curtailed as able counsel for the parties during the course of the proceeding stipulated many matters of importance, and agreed that others could be stricken or disregarded. The excellent proposals and briefs of counsel for both parties are well arranged and referenced; and they have been extremely helpful in the review of the record and the preparation of this initial decision. All proposed findings and conclusions of the parties which are not incorporated herein, either verbatim or in substance and effect, are hereby rejected.

The hearing examiner has given full, careful, and impartial consideration to all the testimony, taking into consideration his observation of the appearance, conduct and demeanor of each of the witnesses who appeared before him. All documentary exhibits in the record, the various stipulations of fact, the testimony presented before Hearing Examiner Hier, and those facts alleged in the complaint which are admitted in the answer, also have been duly considered. And all statements, arguments, proposals and briefs of counsel have been closely studied in the light of all the evidence. Upon the whole record, the hearing examiner finds generally that counsel supporting the complaint have fully sustained the burden of proof incumbent upon them, and have established by a preponderance of the reliable, probative and substantial evidence, and the fair and reasonable inferences drawn therefrom, the material allegations of the complaint. Such evidence establishes the specific findings hereinafter made, which findings, together with the conclusions of law applicable thereto, fully warrant the order herewith issued. He further finds generally that the evidence submitted by respondent is insufficient to establish any valid defense to the violations of law charged in the complaint which are established by the evidence. More specifically, upon consideration of the whole record, the hearing examiner makes the following:

Specific Findings of Fact

Nature and Extent of Respondent's Business

With only minor exceptions, the answer admits the allegations of the complaint pertaining to the corporate character and extent of the business of the respondent. Some evidence was adduced in support of certain of such allegations and there is no dispute with reference to

such evidence. From the admissions in the answer of certain allegations of the complaint, and the evidence, the facts relating to these matters are found to be as follows:

Respondent, Admiral Corporation, is, and, at all times material hereto, was, a corporation organized and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3800 West Cortland St., Chicago 47, Illinois. (Complaint, Count I, Paragraph One, admitted in answer Count I, First Defense, Paragraph One; R. 10-12.)

Respondent is now, and for many years has been, engaged in the business of manufacturing and selling television and radio receiving sets, phonographs and various combinations of the three; and appliances, including ranges, refrigerators, deep freezers, air conditioners, and dehumidifiers. Respondent's gross sales for the year ending December 31, 1956 were in excess of \$182,000,000. (Complaint, Count I, Paragraph Two, as admitted with qualification in answer, Count I, First Defense, Paragraph Two; R. 1174-75, 2828.)

Respondent has manufactured for many years, and still manufactures, the aforesaid products in plants variously located in Chicago, Galesburg, and Harvard, Illinois, and in Shelbyville, Indiana, from each of which points the particular products made there are shipped to customers located in every state of the United States and the District of Columbia for resale and use within the United States. (Complaint, Count I, First Subparagraph of Paragraph Three, admitted with qualification in Count I, First Defense, Paragraph Three of the answer; R. 10, 11, 74-5.)

Respondent, during 1956 and 1957, had from 11 to 15 wholesale branches located in cities in various areas throughout the country. From these branches respondent sold its products to retailers. This general plan of operation has not been changed except that in 1961 respondent sold two such branches, that in Washington, D.C. and the Oklahoma branch, leaving only nine thereafter still in operation (R. 3013 and 3021). It is therefore found that respondent has sold and still sells its products to distributors and to retailers through wholly-owned branches located in a number of states other than the said two states of manufacture, Illinois and Indiana. Respondent is, and, at all times mentioned herein, has been, engaged in interstate commerce in connection with the sale and distribution of its products.

During the years 1956 and 1957 respondent sold its products to customers located in the three general trade areas of Milwaukee, Washington, D.C., and New York City through its wholly owned branches located in such areas. The first two, respectively, were

located at 2941 North Humboldt Ave., Milwaukee 12, Wisconsin and 2046 West Virginia Ave., N.E., Washington 2, D.C. Although the Washington branch was sold in 1961, as already stated, the Milwaukee and New York branches are still operating. The branch servicing the New York City area, known as the Metropolitan Division of Admiral, maintained its warehouse and principal place of business at 497 New Jersey Railroad Ave., Newark 5, New Jersey. It also maintained a showroom and service department at 625 West 54th St., New York 19, New York, until August 1957. Respondent, Admiral Corporation, is responsible for the acts and practices of its branches despite the fact that its branch managers have been given carte blanche in the determination of prices in their respective areas. (Complaint, Count I, Second Subparagraph of Paragraph Three, admitted by answer, Count I, First Defense, Paragraph Three; CX 208(a), 382, 538A; R. 13, 14, 67-69, 1020-21, 1023, 1025, 1406.)

Many of the purchasers of respondent's products are competitively engaged in the resale of said products at retail in the various cities and areas where said purchasers respectively carry on their businesses. Included among such purchasers are radio, television, and appliance stores, and furniture, chain, and department stores. During the years 1956 and 1957, respondent sold to approximately 300 such retailers in Milwaukee, 150 in Washington, D.C., and 700 in the Metropolitan New York City area (R. 192, 517, 1025-27).

Respondent's said purchasers bought and sold Admiral's complete, or substantially complete, line of products or its products within a specific line or lines. The record is replete with illustrations of retailers in the three trade areas of Milwaukee, Washington, and New York, respectively, who so dealt in Admiral's lines. The evidence specifically refers to 8, 10 and 13 such retailers of Admiral products in Milwaukee, Washington, and New York, respectively. In Milwaukee there were: Schuster Company (R. 358) (CX 237(c), (h), (k), (s)); Samson Enterprise (R. 368); Hack's Furniture and Appliances (R. 380); Triangle T.V. (R. 389); Pasch Radio Supply Company (R. 421, 2314); City Electric and Radio Company (R. 455); Err's Radio (R. 470, 2427); and ABC Supply Company (R. 482). In Washington there were: Hub Furniture Company (R. 720); Lansburgh's (R. 734(B)); George's Warehouse Supermarts (R. 756); Todd's Television and Appliances Company (R. 802); Dalmo (R. 826); L & F Home Appliance (R. 862); Irving Sales (R. 881); Max Alperstein Department Stores, Inc. (R. 899-900); Hecht Company (R. 935); and Star Radio, T.V. and Appliances (R. 1498). In New York there were: Heins & Bolet (R. 1192); Davega Stores

Corporation (R. 1218); B & G Music Shop (R. 1235); Vim (R. 1272); S. Klein (R. 1309); Weil and Co. (R. 1338); Oscar's Radio Shop, Inc. (R. 1351); Jules Brite Corporation (R. 1376); Harvard Stores, Inc. (R. 1412-3); R. H. Macy and Company (R. 1426-7) (CX 732(a), 733(a)); Friendly Frost Stores (R. 1446); Charles Appliance, Incorporated (R. 1531, 1540-2); and Standard Brand Distributors (R. 1566, 1576).

The stores of the retailers specified in each of the said three trade areas were located in fairly close proximity to each other in such respective areas, and concentrated their selling efforts in the same respective trade areas in their sales of and attempts to sell Admiral products. Representatives of many of these retailers testified that their stores competed with others in the area both generally and in the sale of various Admiral products involved herein. In Milwaukee (R. 317, 366, 379, 388-90, 408-9, 421-2, 455-6, 470-1, 482-3); in Washington (R. 718-9, 734(a), 752-5, 801-2, 933, 825-9, 861-4, 879, 882-4, 899-900, 961, 1495, 1499-1500, 1507); and in New York City (R. 1217, 1266-7, 1447, 1309, 1428, 1192, 1198, 1202-4, 1235, 1530, 1533-4, 1551, 1564, 1337-9, 1350-2, 1374-6, 1379-80, 1565-8, 1411-3).

The Issues and Evidence as to Section 2(a) Violations

The Section 2(a) violations have been charged in Count I of the complaint. Paragraphs Four to Seven, inclusive, thereof state the ultimate facts alleged to constitute respondent's acts which are the basis of this count. For clarity, an analysis of the various specific charging allegations of this Count I and the answer's respective responses thereto are now set forth.

Paragraph Four of Count I alleges:

The respondent, in the course and conduct of its business, has been and is now in competition with other corporations, individuals, partnerships and firms engaged in manufacturing, selling and distributing similar products in commerce between and among the various states of the United States and the District of Columbia.

Respondent, in Count I, First Defense, Paragraph Four of the answer, substantially admits the foregoing allegations, stating:

* * * that in the conduct of its business, respondent has been and is now in competition with other corporations that are engaged in manufacturing and selling similar products in commerce between and among the various states of the United States and the District of Columbia; and it has been in competition with corporations, individuals, partnerships and firms that were engaged in distributing similar products in intrastate and interstate commerce and in the District of Columbia.

Respondent, however, in the same paragraph of the answer, denies generally the further allegations of said Paragraph Four of Count I

Initial Decision

67 F.T.C.

of the complaint which relates to the essential issue of the retail competition of respondent's purchasers with each other, which allegations are as follows:

Many of respondent's purchasers are competitively engaged in the resale of its products at retail in the various cities and areas where said purchasers respectively carry on their businesses. Included among such purchasers are radio, television and appliance stores, furniture, chain and department stores.

Nowhere else in the answer are such allegations admitted either expressly or in substance. Hence complaint counsel were required to present, and did present, uncontradicted evidence which established such allegations of Paragraph Four of Count I of the complaint.

It is alleged in Paragraph Five of Count I of the complaint that:

In the course and conduct of its business, as above described, respondent has sold and now sells its products to some of said retail purchasers at higher prices than it has sold and now sells such products of like grade and quality to other retail purchasers who have been and are now competing with the non-favored purchasers in the resale of respondent's products.

Similarly to its pleading as to Paragraph Four of the complaint, in the answer, Count I, First Defense, Paragraph Five, respondent, while denying generally the allegations of said Paragraph Four of the complaint by a limited admission,

* * * states that at times in the course and conduct of its business prior to January 1, 1958, respondent has sold some of its products to some retail purchasers at higher prices than it sold products of like grade and quality to other retail purchasers.

Since neither in this part of the answer or elsewhere herein has respondent admitted that it has pursued such conduct after January 1, 1958, the burden fell upon complaint counsel to establish the facts since nowhere in the complaint were the acts of respondent limited to those occurring prior to that date. It is immaterial that in the subsequent proofs of specific acts of respondent, only those occurring in 1956 and 1957 were established.

It is further pleaded in the complaint in Paragraph Six of Count I that:

Respondent has effected the higher prices to the non-favored purchasers by various means including higher list prices; by granting said purchasers less favorable discounts or allowances and by basing some discounts upon quantity purchases.

For example, during 1956, in Milwaukee, Wisconsin, respondent classified its retail customers as "dealers"; "M" dealers; "Key" dealers and "A.D." accounts and issued separate price lists to each type dealer. In all instances the prices charged the purchasers in the first three classifications were higher than those charged the "A.D." accounts; the prices charged the purchasers in the first two

classifications were higher than those charged the "Key" dealers and generally the prices charged "Dealers" were higher than those charged the "M" dealers.

The list prices charged non-favored purchasers in the various classifications described above have resulted in prices ranging from approximately 1% to 10% higher than those charged favored purchasers. In addition, respondent has granted more favorable discounts or allowances to favored purchasers and as a result, the net prices to non-favored purchasers have ranged from 1% to more than 16% higher than those charged the favored purchasers.

Respondent employs and has employed the same or similar pricing practices in other trading areas in various sections of the United States.

Respondent, in the answer, Count I, First Defense, Paragraph Six, while denying generally the allegations of said Paragraph Six of the complaint,

* * * states that it has charged higher prices to some retail purchasers than to others and has granted lesser discounts or allowances to some purchasers than to others, some of which discounts and allowances were based on quantity purchases; and that in Milwaukee, Wisconsin during 1956, respondent classified retailers purchasing from it as "dealers", "M dealers", "Key dealers" and "AD accounts" and issued different price lists to some of said dealers; and that similar classifications of retail customers were made by respondent in some other trading areas of the United States.

This, again, was a limited admission and, as above noted with respect to preceding paragraphs of the complaint, left complaint counsel the burden of proving the unadmitted allegations of Paragraph Six thereof.

Complaint counsel did present substantial evidence which has proved all the material allegations of said Paragraphs Five and Six of Count I of the complaint. Thus all the material allegations of Count I have been proved and are found to be true.

Respondent, in its Proposed Finding 4, refers to facts respecting its competition with other manufacturers. Complaint counsel are in substantial accord therewith in their Eleventh Proposed Finding. The parties, however, are not in accord with respect to the legal conclusions to be drawn therefrom. Respondent's Proposed Finding 4 states, and the examiner finds, that:

Respondent has been, and is, in competition with others, some of which manufacture, some of which sell, and some of which manufacture and sell the same products in interstate commerce. Respondent has about 40 manufacturing competitors of radios and televisions, of which about 10 or 12 do 90% of the business (R. 2828, 2842). Respondent also has about 12 competitors in the manufacture of appliances or "white" goods (R. 2828). Respondent's products are not what are known in the industry as "demand" items, that is, those consumers request by name, such as Zenith and RCA brands in televisions and Frigidaire and General Electric in white goods, but are what are known as "push" items, that is, they require sales effort by the dealer.

Certain customers of respondent in each of the three city trade areas involved herein so testified (R. 931; R. 1518; R. 1750-7; R. 1816-7; 1827; R. 1850, 1851; R. 2429-30; R. 2698, 2699).

Out of the evidence relating to Admiral's products not being in the first line of customer demand and the necessity of "pushing" Admiral's products by the merchants who handle them in conjunction with other competitive, like products of other manufacturers, respondent urges that, as a matter of law, Admiral's products cannot constitute "a line of commerce" as that phrase is used in Section 2(a), the true line of commerce being all brands of radios, televisions, phonographs, and "white" goods sold throughout the country. (Respondent's Brief, pp. 2, 83 and 84.) This contention is opposed by complaint counsel (answer to respondent's Proposed Findings, etc., pp. 1 and 2). The examiner agrees with complaint counsel and rejects this most unusual contention as unreasonable and without any authoritative precedent. No supporting authority has been cited nor has the examiner's own research revealed any which could support respondent's contention.

On principle, it does not seem that "push" items should be treated differently than "demand" items as a matter of law, and certainly respondent's contention would permit each manufacturer or supplier to violate Section 2(a) of the Robinson-Patman Act at will. In the case of televisions, for instance, retailers handle several different makes. The result would be to let each manufacturer or distributor arbitrarily classify its customers and fix discriminating prices to them either as between or within the classifications so fixed. Such a construction would shortly completely erode the true meaning and effectiveness of Section 2(a). Neither the Commission nor the courts have ever considered violations of Section 2(a) in any other light than as between a particular seller, whether manufacturer or distributor, and its buyer. The clear intent of Section 2(a) is to prevent any single manufacturer, dealer, or distributor of a product from granting pricing favors to one customer over another. The basic purposes of the Robinson-Patman amendments to the Clayton Act were to protect each business against unfair price advantages granted to its competitors by suppliers. This is particularly applicable to large concerns with massive buying power gaining any undue price advantages over their smaller competitors.

As already stated, respondent has set out three separate defenses to Count I of the complaint. The foregoing analysis of the ultimate facts pleaded in Count I demonstrates that while certain of such alleged facts are admitted by respondents in its answer, others are

denied generally in respondent's First Separate Defense thereto. Therefore, the complaint counsel were obliged to present, and, as already stated, did present substantial proof of such allegations of the complaint. Since respondent, however, has not submitted proposed findings of fact in opposition to those proposed by complaint counsel upon the Section 2(a) count of the complaint, reference to such facts as hereinafter found will be substantially abbreviated. Before making such findings, however, the other separate defenses of respondent will be disposed of.

The Second Separate Defense is that Count I of the complaint is moot because, "As of December 31, 1957, for business reasons not connected with the then pending investigation which lead to the filing of this complaint, respondent ceased to sell its products to retailers and has no intention of resuming such sales." Originally it was the position of respondent that each of its branches were operated "exactly as an independent distributor. The only difference is that, we, the parent company, own the stock of that branch." (R. 67-8, 73). Subsequently, however, on January 1, 1959, the three branches of Admiral in Milwaukee, Washington, D.C., and New York became a part of the parent organization as divisions thereof. The defense of mootness was therefore withdrawn by respondent's counsel (R. 1020-22). It has been subsequently contended, however, that due to the sale of the Washington branch, evidence pertaining to respondent's acts and practices in that particular branch became moot (Respondent's Proposed Findings 65-7; Brief pp. 50, 86-7). This fact, however, does not constitute a defense to Count I of the complaint because even if the respondent no longer has a Washington branch, it still continues actively in business, it maintains some nine other branches and there has been neither plea nor proof of the complete abandonment by respondent of the type of practices complained of which occurred in the Washington branch office during the time it was in operation, as well as in the Milwaukee and New York Metropolitan Area branch during 1956 and 1957.

Respondent's separate Third Defense consists of five distinctly pleaded but allegedly co-related defenses. All are claimed to have justified the differences in the prices charged by respondent to its retail customers in competition with each other. The first such defense (a) is the orthodox defense of cost justification, based upon differences of sale and delivery resulting from different methods or quantities, under Section 2(a). The second such defense (b) is that the price differentials resulted from respondent giving a lower price to a purchaser in good faith in order to meet an equally low price of

Initial Decision

67 F.T.C.

a competitor. The third such defense (c) is that the differential resulted from price changes in response to changing market conditions, particularly sales in good faith in discontinuance of the business in the goods concerned. The fourth such defense (d) is that the price differential resulted from special low prices being offered to all dealers in competition with each other for periods of time. The fifth such defense (e) is that the price differential did not injure the public interest.

The second defense (b) that respondent lowered its prices to any purchaser in good faith in order to meet an equally low price of competitors is not sustained by any evidence. Respondent sought to elicit information relative to this defense from its competitors by requesting the issuance of subpoenas duces tecum. Further, in connection therewith, as already stated, Examiner Hier finally denied the application on the grounds there was no specific request covering particular competitive situations. His ruling was sustained by the Commission and a subsequent general renewal of the motion was denied by the undersigned examiner as already stated, and will be more fully discussed hereinafter in relation to the Second Count of the complaint.

There was no evidence to sustain the third defense (c) as there is no evidence that Admiral ever discontinued its business in any of the products it manufactured. It is true that it changed models from time to time, but that clearly is not a discontinuance of business in the basic types of the goods concerned.

The fifth such defense (e) that the price differential did not injure the public interest has no merit. There is no requirement in the provisions of the Clayton Act as amended by the Robinson-Patman Act that a finding be made that the proceeding is brought in the public interest. (*Webb-Crawford Co. et al. v. F.T.C.* (C.C.A. 5, 1940) 109 F. 2d 268-269, *cert. den.* (1940) 310 U.S. 638. See also construction prior to Robinson-Patman amendments that public interest is conclusively presumed "and needs to be neither alleged nor proved." *Standard Oil Co. of New Jersey et al. v. F.T.C.* (C.C.A. 3, 1922), 282 F. 81, dissenting and concurring opinion, p. 91. Case affirmed sub nom. *Sinclair Refining Co. et al. v. F.T.C.* (1923) 261 U.S. 403). Even where the words "to the public interest" occur in the Federal Trade Commission Act, no specific finding is required, it being only necessary that this inchoate element relating to jurisdiction be inherently present as a conclusion of law from the evidence in the case (*F.T.C. v. Raladam Co.* (1931) 283 U.S. 643, 648-9). Any proceeding brought by a public prosecutor or agency by its very nature is not brought to

protect private interest, but is brought in a public capacity for the purpose of protecting the public; and the charges in the complaint herein partake of that character. Certainly the history and language of the Robinson-Patman amendments of the Clayton Act manifest a clear purpose on the part of Congress not to protect competitors, but to protect competition so that individual businesses may not be destroyed by practices forbidden by the Act. The evidence in this case hereinafter found manifestly shows that the general practices of respondent tended to be unfairly injurious to, and destructive of, its smaller customers because of the preferences granted by respondent to its larger customers who competed with them. This certainly establishes general elements of public interest in this case beyond any question.

The fourth such defense (d) in the Third Separate Defense will be hereinafter considered in connection with respondent's cost justification defense (a) therein, with which latter defense substantially all of respondent's evidence is concerned.

The evidence clearly establishes numerous violations by respondent of Section 2(a) of the Clayton Act as amended. The evidence of numerous specific violations relates to transactions which took place during the years 1956 and 1957 in the three trade areas of Milwaukee, Washington and Metropolitan New York. While by and large the same general types of preferences in prices and arbitrary classifications of customers obtained in each of the three areas, the evidence naturally differs somewhat in respect to each area. Most of the Commission's evidence relates to the New York City area where respondent's pricing changes and readjustments apparently occurred with much greater frequency than they did in the other two trade areas.

Therefore, in order that the proof as to violations in each of the areas may be separately determined in this initial decision, the specific facts in each of these areas are separately found and stated in connection with the several general, ultimate findings of fact to which all of them relate. This is of importance primarily because the respondent's defense of cost justification was developed solely with respect to the New York area, although as hereinafter more fully discussed, some effort has been made by respondent to apply extensive cost justification accounting evidence to the price differentials between various customers in the New York area, also to the price differentials which have existed between various customers in each of the other two areas. The separation between the three areas is also maintained herein because of respondent's claim that the practices followed in its Washington branch in 1956 and 1957 have become moot by reason

Initial Decision

67 F.T.C.

of the sale of respondent's branch in that area in 1961 as hereinbefore found.

During the years 1956 and 1957, respondent classified its retail customers in each of the three trade areas and issued price lists to said customers according to the categories in which it had placed them. The prices, for identical goods appearing on the respective price lists, differed substantially. Many of the respondent's purchasers, located in the said trade areas, who were classified in less favorable categories, and were charged higher prices, were competitively engaged in the resale at retail of the respondent's products with purchasers classified in the more favorable categories paying the lesser prices.

The price differences, ranging from approximately 1% to more than 10%, varied by product and models within a product line. Included among the prices established by said price lists were some which provided for a reduction in unit price based upon an increase in the quantity of units purchased. Similarly, respondent, at various times, instituted programs whereby purchasers of specified large quantities were granted discounts referred to as "promotional allowances," for the purpose of reducing the purchasers' unit price. In many instances said price reductions were not offered to all competitors of the purchaser so favored and in other instances said competitors could not avail themselves of the reduced prices because of the large quantities to be bought.

The evidence with respect to the classifications and price differences in the three areas involved is very extensive and, even briefly stated, has required an eight-page appendix "A" in the proposed findings of complaint counsel to comprehensively narrate them. Since respondent has offered no substantial proposed findings in opposition to those presented by complaint counsel, reference to all of such evidence will not be made at length herein but only sufficient references to illustrative comparisons are herein stated and found.

In Milwaukee, as admitted by respondent in its answer with respect to the year 1956, the television customers were classified and issued different price lists. The evidence shows that three large retailers, Schuster, Samson and Hack's, were the only accounts classified "AD" among respondent's 300 retailer customer in said area. These three accounts paid the lowest prices provided in respondent's lowest price list. This was true whether they purchased in quantity or by single units. The other dealers were respectively scaled down in classification based on the amount of business done with Admiral as "Key" dealers, "M" dealers and simply "dealers." One illustration, out of

many shown in the record, will suffice to explain the price advantage granted to the higher classifications respectively over those lower than themselves in the said dealer classification of respondent. TV model #T323A1 carried a price to the "AD" dealers of \$136.75, to the "Key" dealers \$143.20, to the "M" dealers \$145.00 and to the "D" dealers \$148.70 (R. 192, 207-8; CX 208a-d). The percentages of difference as to this particular TV model, regardless of quantity purchased, favored the "AD" dealers 4.5%, 5.8% and 8.3% respectively, over the "Key," "M" and "D" customers. The advantage of those in the other classifications of accounts over those lower in the scale is self-evident.

Similarly, the "AD" accounts were given the most favorable prices in connection with the sales of phonograph and hi-fi sets and combinations thereof (R. 218-9, 300-2, 304; CX 221a-223(a)-(b), 224(a), 225(a), 227, 345(a)-(b), 347-59, 352-4). Similar preferences in price in favor of the higher bracket classifications of customers applied with respect to ranges (CX 228a-c; R. 224), refrigerators (CX 229a-e; R. 226) and freezers (CX 231-233, 234; R. 275-7). Air conditioners were sold generally on quantity basis regardless of purchasers in amounts of one-two; three-five; six-24; and 25 or more. But a price differential of 8.6% was the advantage the customers buying 25 or more units had over the customers of one or two units.

Two basic pricing schemes were used by the Washington division. Certain single lot prices, six to 12 items, 12 to 23 items, and 24 or more items, resulted in lower prices for larger quantities respectively. Most of respondent's products in Washington, however, were sold during 1956 and 1957 in accordance with arbitrary price categories determined by Leo Lessey, general manager of the Washington division, as well as by irregular prices fixed from time to time by various salesmen (R. 565, 665). Different quoted price lists were so used with different customers who did not know that their prices were different than those of other competing dealers or that there were different price classifications (R. 538, 664, 878, 882, 902). A primary promotional activity in Washington was an annual open house held on June 15 whereat respondent evaluated all the dealers in the area on the basis of the volume of their purchases. As a result of this practice, there were six basic price classifications: "accommodations"; categories 1, 2, 3; "special"; and George's (R. 515, 516, 543, 565, 665). Once a dealer had received his price classification based on the size of his initial quantity purchase, he continued to receive that price no matter what quantity of products he subsequently purchased (R. 517, 532, 564, 573, 579, 584, 590, 665). The percentage spread of the

Initial Decision

67 F.T.C.

most favored customer, George's, was 2.3%, 3.5%, 4.5%, 5.7% and 6.7%, respectively, over the other five classifications paying Admiral higher prices. Illustrative of such prices are those of TV model #T102 (CX 401-4), refrigerator model #D1150 (CX 447-51) and freezer model #11U70 (CX 460-4).

In the Metropolitan New York area respondent maintained three specific price categories prior to June 1, 1957, classified as "Agency," "Franchise" and "AAA" (R. 1027). As of that date, however, the "Agency" category was dropped and dealers theretofore so classified were placed in the "Franchise" category (R. 1028). The "Agency" dealers had been charged the highest prices by respondent. They were dealers who did not sign a franchise or who merely engaged in "pick up" purchase for a customer of theirs who wanted a particular model (R. 1027). The "Franchise" dealers, of course, had signed franchises at new merchandise shows conducted by respondent and these constituted the largest number of respondent's dealers in this area (R. 1027-8). To qualify in this class of dealers, a customer had to make a substantial specified initial purchase of televisions and radios. Such "Franchise" dealers could also qualify for the "AAA" price if they purchased a carload of televisions and radios or "white" goods; but subsequently such a dealer was not entitled to the carload prices unless he bought a complete carload (R. 1029-31).

The "AAA" dealers in New York were large purchasers that normally bought products by the carload and generally received them on direct shipment from respondent's factories. There were only about 15 dealers in this classification, including the Devega, Vim and Friendly Frost stores (R. 1030, 1218, 1283-4). This class of dealers received the lowest prices irrespective of whether they bought by the carload or but one or a few individual items. Even within this class, Vim received certain advantages over the other "AAA" dealers. Illustrative of this, Vim's price paid on March 21, 1956 for TV model #T18A1 was \$90 as against the "AAA" price of \$94, the "Franchise" price of \$112, and the "Agency" price of \$115. (CX 538(a), (b), 541 and 544). From the foregoing figures, it is clearly shown that substantial percentage advantages were enjoyed by each class over the others with Vim obtaining an even greater advantage.

These differences in price applied similarly during 1956 and 1957 with respect to other products—radios and phonographs (R. 1055; CX 576, 577, 579, 580, 581ab) and refrigerators and freezers (R. 1055-6; CX 606, 607, 611, 620, 622, 624, 657, 659). And commencing in January 1957, Admiral's air conditioner prices, which had pre-

viously been the same for all buyers (R. 1055-6), were fixed into four different categories based on quantities purchased, ranging from the lowest price to "AAA" dealers on up through "Carload" (or 65 units), "Split-Car" (33 units) and "Less than Split-Car" (any quantity less than 33 units) (R. 1122; CX 664-5).

In addition to the said price differences, which were inherent in Admiral's basic pricing structure, respondent also granted price concessions, in the guise of "promotional allowances," to some purchasers. For example, during 1956 and 1957, in each of the trade areas involved, respondent inaugurated its "GOYA" ("Get Out Your Ammunition," CX 141A) "promotional allowance" program whereby a dealer received a discount in the form of a flat sum reduction from the face of the invoice for purchasing a carload or one-half carload of specified Admiral merchandise (R. 94-7, 168-73; CX 78, 141(a), (b), 144(a), (b), (146)). Initially, and generally, "GOYA" pertained only to the purchase of a carload of appliances, that is, "white" goods, although later the promotion was expanded to apply to televisions, which latter practice was referred to as a "Split" (R. 94, 167-8, 171; CX 78, 144(a), (b)). Other variations of the "GOYA" program such as Bonus GOYA and PAR were also employed by respondent during 1956 and 1957 (R. 172-3; CX 146, 212(a), (b), 124, 130(a), (b)).

On June 28, 1956, respondent amended its "GOYA" program and provided \$1200 and \$1000 allowances respectively on carload purchases consisting of 75 pieces (CX 144(a), (b)). Although the program specified certain promotional services to be performed by the purchaser, none were required and the purchaser so favored received the allowances and treated them as price reductions which amounted to \$16 and \$13.33 per unit respectively.

The foregoing actual price concessions, however named or disguised, were either not offered, or were not functionally available, to all competing purchasers.

In Milwaukee, officials of respondent, in their testimony, agreed that the term "promotional allowance" as it appeared on invoices was a fictional statement to cover up price reductions. This was done so that the general price structure could be maintained since in this type of industry if prices are once broken they can never be restored (Raymond Hebenstreit, Vice President and General Manager of respondent's Milwaukee Division, R. 198-9, and Milton C. Akers, its General Sales Manager in this area, R. 228, 287; CX 254-5). The three "AAA" dealers, Samson, Schuster and Hack's, received allowances under the "GOYA" and similar programs and treated them as price reductions

Initial Decision

67 F.T.C.

(R. 286, 323, 358, 368-70, 374, 376, 381-3; CX 185(a)-(d), 186, 187(a)-(c), 246(a)-(d), 248(a)-(b); see also CX 237(c)-(f), (h)-(j)).

In Washington, D.C., "window and floor displays" and other "promotional allowances" required no services of the purchasers and were therefore treated as price reductions (R. 523-5). A \$1,200 "promotional allowance" under the "GOYA" program was offered certain large dealers who were purchasing in carload quantities (R. 519, and see for example: George's—R. 650, 654, 657, 761, 770-2, 801; CX 517a-c, e). Other carload quantity deals with reduced prices were also offered to Hub (R. 726) and Todd's (R. 803). Todd's elected to use a number of its carload purchase price allowances for promotional purposes (R. 699-701, 805, 807, 815-7; CX 518, 528-30, 533-5). This was also true with respect to George's (R. 654, 575, 770-2, 801).

In the large Metropolitan New York City area, "GOYA" and similar carload promotional deals were offered to the large retailers, such as, Klein, Vim, Devega, Friendly Frost, and Macy. No services were required of them (R. 1032-6, 1282, 1313, 1434 and 1449-50). No services were required where these promotional allowances were granted in large quantity purchases and were, therefore, actually price reductions (R. 1175).

In all of the said three trade areas there is evidence that these large deals, while in some instances, were offered to small purchasers, were in fact not functionally available because of the financial inability of such small dealers to buy in carload quantities. This was true in Milwaukee (R. 395-7, 425-6, 458-9, 473-4 and 485-7); in Washington (R. 867-8, 876, 890, 968-70 and 980); and in New York (R. 1343 and 1418). It is also true that in Washington (R. 834-7, 903-6, 1501) and in New York (R. 1199, 1417, 1538 and 1575) that "GOYA" and other carload quantity discount allowances were not made to small dealers.

Counsel has cited *F.T.C. v. Morton Salt Company* (1948, 334 U.S., 42-3, 49), which holds that although discounts may be theoretically available to all purchasers, where they are not functionally available it is contrary to the intent of the Robinson-Patman Act that large buyers could thus obtain competitive advantages over small buyers. They have also cited a number of other cases, the latest of which is *Mueller Company*, Docket No. 7514, p. 7, mimeograph copy, January 12, 1962. The principle involved in these cases is applicable here and as counsel urge, if anything, more persuasive because in many instances the large, favored purchasers were given large quantity reduced prices even when they purchased in small amounts.

In the sales to purchasers of identical products, respondent charged said purchasers, in the various trade areas, prices consistent with the customer classifications reflected in the price lists hereinbefore referred to and granted certain purchasers the discounts also hereinbefore referred to. The price differences among competing purchasers in the respective trade areas, resulting from the foregoing pricing practices, were substantial.

Some detailed reference has already been made to the substantial percentage differences among the various classes of competing purchasers in the three trade areas involved herein. Complaint counsel in appendix "B" to their proposed findings have listed a substantial number of examples of differences in prices between the various classes of customers so arbitrarily made by respondent in each of the three areas. These specific instances cover televisions, radios, refrigerators, freezers, dehumidifiers, and ranges in the Milwaukee area where price differences percentage-wise and dollar-wise are extremely great. This is also true of the specific illustrations cited with respect to the same products in Washington, D.C. and in the New York areas. Said appendix "B" contains over 100 specific examples which show differences in prices between the favored and non-favored customers of as much as \$41.05 on televisions (CX 366-k) with a percentage difference of 22.6% involved, and a difference of \$46.30 on a refrigerator with a 13.7% involved (CX 237-g).

Respondent, in many instances, has charged competing purchasers in the same customer categories, prices which differed substantially for identical goods, purchased at or about the same time.

For example, in the New York area among its "AAA" customers: television model #T23A2TV sold to Klein on September 5, 1956 for \$134 which is \$21.50 or 15% more than Vim purchased the same item on the same date at \$112.50 (RX 216-Z-5; CX 732-Z-5); radios and phonographs on May 10, 1957 (RX 206-a; CX 733a) Devega paid for model 215 \$23.95 which was \$1 or 3.8% more than Vim paid for the same model, \$22.95; and on freezers on October 8, 1957 Devega for model #11U50P paid \$169 which is \$19 or 11.3% more than Vim paid for such model on October 31, 1957 of \$150 (RX 208 and CX 735).

In summation, respondent's products of like grade and quality were sold to competing purchasers at different prices in each of the respective areas at or about the same time and such products were sold to said purchasers for use, consumption, or resale within the United States or a territory thereof or the District of Columbia.

As will subsequently be discussed herein in connection with respondent's defense of cost justification, differences in prices between various customers or classes of customers cease to be de minimus and become important only when differences involved are substantial in the light of the particular product and competitive situation involved. It is a classic truism that a one cent difference in the price of a railroad locomotive is of no importance but such a difference is vital if the product is a pack of chewing gum. It is the percentage of difference involved in the particular competitive area as applied to the particular product which determines the substantiality of price discrimination. This difference is probably sharpened where a line of goods consists of "push" items which are sold in competition with better known products of like character and of substantially the same grade and quality as in the case at bar where Admiral's customers dealt also in many other manufacturers' television and radio receiving sets and other products. The evidence of many dealers does not reveal Admiral to have been the only product line sold by any retailers.

There is a considerable amount of testimony in this record that competition at the retail level in each of the three trade areas in the sale of respondent's products was extremely keen and rough and that price was the most important factor in connection with the retail sale of Admiral products in competition with competing goods of other manufacturers. (In Milwaukee, R. 394, 409, 423-4, 457, 472-3 and 485; in Washington, R. 831, 866, 885, 902, 965 and 1503; and in New York City, R. 1196, 1235, 1353, 1380, 1415, 1536-7 and 1571.) In the New York City area, Samuel Schwartzstein, the very competent general manager of respondent, admitted that the retail market in his area was extremely price sensitive and conscious (R. 1164). There is abundant evidence that small price differences at retail of as little as \$.15, \$.25, \$.50 and \$1.00 will switch a sale to another dealer. This is true with respect to television sets (R. 1334, 1538, 1584) and with respect to radios, \$.15 and \$.25 retail price differences will also switch a sale (R. 888).

These conditions required non-favored retailers to work on very low percentage of mark up of their cost of Admiral products in order to meet their price competition (R. 832, 867, 888, 966-8, 1503, 1198, 1353-6, 1381-3, 1416, 1535 and 1570). In one New York case, this mark up was only a \$1.00 mark up on portable phonographs (R. 1559-60). In the several market areas competitive conditions were such that mark ups, however small, were frequently reduced by non-favored customers of respondent in order to make sales (R. 965, 968, 1355, 1381, 1416-7, 1503 and 1517); and in one instance, the mark up to make a sale went down from 13% to 3% (R. 1381).

Non-favored retailers who paid respondent much higher prices than did their competitors had very low net profit returns on the products here in question and in some cases they even sustained losses during the years 1956 and 1957. These low net profits ranged from 7.5% down to as little as .2% (R. 391-2, 422, 456, 827, 863, 900, 1194, 1214-5, 1352, 1368 and 1462-3). There was some testimony that such retailers sustained losses on the sale of certain products with the amount unspecified (R. 863, 962), while some retailers testified to losses on such products ranging from 1% to 3% (R. 1413, 1462-3).

It is therefore found from this evidence that the charging of substantially higher prices by respondent to some of its retail customers who compete with other customers of respondent favored by lower prices has been the continual general practice of respondent, although subject to numerous changes and variations. Such price differences have and are discriminatory to such a great extent that they have had, in many instances, the actual effect of substantially lessening, injuring, or preventing competition by the said non-favored retailers with the favored retailers to which respondent sells its products in the various trade areas; and it is not only reasonably possible, but is reasonably probable, that such price differences may have such effects in the future unless respondent is restrained from engaging in such practices.

Respondent has contended, in its Proposed Finding 49 and conclusion 7 (see Respondent's Brief, pp. 39, 84-85), that there is no evidence that any of respondent's customers had knowledge of any of the price discrimination involved herein. There is abundant evidence, however, from which it is inferred that the smaller dealers knew they were being undercut by larger dealers but in any event it is immaterial in this proceeding whether any customer of respondent knew of its price discriminations in favor of such customers' competitors. The act was designed to protect competition and not competitors. The only reference to knowledge is the phrase "knowing receipt" of such price discriminations in Section 2(a). This applies only to buyers (80 Cong. Rec. 6350-1, 6428 (1936)). This proceeding is not brought against any buyer or buyers but only against the respondent seller.

It is therefore concluded that the evidence definitely establishes that respondent has violated Section 2(a) as charged in the complaint; and a cease and desist order must issue against it unless a showing has been made that in its pricing practices respondent's price differentials between its competing customers have been cost justified under the authority of the first proviso of said Section 2(a) and as pleaded in Paragraph Ten (a) of the Third Defense in the answer.

Initial Decision

67 F.T.C.

*Respondent's Cost Justification Defense Not Sustained
By the Evidence*

It is basic that a respondent who seeks to justify price differentials among its customers has the burden of proving such justification. (*F.T.C. v. Morton Salt Company*, *supra*, 334 U.S. at pp. 44-5) The Commission has sustained its burden of proving a prima facie case of Section 2(a) violations by establishing that substantial price differentials were made by respondent among its various customers for sales of goods in the same grade and quality in the three trade areas involved herein. Respondent has never precisely conceded that such price differentials existed and objects to complaint counsel's proposed findings thereon. It contends, together with other arguments, that such price differences as may have been established are too insignificant to support the complaint.

Respondent's evidence of matters pertaining to its cost justification defense constitutes most of the record made by it. An extensive cost study covering the 1956-1957 situation in the Metropolitan New York area was made by accountants of S. D. Leidesdorf, Certified Public Accountants, with offices in New York, Chicago, St. Louis, Greenville, S.C. and Charlotte, N.C. This firm had been employed generally as the accounting firm of respondent corporation and had not been employed merely for the purpose of preparing its cost accounting in this proceeding. The four professional witnesses on this defense are, one of the partners of S. D. Leidesdorf, William E. Arnstein (R. 3058-72, 3073-8, 3079-81, 3084-8, 3089-91, 3094-3108, 3111-7, 3120-3, 3128-32, 3138-61), and three of its other accountants, Herman Burstein (R. 1972-90, 2868-94, 3048-58, 3072-3, 3078-9, 3081-4, 3088-9, 3091-2, 3108-10, 3117-20, 3123-8, 3132-3, 3161-77, 3245-97, 3306-8), Steven Reiss (R. 1990-2003, 2911-20), and Emmet Patrick O'Sullivan (R. 2894-2911). These latter three worked under Arnstein's direction.

As to the pricing practices of respondent in the other two trade areas under consideration, respondent's evidence relative to Milwaukee was presented in that city on July 6 and 7, 1960 (R. 2312-2501). Respondent's evidence as to the Washington trade area was presented in that city on September 19, 1960 (R. 2502-96). These portions of the evidence largely consisted of the testimony of a number of retail dealers in those places who were recalled to testify further with respect to matters respondent deemed material to its defense. In New York, a number of retail customers of respondent were also recalled for further examination. The accountants also testified in New York, but by far the largest part of the testimony taken there was that of Samuel Schwartzstein, the respondent's general manager and former

sales manager in the area. He testified at length, both on direct and cross-examination, explaining the elements claimed to constitute the prices of respondent's numerous sales to the customers theretofore selected by complaint counsel as representative in that area. As respondent's counsel have aptly suggested, most of the hearings in New York were concerned with the correction of certain errors in the computation of "net prices" made by the Commission's accountant since the extensive evidence of Schwartzstein is largely of such corrective character (R. 1875-1959, 2014-40, 2073-2129, 2131-85, 2205-37, 2722-2825, 2920-70 and 3007-32). Numerous stipulations of counsel also were made in connection with Schwartzstein's testimony on these matters. (For example, R. 2185-90, 2191-2205 and 2808-25)

With respect to the cost justification of the price differentials clearly demonstrated to have been allowed by respondent in the Milwaukee and Washington trade areas, no cost study thereof was made by respondent although a number of comparative price tabulations for these areas are in evidence (RX 226-235). The reason therefor, as stated by its counsel, appears to have been the great expense involved in causing such cost studies to be made. In connection with such counsel's attempt to apply the principles used in the New York cost study to the other two areas, by means of an allegedly professional opinion of witness Arnstein, it was stated by counsel (R. 3150),

I am not attempting to get the same benefits we would obtain by making a cost study in either Milwaukee or Washington. The cost of one of these things is great. This one [covering the New York trade area for 1956 and 1957] has run in the nature [sic] of \$80,000 to date [August 22, 1961]. We can't afford to do that for both Milwaukee and Washington. So all I am expecting to get out of this [witness' answer to a hypothetical question as to whether results would be approximately the same in Milwaukee and Washington if such cost justification studies were to be made] is that you will find cost savings of this kind inherent in Milwaukee and Washington because of the identities of operations in those two cities with New York as disclosed in the record. We are not going to get any definite figure from this witness. He is a good accountant. He is not going to make a statement with a definite figure. I am not trying to get a definite figure. You can rely on the fact that it is impossible.

The foregoing statement arose upon objection being made by complaint counsel to the hypothetical inquiry posed to the witness Arnstein which was as follows:

Assume that Washington and Milwaukee branches in 1956 and 1957 distributed the same Admiral products as did the [Metropolitan New York] Division during that period of time . . . and that they always sold to retailers as did the Metropolitan Division; also assume that in Washington and Milwaukee some retailers were larger than others and received lower prices as did some retailers in the Metropolitan Division and that some of the larger dealers only purchased

Initial Decision

67 F.T.C.

direct carloads. With these assumptions, what, in your opinion, would a cost study, made like that prepared for the Metropolitan Division, disclose with respect to Washington and Milwaukee in selling the larger dealers as [compared to] selling the smaller dealers? (R. 3145-6)

Objection to this question was sustained on many grounds, among them that the witness had not made such a study and that his answer would be a pure conclusion premised on many infinitesimal unstated matters, and such answer would foreclose any proper or effective cross-examination (R. 3146-50). An offer of proof was then permitted to be made to which objection was similarly sustained (R. 3153). In short, considering the infinite detail which the Commission has now indicated is required in the presentation and consideration of evidence in Robinson-Patman cases, *Ark-La-Tex Warehouse Distributors, Inc. et al.*, Docket No. 7592, *supra*, there can be no question as to the impropriety of this proffered opinion evidence. This type of case cannot be tried upon an expert opinion as to what a study would show even generally when the study document itself has never been prepared and the data whereon it would necessarily be premised have not been stated, studied and analyzed.

It is, therefore, necessarily found that the respondent has wholly failed to establish its cost justification defense to the Commission's case-in-chief insofar as the Milwaukee and Washington trade areas are concerned. It would seem to be entirely proper for the examiner therefore to stop at this point and give no consideration to any of the cost justification evidence pertaining to the New York Metropolitan area since the proof of discrimination in any one of the three areas would be adequate to sustain the cease and desist order requested by complaint counsel. Since counsel for both parties have discussed respondent's extensive and well-arranged cost study so exhaustively in their briefs, however, some consideration thereof is deemed appropriate.

With respect to respondent's cost justification of price differentials in the Metropolitan New York area, the basic contention between complaint counsel and respondent arises from respondent's use of average prices in its cost study. Complaint counsel hold to the doctrine that the averaging concept of prices used by respondent is not applicable in this proceeding. Respondent contends that since complaint counsel has selected a number of specific instances of compared prices as the foundation of its case rather than a broad price study of all sales to all customers in 1956 and 1957 in the several areas involved, it is appropriate for respondent to make its own selection of its prices on various products to the same customers during such

period. Respondent argues that under the facts of this case only a weighted average method of measuring price discrimination is meaningful in ascertaining probable injury to competition.

It is also urged in effect by respondent that many of the illustrations of comparative prices, which complaint counsel have set up as proof of violation of Section 2(a), are not proper measures of price discrimination because in numerous instances the net price per model cannot be accurately determined for comparative purposes since in each of numerous instances many of the articles were bought in combinations of various models at a total price which was less than the sum of the then current prices of each model if such models had been bought separately. It is therefore insisted that the price of a model bought by itself was determined by the buyer. Respondent reasons that if its customer did not wish to buy the combination he could purchase a single item and pay a higher price for it whereby such buyer's lack of merchandising skill was the real reason his larger competitors were able to outsell him. In substance, respondent advances the bizarre doctrine that a small retailer, who is either unwilling or unable to buy a large line of models offered in combination, himself causes the price discrimination rather than the respondent who made such combination offers. Respondent also contends that these combination offers were small enough so that even the non-"AAA" customers had the financial ability to buy them. Some of them may have been able to buy the combinations, or some of them, but whether they were offered or not, or accepted or not, each particular buyer had the right to buy or not as he chose. In the examiner's opinion, respondent's reasoning in support of this doctrine is specious, untenable, and unfair. Respondent seller is the offeror and it cannot shift to the buyer the burden of meeting price competition on any one article by forcing a combination offer upon the buyer of many other articles which the buyer either does not desire or cannot purchase.

It has been recognized by the highest authority that the Commission in presenting a Section 2(a) case is justified in using a few illustrations. "* * * [S]ampling has long been a recognized technique in price discrimination cases". *U.S. v. Borden Company, supra*, 370 U.S. at page 466, footnote 6. This does not mean that cost justification is only necessary as to the sales upon which the prima facie case of the Commission has been premised, *id.* None of the respondent's accountants who testified was willing to state that the methods they used in the cost justification study were those customarily used in cost accounting. The averaging concept used in this case was one determined

Initial Decision

67 F.T.C.

upon by the chief defense counsel and not by the accountants. It was his contention that the system of arriving at cost defenses was "The result of my own ingenuity. This is a legal question and I object to your asking * * * [Accountant Burstein] * * * any questions as to what he thinks about it." Objection being overruled, the witness Burstein answered, "We were guided here by counsel and we accepted his interpretation." He had previously testified that in preparing cost data he did not "devise this system of arriving at these cost differences" (R. 3056-7). On a later occasion he further testified as follows:

Q. Do I understand that you and the Leidesdorf firm approved this computation of price differences, is that correct?

A. I am afraid I will have to ask for an explanation of what you mean by the word "approved." Do you mean from the mathematical approach?

Q. The method, the approach.

A. Frankly, I don't know how to answer that. Here we have been following the instruction of Mr. Williams [respondent's counsel] as to what is a legally correct method of obtaining the price difference under Robinson-Patman.

Mr. Williams: I will take full responsibility for the method. This is what we have to argue about. It is not really an accounting question. * * *

Q. Do I understand that your work consisted solely of checking Mr. Williams' mathematics?

A. Yes. * * * Excuse me, yes, plus making additions which he requested us to do which he had not previously done himself. * * *

Q. Again, basically or solely, your only connection with these tabulations, [respondent's exhibits] 237 through 242, was purely mathematical, is that correct?

A. That's right.

Hearing Examiner Laughlin: In other words, you didn't evolve the theory but you followed Mr. Williams' premise?

The Witness: Yes. (R. 3268-70) (See also R. 3276-8 to the same effect.)

The respondent's cost study's value certainly rests fundamentally on whether its counsel has selected a proper legal basis therefor. This determination was not left to the accountants themselves and nowhere in their evidence did they purport to determine its correctness as a matter of cost accounting practices. In fact, there is no evidence that any of these accountants were ever before engaged in any cost justification study under the requirements of the Robinson-Patman Act amendments to the Clayton Act. This is not to say that they were not well qualified in their field, but is merely indicative of their lack of acquaintance with the particular principles of accounting which have been developed in this type of litigation. Of course it is an appropriate function of counsel to outline the problems which he desires his accountants to determine through any cost study made by them, although, in this case, they were merely left the mechanical

function of computing and checking figures in addition to making certain time and motion studies involving expenses allegedly incurred "in the cost of * * * sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered" as authorized in the first proviso of Section 2(a).

The respondent, in adopting the averaging principle, relies chiefly upon *Sylvania Electric Products, Inc.*, 51 F.T.C. 282 (1954) wherein the Commission held it proper to use a "weighted average" price in determining the amount of the differential to be cost justified. The Sylvania case as discussed in complaint counsel's proposed findings, appendix "C," page 2, and their answer to respondent's proposed findings, page 12, clearly involved but one area of competition—Sylvania's own distributors and Philco to whom price advantages were granted. Also, Sylvania products, some 600 models of radio tubes for replacement purposes, were of such character that Sylvania's customers were obliged to carry the entire line. On this point, Chairman Howrey, in his learned concurring opinion, says, "Thus we are confronted with a unique marketing situation—one where volume and demand are not affected by such normal competitive factors as price, consumer preference or profit margins." The Commission has rejected the averaging concept in *Thompson Products*, 55 F.T.C. 1252, 1264-5, 1276-7 (1959). The Commission, in distinguishing the Sylvania case, in sustaining the hearing examiner in his ruling on this point, among other reasons, emphasized the general competitive situation obtaining which is analogous to that of Admiral's customers herein:

Furthermore, the respondent's distributors and jobbers must compete in as many areas of competition with vehicle manufacturers as there are manufacturers buying the common parts and not with a single hypothetical original equipment manufacturer. (*id.*, p. 1277)

Other authorities have recognized the peculiar characteristics of Sylvania's pricing system.

The Commission's conclusion flowed from the realization that the challenged price differential was commercially significant not in terms of individual items sold by Sylvania, but rather in terms of its price policy in distributing an entire product line through two separate channels of distribution. (Frederick M. Rowe, *Cost Justification of Price Differentials Under the Robinson-Patman Act*, 59 Col. L. R. 584, 590 (April 1959). See also Herbert F. Taggart, *Cost Justification*, p. 380).

In *Reid v. Harper & Brothers*, (CA 2, 1956) 235 F. 2d. 420, 422, in referring to the Federal Trade Commission's authorization of the use of aggregate cost differences to justify price differentials, citing

Initial Decision

67 F.T.C.

the Sylvania case, the Court stated that this method was permissible where there was "absent a showing that the lack of uniformity of the price spread had any competitive significance." In the case at bar, however, there was intensely sharp competition in the sale of respondent's products at retail and while the price differences were very small compared to those in numerous cases cited by respondent, it is clear from the evidence in the case that the difference of a dollar or a few dollars meant the loss of a customer when the price of a radio or television is involved.

In respondent's cost justification study, there has been some attempt to determine aggregate cost differences between various classes of customers. But it is not cost differences but price differences which are vital. Respondent's study was not premised on all of the many millions of dollars worth of annual business done by it in the Metropolitan New York area, but was limited to only a part of the sales to those 13 customers which had been selected by the Federal Trade Commission and shown in its tabulations in evidence to illustrate and establish various price discriminations whereon this Section 2(a) count is premised. Aggregate price differences cannot be determined from this limited number of customers and sales as against the total number of the many hundreds of customers and thousands of sales which respondent had during 1956 and 1957 in this area.

Respondent cannot cost justify its price differences between its various customers by averaging these few examples out of its innumerable transactions. The evidence indicates that orders of respondent's customers were never even substantially identical but varied between customers and also varied from time to time with each customer. This is particularly true where respondent made so many different types of combination offers to its customers. For respondent's cost justification to be fairly accurate, it must be assumed that the Commission's tabulated sales for the 15 regular and five "AAA" dealers in New York were representative of all sales to these classes of dealers and that the mix or percentage of each model of the total would be the same for both classes of dealers. Complaint counsel argue that respondent's selections of such a small segment of its overall operations both in its number of dealers and its dollar volume are too limited to furnish a valid sampling since hundreds of other regular dealers and some 36 "AAA" dealers are not truly represented by the limited sales to those few dealers which were selected by complaint counsel to establish the case-in-chief. The examiner concurs in this and, while recognizing the burden which a complete cost justification entails upon respondent, also considers that the exceedingly

irregular and frequently changed price patterns followed by respondent are largely the cause of its difficulties in this respect. If this was due to any specific competitive situations in the New York Metropolitan area among Admiral and its rival manufacturers of televisions and other products involved herein, respondent has not established that fact by competent evidence, and mere general competitive situations are immaterial in this proceeding as hereinafter more fully discussed in connection with the defense to Section 2(d). As already stated in *U.S. v. Borden Company*, *supra*, 370 U.S. at page 466, footnote 6, the court emphasized that defendant's "cost justifications were not limited to the Government's sample stores." The court quoted with approval from *Champion Spark Plug Co.* 50 F.T.C. 30, 43 (1953) as follows (*id.* 470): "A cost justification based on the difference between an estimated average cost of selling to one or two large customers and an average cost of selling to all other customers cannot be accepted as a defense to a charge of price discrimination." And in the further course of the opinion the court held that "The burden was upon the proffesor of the classification to negate this possibility [of improper allocation of cost to some buyers] and this burden has not been met here." (*id.* 471).

Another reason why an average cost cannot be shown by respondent is that its prices were never uniform as its salesmen were free to make special pricing deals to any customers and did make such deals. And even within the arbitrary classifications in respondent's various price lists there were substantial variations in price ranging from 1% to 10% for identical items.

It would serve no useful purpose to discuss the numerous other contentions and supporting arguments of opposing counsel or to refer specifically to any of the numerous items in respondent's cost justification study since such study is admittedly premised upon a very small sampling of its total business in the Metropolitan New York area. Such discussion here would only unduly lengthen this decision. It is therefore concluded that respondent has failed to maintain its cost justification defense.

In respondent's third separate defense, one of its subordinated defenses (d) is that its price differentials resulted from special low prices being offered to all dealers in competition with each other for periods of time. This defense has not been maintained. There is substantial dispute as to whether all dealers were offered special low prices. Furthermore, in any event, these special low price offers were not just on individual items but were made in connection with the combination offers as hereinbefore discussed. Whether any of the

small dealers or all of them were financially able to accept the combination offers is immaterial, for, as already stated, respondent cannot force its dealers to obtain lower prices by making combination offers which they do not desire to accept.

Section 2(d) Defenses Not Proved

In Paragraph Two of Count II of the Complaint it is charged that in the course and conduct of its business in interstate commerce respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by the respondent and that such payments usually referred to as promotional allowances were not available on proportionally equal terms to all other customers competing in the distribution of its products. In Paragraph Five of said Count II it is stated as a legal conclusion that these acts and practices of respondent violated Section 2(d) of the Clayton Act, as amended.

In Paragraphs Three and Four of said Count II of the complaint more specific reference is made to certain types of allowances or deductions from cost, including newspaper advertising and floor and window displays, and it is further alleged that in some instances the respondent failed to offer such allowances to all competing customers on proportionally equal terms, that in other instances it failed to offer such allowances on any terms to non-favored competitors and in some instances the terms of respondent's allowances were such as to preclude competitors of favored customers from availing themselves of the opportunity to participate in such promotional programs.

Respondent has pleaded four defenses in the answer to Count II of the complaint. In its First Defense thereto, while admitting that in some instances it paid to some retail customers allowances or deductions as compensation for promotional services or facilities, respondent denies any discrimination among its customers in connection therewith.

As its second defense, respondent alleges that said Count II of the complaint is moot because on December 31, 1957, for business reasons not connected with the complaint, respondent ceased to sell its products to retailers and has no intention of resuming such sales. In its third defense, respondent states conditionally that if, as claimed in Count II of the complaint, it made any payment or contract to pay something of value to any retail customer which was not available on proportionally equal terms to retail competitors of such customer,

such act was performed in good faith to meet equal payments or contracts to pay made by a competitor of respondent. As a fourth defense to said Count II, respondent alleges in substance that it "did not injure the public interest."

In its proposed findings with respect to the evidence pertaining to Section 2(d), however, respondent has waived all of its four defenses except that of meeting competition. On page 40 of its findings, it states, "Respondent does not dispute that the evidence establishes it did not make cooperative advertising allowances available on proportionally equal terms to all customers of the Milwaukee, New York, and Washington branches competing in the distribution of Respondent's products. Instead, it has based its defense on meeting competition under Section 2(b)."

The foregoing admission by respondent obviates the necessity of reciting at length herein any of the very substantial evidence in the record sustaining the allegations of Count II of the complaint. That this evidence is quite extensive fully appears from the exceedingly numerous correct record references on pages 21 to 33, inclusive, of the proposed findings of complaint counsel as well as in their separate filing entitled "In Camera Material Supporting the 17th Proposed Finding," which document includes two tabulations and two pages of other record references.

The examiner therefore makes the following specific findings of fact with reference to the Section 2(d) violations:

In order to promote the resale of its products, and in the course and conduct of its business in commerce, respondent, by way of credit memorandum or deductions from invoices, has, for many years, and specifically during the years 1956 and 1957, made payments to or for the benefit of some of its customers, in various competitive areas, as compensation for various promotional services or facilities, furnished by said customers, pursuant to agreement with the respondent, in connection with the offering for sale or sale of respondent's products.

Respondent distributes its cooperative advertising manual to each of its wholly owned branches, and the cooperative advertising policies of the respective branches are purportedly guided by that manual. Neither the respondent nor its branches distribute the manual or any printed matter relative to the procedures or terms and conditions for obtaining promotional allowances to their retail customers, and in fact it was not respondent's policy or practice to notify all customers of the amounts available to them.

During 1956 and 1957, respondent granted such allowances, in return for a variety of promotional services, furnished by certain cus-

tomers located in the respective trade areas hereinbefore mentioned but failed to offer or grant such allowances on proportionally equal, or any, terms to all competition of the favored customers.

During the years 1956 and 1957, while favored customers received allowances for promotional services furnished Admiral in connection with the resale of its products, non-favored competitors of said customers were purchasing goods of like grade and quality, at or about the same time as the favored customers.

As already stated by the above admission of respondent, it definitely is relying upon its third or "meeting competition" defense and has abandoned its three other defenses to said Count II of the complaint. But inasmuch as it apparently still insists, as its second defense to Count II, that the issues as to the situation in Washington, D.C. are moot because pendente lite it has sold its branch in that city (respondent's brief, pp. 50, 86-7, 89-90), the undersigned examiner specifically holds that such defense has not been maintained for the same reasons as those stated with reference to the like defense to Count I of the complaint. For brevity, such reasons there given will not be repeated here.

Similarly, as to the fourth defense of Count II, the alleged lack of public interest, it is held such defense has not been maintained for the same reasons that the like defense of Count I has been rejected, and they will not be repeated here. In summary, each of the three defenses to Count II of the complaint, general denial, mootness, and lack of public interest are each found and are hereby held not to have been maintained.

The main thrust of respondent's third defense to Count II is that the rulings made denying respondent's applications for subpoenas duces tecum for its competing manufacturers and dealers whose products are also sold in the Milwaukee, Washington, and New York trade areas in competition with the respondent's products constitutes prejudicial and basic error which requires a dismissal upon three grounds: (1) the documents sought to be obtained for respondent's said competitors were relevant and necessary to its respective defenses of meeting competition both under Section 2(a) and 2(d); (2) it is now problematic, after the passage of time since 1956 and 1957, whether the documents sought by these subpoenas are still in existence; and (3) the evidence as to the meeting competition issues is old, being limited to evidence occurring in the years 1956 and 1957, a defense somewhat akin to laches in equity.

In opposition to these contentions of respondent, complaint counsel urges, in substance, that the rulings denying respondent's motion for

subpoenas were correct since such motions lacked specificity and were not followed through by further proceedings in response to said rulings; and respondent's claim that due to the lapse of time, it is probable that respondent's competitors' records have been destroyed is purely conjectural. They further contend, in substance, that the passage of time does not destroy the value of the evidence submitted concerning respondent's practices in 1956 and 1957.

Determination of these matters requires a detailed study of the history of respondent's application for such subpoenas duces tecum. On March 3, 1959, Examiner Hier issued an order granting in part and denying in part a prior motion of respondent for the issuance of a number of subpoenas duces tecum to competitors engaged in the manufacture and sale or sale of other brands of the lines of products involved in this proceeding in the three trade areas in question. That motion was dated February 27, 1959 and filed March 2, 1959. It consisted of three distinct parts and the persons subpoenaed and the specifications of the documents requested were respectively set forth in the three separate parts, each relating to one of the said three trade areas of Milwaukee, Washington, and New York. In his order of March 3, Examiner Hier granted such parts of the motion as related to the Section 2(a) charge in Count I of the complaint but denied it as to the Section 2(d) charge in Count II of the complaint. He did this on the then controlling authority of the Commission's opinion in Docket No. 6212, *Henry Rosenfeld, Inc. et al.*, June 21, 1956, subsequently reported in 52 F.T.C. 1535, in which the Commission held "that Section 2(b) could not constitute a substantive defense to a charge of violation of Section 2(d) of the amended Clayton Act." Upon appeal from this ruling, the Commission adhered to its former holding and sustained the examiner on May 29, 1959 that the meeting competition "defense afforded in subsection (b) of Section 2 * * * does not extend to other proceedings involving proved charges of violation of Section 2(d)."

In his ruling of March 3, Examiner Hier granted the motion for subpoenas insofar as they dealt with proposed defenses to Section 2(a). These subpoenas were duly served upon the respondent's named witnesses, all of whom, except two of the 26, filed motions to quash or limit such subpoenas within the time fixed for their appearance. In his order of April 7, 1959, Examiner Hier correctly recited that these subpoenas had been issued on request of respondent to produce evidence in support of the pleaded defense that its lower price to certain customers "was made in good faith to meet an equally low price of a competitor"; that these subpoenas were unusually broad in scope

Initial Decision

67 F.T.C.

but were issued on the ground that they "had apparent or at least sufficient relevance"; further ruled that the concerns subpoenaed in their motions to quash or limit the subpoenas based the same on the grounds of irrelevancy or unreasonableness of scope. In his analysis of the propriety of issuing said subpoenas, the examiner sustained the motions opposing such subpoenas on the ground that "Section 2(b) reads in the singular; it is concerned with individual competitive situations, particular prices on particular sales by particular competitors at particular times on specified products—not with meeting with competition in general." In support of this construction of Section 2(b), he very correctly cited *U.S. v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 753; *Standard Oil Co. of Indiana v. F.T.C.* (1951) 340 U.S. 231, (245-6); *F.T.C. v. C. E. Niehoff and Company*, 241 F. 2d 37; and *Standard Motor Products, Inc.* (1954), 50 F.T.C. 624 (626-7). (This principle has recently been reaffirmed in *Tri-Valley Packing Association*, Docket No. 7225 and 7496, May 10, 1962, mimeographed copy of Opinion, pp. 6-7.) Examiner Hier thereupon ruled in substance that respondent could not conduct a fishing expedition and knew, or should know, the specific situations which caused it "in good faith to meet a equally low price of a competitor." He further ruled that "if respondent's counsel will present new subpoenas narrowed and defined as indicated, consideration of their issuance will be given," and sustained all motions to quash subpoenas duces tecum. Respondent prosecuted their appeal to the Commission from this order on May 25, 1959 within time granted by the Commission. Complaint counsel filed their answer in opposition to the respondent's appeal and as already recited on July 15, 1959 the Commission, after the death of Examiner Hier, issued its order denying such appeal together with its extensive opinion referring to the foregoing facts and sustaining Examiner Hier's ruling upon the ground of the authority cited by him as well as upon another so-called "Moog issue" (*Moog Industries, Inc. v. F.T.C.*, 355 U.S. 411) relating to the Commission's discretion, to determine the effective date of any order which might be issued. In particular the Commission held,

The specifications * * * [of the subpoenas] * * * failed to describe with reasonable particularity the documents sought. Any subpoena duces tecum based upon such specifications would be entirely unreasonable in scope in that documents sought are related to competition generally and are not identified with specific offers by respondent's competitors to customers to whom respondent gave the lower prices which are the basis for the price discrimination charges in the complaint.

More than two years afterward, on August 21, 1961, respondent orally renewed its motion for the issuance of such subpoenas duces

375

Initial Decision

tecum to competitors for the purported purpose of establishing its meeting competition defense both to the 2(a) and 2(d) charges. This was done briefly and without specific supplementation of any alleged specific competitive situations or other pertinent information. The undersigned examiner therefore summarily denied this renewed motion on said date of August 21, 1961 (R. 3014-5). From this ruling no appeal was taken. Shortly thereafter it was held in *Exquisite Form Brassiere, Inc. v. F.T.C.* (CA DC, Nov. 22, 1961), 301 F. 2d 499, cert. den. 369 U.S. 888 (July 12, 1962) that the Section 2(b) meeting competition defense was available in a Section 2(d) case. This decision referred specifically to the Commission's earlier rulings in *Henry Rosenfeld, Inc.*, *supra*, *J. H. Filbert, Inc.*, 54 F.T.C. 359 (1957) and the Commission's said ruling of 1959 in the case here at bar, *Admiral Corporation*, 55 F.T.C. 2078, each of which was adversely criticized (301 F. 2d 505-6). It also disagreed with the Commission's like ruling in *Shulton, Inc.* A subsequent court decision in this latter case, *Shulton, Inc. v. F.T.C.* (CA 7, May 10, 1962), 305 F. 2d 36, followed the judicial ruling in *Exquisite Form Brassiere, Inc.*, *supra*. It is therefore now well settled that the defense of meeting competition is available in a Section 2(d) case.

Subsequent to these judicial decisions, respondent made no further requests for a reversal of the former orders on which no appeal had been taken, although final hearings herein were held on April 25, 1962 and the record was not closed for the reception of further evidence until July 24, 1962, 12 days after the Supreme Court had finally ruled on July 12, 1962 by denying certiorari in *Exquisite Form Brassiere, supra*.

The issuance of subpoenas by hearing examiners is provided for by Section 6(c) of the Administrative Procedure Act, 5 U.S.C. § 1005(c), which pertinently provides "Agency subpoenas authorized by law shall be issued by any party upon request and as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought" At the time respondent filed its motions in the spring of 1959, the Commission's rule relevant to subpoenas was Section 3.17(b) of its May 1957 Rules which provided "*Subpoenas duces tecum*. Application for issuance of a subpoena requiring a witness to appear before a designated hearing examiner at a specified time and place and produce specified documents shall be made in writing to the hearing examiner or to the Commission, and shall specify as exactly as possible the documents to be produced, showing their general relevancy and reasonable scope. * * *"

Initial Decision

67 F.T.C.

The subsequent rules of 1960, Section 415(b) is identical therewith. This latter rule was in effect from July 21, 1961 until August 1, 1963 and therefore procedures thereunder were available to the respondent at all times after the decision of the Court of Appeals in *Exquisite Form Brassiere, supra*, on December 22, 1961. During these eight months before the record was closed, respondent failed to renew its motion for subpoenas under the new and binding interpretation in *Exquisite Form Brassiere, supra*, which would have required the issuance of such subpoenas if substantially specific and relevant to individual competitive situations. It is contended by counsel supporting the complaint, since respondent made no such motion, it cannot now urge the failure to issue catch-all and insufficient subpoenas back in 1959 as justification either for dismissal or for reopening of the case. Respondent's position in this respect is chiefly that, since the evidence solely pertains to alleged price discrimination in 1956 and 1957, it is doubtful if respondent's competitors would have preserved any of the documents sought by the respondent in its motion for subpoenas filed in the early part of 1959. Of course, the specific character of the documents sought to be requested under a Section 2(b) defense insofar as a Section 2(a) charge is concerned is identical with that which would be requisite in a defense to a Section 2(d) charge. The respondent therefore slumbered for many months during which time, had it chosen to do so, it could have moved again with proper showing for a reconsideration of earlier motions on the grounds of *Exquisite Form Brassiere, supra*. The examiner therefore concurs with counsel supporting the complaint that respondent is not serious in its contention and finds that, in any event, it has waived its right to complain that such subpoenas have not been issued. Certainly within the record there is utterly nothing from which it can be fairly inferred that respondent ever attempted to meet a specific competitive situation under its defense of meeting competition to the Section 2(d) charge any more than it would to such defense to the Section 2(a) charge. To the contrary, the record broadly indicates that the various broad advertising programs and the general promotional allowances made thereunder during the course of the same, which programs changed many times during the years 1956 and 1957, were directed to general competition rather than any specific competitive situation.

It may well be said that the evidence in this case is somewhat stale since it concerns matters which occurred now some six to seven years ago. As already stated, delays in this case cannot be attributed to any fault of the parties or their counsel or of the hearing examiner, but is a result of the then approved general practice of hearings at intervals,

the very heavy case loads of the Commission and of this examiner during the period here in question and the length of time respondent required to complete its cost justification studies. Many cases of this type of course have lasted much longer in litigation before the Commission as well as before the courts than has the case at bar. Nevertheless, since the respondent has not even pleaded, let alone produced evidence, upon a defense of abandonment of such of its practices as have been established by the evidence, the examiner has been duty bound to make findings of fact upon the record made. The respondent's defense of meeting competition is without merit.

Upon the findings hereinbefore made, although for clarity conclusions have been stated as to each of the Counts of the complaint, by way of summarization the hearing examiner now makes the following:

Conclusions of Law

1. The Federal Trade Commission has jurisdiction of the person of respondent and of the subject matter of each of the Counts of the complaint in this proceeding.

2. The respondent's acts and practices, as charged in Counts I and II of the complaint, and as hereinabove found, are in violation of Sections 2(a) and 2(d) of the Clayton Act, as amended, and respondent has failed to sustain its burden of proof upon the various defenses which it has pleaded and presented herein.

The proposed order of complaint counsel is in accord with law and practice, and correctly premised upon the foregoing findings and conclusions and it is therefore adopted and entered herein as follows:

ORDER

It is ordered, That respondent Admiral Corporation, a corporation, its officers, employees, agents and representatives, directly or through any corporate or other device, in or in connection with the sale of its products, in commerce, as commerce is defined in the Clayton Act, as amended, do forthwith cease and desist from:

1. Discriminating, directly or indirectly in the price of said products of like grade and quality by selling to any purchaser at net prices higher than the net prices charged to any other purchaser who, in fact, competes with the purchaser paying the higher price in the resale and distribution of respondent's products.

2. Paying, or contracting to pay, or granting or contracting to grant, or allowing anything of value, including checks and

credits, to or for the benefit of any customer as compensation or in consideration of any newspaper, radio, catalog or sign advertising, or for salesmen's incentives, floor and window displays, or other services or facilities furnished by or through said customer in connection with the sale or offering for sale of respondent's products, unless such payments, credits or allowances are available on proportionally equal terms to all other customers competing in the distribution of said products.

OPINION OF THE COMMISSION

This matter is before the Commission for consideration of an appeal by the respondent from an initial decision in which the hearing examiner finds that it violated Sections 2(a) and 2(d) of the amended Clayton Act in the sale of electrical products, including television and radio receiving sets, refrigerators and freezers. The initial decision contains an order which, if sustained by the Commission, would require the respondent to cease and desist from the acts which the examiner found to be unlawful.

The complaint, served on or about April 16, 1958, contains two separate counts. In Count I respondent is alleged to have violated Section 2(a) of the amended Clayton Act by discriminating in price between and among its retailer customers, charging some nonfavored customers prices which ranged from a low of 1 percent to as much as 16 percent higher than those charged certain competing favored purchasers. The complaint utilizes respondent's pricing in Milwaukee, Wisconsin, as an "example" but alleges that similar pricing practices are employed in other trading areas.

In Count II it is alleged that the respondent violated Section 2(d) of the amended Clayton Act by offering and paying discriminatory advertising and promotional allowances to competing retailers in Milwaukee and in various unnamed sections of the country.

The respondent's answer denied that it had violated the law and affirmatively alleged, *inter alia*, that its lower prices to some customers were justified by a savings in the cost of selling or delivering to such customers and that the lower prices and higher promotional payments afforded to some customers constituted good faith attempts to meet the prices and allowances of competitors.

Complaint counsel utilized the trade areas of Milwaukee, Wisconsin, Washington, D.C., and New York City, New York, to illustrate the nature of respondent's dealings with its retailer customers, which are charged to be unlawful. The base period covered by the evidence en-

compasses the years 1956 and 1957. The actual trial of the matter commenced September 2, 1958, and continued thereafter by intervals until respondent rested its defense on April 25, 1962. Simultaneous filings of proposed findings, conclusions and orders were made on April 11, 1963.

The trial of this proceeding was marked by the accidental death of the original hearing examiner on June 10, 1959. At this juncture complaint counsel had rested the case-in-chief, but respondent had not commenced presentation of its defense. A new examiner was appointed on October 2, 1959, and respondent, on October 5, 1959, filed a motion to strike the testimony of only three witnesses out of the total of forty-six who had theretofore testified before the original examiner. This motion was not opposed by complaint counsel and the three witnesses were recalled and were again fully examined and cross-examined. Their previous testimony was ordered physically stricken from the record. Both parties agreed that there would be no objection made to the replacement examiner passing upon the other testimony and evidence adduced as part of the case-in-chief.

The hearing examiner filed his initial decision September 11, 1963, and, as aforesaid, found that both counts of the complaint had been sustained and that respondent had in fact violated Sections 2(a) and 2(d) of the amended Clayton Act. Respondent filed its appeal brief December 2, 1963, and complaint counsel's answering brief was filed February 17, 1964. Respondent filed a reply brief February 28, 1964. The Commission heard oral argument on March 12, 1964, and reargument on December 15, 1964.

The 2(d) Charge

In its proposed finding numbered 68 submitted to the hearing examiner, respondent stated:

Respondent does not dispute that the evidence establishes it did not make cooperative advertising allowances available on proportionally equal terms to all customers of the Milwaukee, New York, and Washington branches competing in the distribution of Respondent's products. Instead, it has based its defense on meeting competition under Section 2(b).

The hearing examiner, in reliance upon this admission, found the respondent in violation, holding that respondent had been afforded the opportunity to secure and offer evidence in support of its meeting competition defense but that it had failed to avail itself of this opportunity. We cannot agree that the respondent was afforded a proper and adequate opportunity to present its defense.

Opinion

67 F.T.C.

The trial of this matter found the law in a state of transition. When this proceeding commenced it was the Commission's legal view that " * * * Section 2(b) cannot constitute a substantive defense to a charge of violation of Section 2(d) of the amended Clayton Act. * * *" The quoted ruling had been made June 21, 1956, in *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535. However, as we pointed out above, the respondent's answer advanced as an affirmative defense that the discriminatory advertising and/or promotional allowances granted by it to certain customers were granted to meet competition. To secure evidence in support of its 2(b) defense, the respondent moved the hearing examiner to issue subpoenas duces tecum to its competitors. The subpoenas called for documents relevant to respondent's defense to both the 2(a) charge and to the 2(d) charge. On March 3, 1959, the hearing examiner granted such parts of the motion as related to the Section 2(a) charge but denied it as to the defensive evidence responsive to the 2(d) charge. This ruling was appealed to the Commission, which by order of May 29, 1959, denied the appeal, holding " * * * the defense afforded in subsection (b) of Section 2 to the proceedings there designated does not extend to other proceedings involving proved charges of violation of Section 2(d)." (55 F.T.C. 2078, 2079.)

The subpoenas which had been previously issued contained specifications calling for only such information as would be relevant to a 2(b) defense to the price discrimination charge. With two exceptions the recipients of the subpoenas filed motions to quash or limit their scope. On April 7, 1959, the hearing examiner ruled in effect that the subpoenas were too broad and constituted a "fishing expedition" into the records of respondent's competitors. He advised the respondent to present new subpoenas, narrowed and defined as indicated in the examiner's opinion. The respondent subsequently appealed this ruling to the Commission, which upheld the hearing examiner, holding that the specifications of the subpoenas " * * * failed to describe with reasonable particularity the documents sought. Any subpoena duces tecum based upon such specifications would be entirely unreasonable in scope in that documents sought are related to competition generally and are not identified with specific offers by respondent's competitors to customers to whom respondent gave the lower prices which are the basis for the price discrimination charges in the complaint. * * *" (56 F.T.C. 1627, 1629.)

On August 21, 1961, respondent orally moved the hearing examiner for the issuance of subpoenas duces tecum to competitors for the purported purpose of establishing a 2(b) defense to both the 2(a) and

the 2(d) charges. Since respondent supplied no new details or other pertinent information in support of the motion, it was denied by the hearing examiner on August 21, 1961. Respondent took no appeal from this denial.

On November 22, 1961, the Court of Appeals for the District of Columbia Circuit held in *Exquisite Form Brassiere, Inc. v. Federal Trade Commission*, 301 F. 2d 499, that the Commission's view as expressed in the *Henry Rosenfeld* case and in its 1959 interlocutory opinion in this case was "untenable". The court stated that it agreed with the views of the United States District Court for the Southern District of Florida which had held in *Delmar Construction Co. v. Westinghouse Electric Corp.*, on February 24, 1961, that "... because of the close interrelation of § 2(d) and § 2(e), it is both logical and reasonable to likewise recognize such [meeting competition] defense in cases arising under § 2(d). * * *" (1961 Trade Cases, ¶ 69947.)

The Commission's petition for certiorari in the *Exquisite Form* case was denied May 21, 1962 (309 U.S. 888). Shortly thereafter, the Commission reversed the position it had taken in *Henry Rosenfeld* and in its rulings herein respecting respondent's applications for subpoenas calling for information relevant to a 2(b) defense to the 2(d) charge. Since the effect of the rulings in this matter was to deny respondent the opportunity to secure and offer defensive material, now deemed relevant and material, dismissal of the 2(d) charge is required unless the error was corrected or the inhibitory effect of the ruling erased while the proceeding was still in the hearing stage.

The hearing examiner holds that the respondent was given every opportunity to apply for new subpoenas subsequent to the denial of the writ for certiorari in the *Exquisite Form* case, for the record was not closed for the reception of evidence until July 24, 1962. This was approximately six weeks after the Supreme Court's denial of certiorari in the *Exquisite Form* case and followed by twelve days the ruling in *Shulton, Inc. v. Federal Trade Commission*, 305 F. 2d 36 (7th Cir. 1962), which likewise held the 2(b) defense applicable in a 2(d) proceeding. But respondent contends that the Commission did not indicate its intention of following the rule of law announced by the District of Columbia and Seventh Circuits until November 10, 1962, when it remanded the *Max Factor & Co.* proceeding, Docket 7717, to the hearing examiner for the taking of evidence offered to show that the respondent in that 2(d) proceeding had granted discriminatory promotional payments to meet the similar payments of a competitor.

Respondent claims, in this connection, that any attempt on its part to acquire evidence in support of a 2(b) defense to the 2(d) charge would have been futile until the *Max Factor* decision, and moreover, at this late date issuance of the requested subpoenas would in all likelihood be unproductive for:

Documents have a way of becoming lost in four years and memories deteriorate. Documents are frequently destroyed in the ordinary course of business as they lose their value with advancing age. The personnel of corporations change and the destruction of documents may not even be known to present company employees. New subpoenas today are far from being the equivalent of the same subpoenas in 1959; and there is now no way by which respondent can be restored to the position it occupied before the wrongful denial of its rights.

While this argument is not persuasive to the Commission, it cannot be denied that the respondent has been disadvantaged by the delay. The documentary evidence adduced by complaint counsel in support of their case was fresh and they had the advantage of testimony concerning events in their witnesses' very immediate past. The hearing examiner's ruling would force respondent to rebuttal with dated evidence of less reliability. Respondent's ability to defend with evidence of comparable probity and reliability has been harmed therefore through no fault of its own. This is a very close question but on these facts it is our conclusion that equity decrees dismissal.

But this leaves the problem unsettled, for insofar as this record reveals, respondent may be to this day continuing to grant discriminatory cooperative advertising payments in the several trade areas considered. Whether these discriminations are legally justified or unlawful has not been determined. In situations of this type, remand to the hearing examiner for perfection of the record will usually be ordered but in this case such a course would not be appropriate. Instead, we have instituted an investigation to determine whether a new complaint dealing with current practices is required by the public interest.

The Price Discrimination Charge

The basic difference between the parties is not whether a price difference exists, for this is conceded, but concerns the measure of the disparity as to both individual items and over-all volume of business. Resolution of the questions is complicated by the wide range of products covered by the proof and respondent's constantly changing and inconsistently applied pricing policy. In Section 2(a) litigation, inferences are permissible and even necessary with respect to elements such as competitive effects, for the statute itself requires a prognostication of the likely results of price discrimination. But as to the

existence of the discrimination itself, definitive findings of fact are required, for certainly this is a factor which should be measured.

To prove his case, complaint counsel introduced evidence as to the prices charged to a selected group of dealers located in three cities: New York City, New York, Milwaukee, Wisconsin, and Washington, D.C. Within each city a sample of customers, some allegedly favored and some allegedly unfavored, were selected for detailed analysis. All invoices showing sales to the selected dealers for the years 1956 and 1957 were secured, but instead of placing the invoices in evidence, the significant information was copied from the invoices and submitted in evidence in tabulation form. Within each city separate tabulations were prepared for the four broad categories of respondent's products considered by the case, that is, television, radios and phonographs, refrigerators and freezers, and air conditioners.¹

Originally complaint counsel had a subpoena served upon respondent which called for the production of all invoices for all dealers in the three cities of Milwaukee, Washington and New York for the two-year period 1956 and 1957. When informed by respondent that full compliance with this specification would result in the production of an unwieldy amount of material, complaint counsel modified the request and selected a few dealers in each city. The basis of the selection is not disclosed in the record. Respondent then supplied complaint counsel with all 1956 and 1957 invoices to the dealers selected. The tabulations were prepared by a Commission accountant from the invoices supplied. The accountant did not tabulate all of the invoices but utilized only what he considered to be reasonably contemporaneous sales of the same models. In other words, he would not tabulate an invoice which indicated a sale too far in point of time from other sales of the same model to be considered competitive. Invoices evidencing sales of items purchased by only one dealer were also not tabulated. Where there was more than one invoice for the same item to the same customer on a particular date, only one of the invoices would be tabulated and a note entered on the tabulation indicating that there were additional invoices at the same price. In some instances a notation upon an invoice would indicate that an allowance, discount or deal of some type was applicable and in such instances recourse was had to credit memoranda, sales bulletins and "deal" announcements so that the appropriate net price could be listed on the tabulation. In those instances where the invoice indicated a "deal"

¹ Respondent claims the tabulations are in error in several respects and it placed into evidence photostat copies of the same tabulations with complaint counsel's alleged errors crossed through and corrected figures inserted.

but the accountant, with the aid of extrinsic materials was unable to determine its exact nature, the tabulation contains the full invoice price with a notation that a deal was operative with respect thereto. From the foregoing it can be seen that the net prices listed on the tabulation represent the conclusions of the accountant. The parties are in agreement that certain of the net prices contained on the tabulations require adjustment but there is disagreement as to others.

A basic dispute between the parties is the proper way to measure the size or extent of the price discrimination. It is complaint counsel's theory (adopted by the hearing examiner) that the discrimination can be illustrated by "examples" which compare the prices charged to competing customers on single sales. Some 100 examples or comparisons were taken from the 6,000 sales listed in the basic invoice tabulations and offered as illustrative of the unlawful discriminations charged.² Complaint counsel pleads: "If any Commission cases involving violation of the Clayton Act, as amended, have been decided by the Commission and confirmed by the courts on anything more than an *example* of the violations charged, they are in the distinct minority and complaint counsel cannot recall one at this time."

It is true "that sampling has long been a recognized technique in price discrimination cases" (*United States v. The Borden Company*, 370 U.S. 460, 466, n. 6 (1962)), and complaint counsel is quite correct in stating that a prima facie case of price discrimination is ordinarily established by introducing evidence consisting of merely examples or samples of a seller's pricing program. But certainly where single sales are selected to illustrate a seller's pricing practices with respect to particular customers to whom many sales are being continuously made, there must be some showing that the sales selected as examples were typical and fairly representative of the other sales so that it can be determined whether any customers were in fact either the victims or the recipients of legally cognizable price discriminations. Complaint counsel have not only failed to make this showing with respect to their 100 "examples," but respondent has attempted to rebut any

² In addition to the one hundred examples, the hearing examiner based his affirmative finding of price discrimination upon price lists introduced by complaint counsel which show that respondent's pricing program entailed a division of customers into several price categories. But the hearing examiner's reliance upon them as evidence of price discrimination is in error. Price lists have utility in a Robinson-Patman record when there is a showing that the prices contained thereon are actually followed and sales are consummated at those prices. Price lists standing alone do not constitute evidence of sale and Section 2(a) is concerned only with discriminatory sales and not with offers or intentions. In addition to the dearth of evidence in this record that the price lists relied upon were actually followed, there is a showing that the net prices to the various customers were so complicated and modified by a confusing welter of deals and discounts as to make respondent's price lists almost useless.

375

Opinion

inference that they are typical by selecting from the 6,000 transactions some sixty examples which show that the same customers which complaint counsel allege were the victims of respondent's price discriminations actually paid lower prices than their allegedly favored competitors. To illustrate, complaint counsel's 100 "examples" include the following transactions in Milwaukee where Samson, Hack's and Schuster were the favored customers in the purchase of television sets and ABC Supply, Triangle TV, and City Electric were the unfavored customers:

Customer	Model No.	Date of invoice	Price	Dollar difference	Percent difference
Hack's.....	CS23A1	2-16-56	175. 00		
ABC Supply.....	CS23A1	2-16-56	194. 00	19. 00	9. 8
Samson.....	CS23A12	8-29-56	174. 55		
Triangle TV.....	CS23A12	9-21-56	190. 00	15. 45	8. 1
Schuster.....	CS323B26	11- 7-56	234. 95		
City Electric.....	CS323B26	11-16-56	259. 95	25. 00	9. 6

Respondent's "examples" include the following transactions:

Customer	Model No.	Date of invoice	Price	Dollar difference	Percent difference
Hack's.....	CS323A16	1-16-57	208. 60		
ABC Supply.....	CS323A16	1-16-57	199. 58	-9. 02	-4. 5
Samson.....	CS323B2	2-11-57	223. 55		
ABC Supply.....	CS323B2	1-16-57	203. 35	-20. 20	-9. 9
Schuster.....	CS23A11	11- 6-56	174. 60		
Triangle TV.....	CS23A11	11-29-56	167. 50	-7. 10	-4. 2

Under the circumstances we think that respondent is justified in claiming that its 60 selected examples tend to offset complaint counsel's examples. Certainly, complaint counsel's "examples" are not truly representative of the prices charged different purchasers. We hold therefore that the examiner erred in finding on the basis of the selected transactions that respondent unlawfully discriminated in price in favor of certain customers.

While there can be no doubt that respondent did in fact discriminate in price in favor of certain dealers, as stated above the chief problem created by the unorthodox pricing practices involved in this proceeding is how to measure the discrimination. No clear pattern of preferential treatment emerges from an examination of isolated

transactions.³ Nor does a showing of discrimination in the sale of one article of merchandise (such as a certain model television set) necessarily create an inference of competitive injury when there is evidence that the customer paying the higher price purchased another article in the same general line (a different model television set) at a lower price than the favored customer in the first transaction. This does not mean, however, that a seller whose prices to one or more customers are generally lower than prices charged others may escape liability under Section 2(a) by occasionally discriminating in favor of the purchaser who normally pays the higher price. But in any case in which a seller engages in such a practice, the amount or percentage of the differentials and the significance thereof must be known as a predicate for determining whether injury is likely to result.

It seems clear from the record that the individual products in each of the various lines or groups sold by respondent are so dissimilar that any computation of the average difference in price between "favored" and "nonfavored" customers on all items within a particular classification or group would be virtually meaningless. We are fully aware, in this connection, that in each of the various product lines there are individual products for which consumer demand is far greater than for others and that a price difference on one product would have far greater competitive significance than a price difference on another.⁴ For example, the price of an extremely popular model television set may be 10% lower to customer A than to customer B, whereas B may pay 15% less than A for a very expensive, slow-moving model. Although A may thereby be given a decided advantage over B, an average of the price differences on these two products would not necessarily reflect the true competitive situation and may, in fact, show B to be the favored customer.⁵

³ The tabulations include only those transactions showing discrimination in the sale of products of like grade and quality within brief periods of time arbitrarily selected by the accountant who prepared the tabulations.

⁴ It will be noted that in an attempt to distinguish the facts of this case from *Sylvania Electric Products, Inc.*, 51 F.T.C. 282 (1954), complaint counsel argue " * * * it is apparent that while an averaging concept may have been acceptable in *Sylvania*, that case does not dictate that an averaging concept is acceptable in all instances. It is obvious from this record that it is not mandatory that an Admiral dealer carry every model in every product line and it is also obvious that, unlike *Sylvania*, price, consumer preference and profit margins are extremely important."

⁵ Averaging of the prices of products within a group or category of goods would be permissible only if the products within the group are reasonably homogeneous, are customarily sold as a line, and are not resold or marketed in a sufficiently divergent manner. See *Sylvania, supra*, wherein it was held that the nature of the products was such that the injury was caused by the average price difference on the entire line rather than by the differential on individual products within the line.

In a case such as this, a prediction as to the effect of the price discriminations can be made only by ascertaining the competitive significance of the differential on each product within the various product lines. As indicated above, a price discrimination on one product need not necessarily be offset by a price discrimination on another, even though the latter is of the same or greater magnitude. It is only through information as to the relative importance of the discriminations to the buyer that we can determine whether one buyer is clearly favored over another when both are the recipients of lower discriminatory prices. We are of the opinion however that the record here does not provide an adequate basis for making such a determination. As complaint counsel themselves point out "The record in this case discloses the wide difference in prices of the respective models involved in the various product lines and no probative evidence as to the rate of turnover or other marketing factors of one model vs. another." It is precisely this type of information which is needed when there is a showing that the seller has not consistently discriminated in favor of the same purchaser or purchasers. Consequently, we cannot find from the evidence before us that respondent's discriminations will have the prescribed effect on competition at the buyer level.

There are other questions raised in respondent's brief but in view of the disposition we propose to make of this proceeding it is unnecessary to resolve them.

Respondent's appeal is granted. The hearing examiner's initial decision will be vacated and set aside and the complaint will be dismissed.

Commissioner Dixon and Commissioner MacIntyre did not concur.

FINAL ORDER

This matter having been heard by the Commission upon respondent's appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission having rendered its decision granting the appeal:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, vacated and set aside.

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

Commissioner Dixon and Commissioner MacIntyre not concurring.

Complaint

67 F.T.C.

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION,
Docket No. 8318

BRISTOL-MYERS COMPANY, Docket No. 8319

PLOUGH, INC., Docket No. 8320

STERLING DRUG, INC., Docket No. 8321

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

*Dockets 8318, 8319,¹ 8320, 8321. Complaints, Mar. 14, 1961—
Decisions, Apr. 7, 1965*

Order withdrawing complaints against four major drug manufacturers which charged them with false and misleading advertising of their analgesic preparations, rescinding earlier orders to submit special reports, and denying one respondent's motion for prehearing discovery on grounds of mootness.

COMPLAINT ²

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 American Home Products Corporation, hereinafter referred to as respondent, 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 American Home Products Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 20 East 40th Street in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution of a preparation which comes within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

The designation used by respondent for said preparation, the formula thereof and directions for use are as follows:

¹ Amended and Supplemental Complaint, *In the Matter of Bristol-Myers Co.*, Docket 8319, dated July 25, 1961.

² *In the Matter of American Home Products Corporation*, Docket No. 8318.

Designation: "Anacin."

Formula: Acetophenetidin three (3) grains per tablet, aspirin, caffeine.

Directions: One (1) to two (2) tablets with water. Repeat if necessary, one (1) tablet every three (3) hours.

PAR. 3. Respondent caused the said preparation, when sold, to be transported from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said Anacin by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines, and other advertising media, and by means of television and radio continuities broadcast over networks through stations located in various States of the United States, and in the District of Columbia, and by means of other radio and television continuities broadcast over stations having sufficient power to carry such broadcasts across State lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said Anacin; and has disseminated, and caused the dissemination of, advertisements concerning said Anacin by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical, but not all-inclusive, of the statements and representations contained in said advertisements and television and radio broadcasts disseminated as hereinabove set forth are the following:

Mere aspirin or even aspirin with buffering contains * * * no special medication to relax nervous tension. But Anacin is a *combination* of medically proven ingredients, including special medication, which relieves pain incredibly fast, also relaxes nervous tension and releases painful pressure on nerves.

* * * * *

Better than aspirin or aspirin with buffering for TENSION HEADACHES

Most headaches are caused by tension that presses on nerves.

Anacin contains *special medication* that * * * relaxes tension * * *. This special medication is *not* obtainable in aspirin or any buffered aspirin.

Ladies Home Journal, February 1961.

67 F.T.C.

Video :	Audio :
Open profile of woman with headache.	Announcer : What causes a headache?
Start greying down to black silhouette.	Announcer : (V.O.) Doctors know most headaches are caused by * * *
Pop on large jagged word : "Tension".	(Echo) * * * tension!
The word "Tension" zooms down to neck. Muscle fibers form.	Tension * * *
Muscles continue to twist.	* * * Tightens muscles * * *
Pop on word "Tension"	Tension * * *
Word "Tension" zooms down to mid-head area. Nerves grow and vibrate.	puts nerves on edge.
Pop on : "Tension". Word zooms down to front head area.	Tension * * *
Pain lines grow and flash.	causes pain * * *
Muscles twisting nerves. Vibrating pain flashing. Word "Pain" zooms out.	Announcer : (V.O.) <i>headache pain!</i>
* * *	* * *
Block wipe to package, with titles : "Relax the Tension," "Relieve the Pain."	"Anacin * * * has special ingredients to relax the tension * * * as it relieves the pain fast!"
Cut to profile of head. Title : "Aspirin." Single line of bubbles go to "Pain." Pain lines reduce flashing. Nerves and muscles continue action.	Look * * * aspirin has only one pain reliever—no special ingredient to relax tension.
Title : "Add Buffering." Single line of bubbles go to "Pain." Pain lines reduce flashing. Nerves and muscles continue action.	Add buffering, still nothing special for that cause of headache pain.

430

Complaint

Video:

Audio:

Title: "Anacin."

But * * *

Pop on three lines of bubbles. * * * Anacin has a combination of ingredients.
 Pain, nerves and muscles
 gradually stop action.

Pain lines out.

To * * * relieve pain fast * * *

Nerves out.

* * * calm jittery nerves * * * fast.

Muscles out.

* * * relax tension fast!

Match diss. to live woman.

Woman: (sigh of complete relief) What relief!

* * * * *

Wipe to split screen. Title: Announcer: Remember, aspirin even with buffer-
 "Aspirin with Buffering" on ing has no special ingredient to relax the
 left. One stream of bubbles tension.
 to pain area in head. Title:
 "Anacin" on right. Three
 streams of bubbles. Nothing
 in head.

* * * * *

Block wipe to package, with Anacin * * * to relax tension as it relieves the
 titles: "Relax the Tension," pain.
 "Relieve the Pain."

Lose titles. Zoom "Fast" out Anacin for fast * * * fast * * * fast relief!
 of pkg. Three times.

"Truth or Consequences" Show, National Broadcasting Company
 television network, August 26, 1960.

* * * * *

Pop on title, "Anacin" with Anacin of the four leading headache remedies
 three streams of bubbles to has special ingredients to * * *
 three panels [panels are
 titled "Pain," "Depression"
 and "Tension"]. Action in
 each immediately slows
 down.

Pain panel greys down. relieve pain * * *.

Word "Fast" pops on in place fast.
 of pain panel.

Depression panel greys down. Help overcome depression * * *.

Word "Fast" grows and pops fast.
 off depression panel.

Complaint

67 F.T.C.

Video:

Tension panel greys down.

Audio:

Relax tension * * *.

Word "Fast" grows and pops fast.
off tension panel.

* * * * *

Cut to include read (sic) projection screen, on which is split screen of two outline heads. Title on left: "Aspirin with buffering." Single stream of bubbles to first panel which is greyed down. Title on right: "Anacin" with three streams of bubbles to three panels all greyed down.

X-out left half of screen. no special ingredient for tension. Take Anacin. * * *.

* * * * *

Cut to pkg. pop on word "Fast" Anacin for fast * * * in sync with audio.

Pop on second word "Fast" fast * * * nearer camera than first.

Zoom both words "Fast" onto incredibly fast relief.
pkg.

Sugar Bowl Football Game, National Broadcasting Company
television network, January 2, 1961.

PAR. 6. Through the use of said advertisements, and other similar thereto not specifically set out herein, respondent has represented, and is now representing, directly and by implication:

1. That Anacin acts with such incredible speed as to provide relief of pain faster than any other analgesic preparation available and offered for sale to consumers.

2. That Anacin relaxes tension.

3. That Anacin helps overcome depression.

PAR. 7. The said advertisements were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact:

1. There is no significant difference between the rate of speed with which Anacin provides relief of pain and the rate of speed with which other analgesic preparations available and offered for sale to consumers provide relief of pain.

2. Anacin will not relax tension.

3. Anacin will be of no benefit in the treatment of depression.

PAR. 8. The dissemination by the respondent of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

AMENDED AND SUPPLEMENTAL COMPLAINT³

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 Bristol-Myers Company, a corporation, hereinafter referred to as respondent, 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 amended and supplemental complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Bristol-Myers Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 630 Fifth Avenue, in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution of two preparations which come within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

The designations used by respondent for said preparations, the formulas thereof and directions for use are as follows:

(1) Designation: "Bufferin"

Formula:—Each Bufferin tablet contains five (5) grains of aspirin and Bristol-Myers' brand aluminum glycinate and magnesium carbonate known as "Di-Alminate."

Directions:—For simple headaches, discomforts of colds, neuralgias, menstrual pain and minor muscular aches, one (1) or two (2) tablets, taken one (1) to six (6) times daily as needed. For temporary relief of minor arthritic pain two (2) tablets six (6) times daily as needed.

(2) Designation: "Excedrin"

Formula:—Each tablet contains:

Acetophenetidin	-----	2¼ grs.
Salicylamide	-----	2 grs.
Aspirin	-----	2¼ grs.
Caffeine	-----	1 grs.

Directions:—Adults take two (2) tablets with water. Repeat every three (3) hours with one or two (1 or 2) tablets as needed or follow directions of your physician. Dosage should not exceed eight (8) tablets per day. Children six to twelve (6-12) one half (½) the adult dose.

³ In the Matter of Bristol-Myers Company, Docket No. 8319.

Complaint

67 F.T.C.

PAR. 3. Respondent causes the said preparations when sold, to be transported from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said Bufferin and Excedrin by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines, and other advertising media, and by means of television and radio continuities broadcast over networks through stations located in various States of the United States, and in the District of Columbia, and by means of other radio and television continuities broadcast over stations having sufficient power to carry such broadcasts across State lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparations; and has disseminated, and caused the dissemination of, advertisements concerning said preparations by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical, but not all-inclusive, of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

(1) Bufferin

And to relieve headache, body ache and to lower fever, take Bufferin. Bufferin adds special ingredients to its aspirin that rush the pain reliever into your system. For millions Bufferin acts *twice as fast as aspirin*.

* * * * *

Take Bufferin. The fast one. Good Housekeeping Magazine, February 1961.

Video:

Scene of night street. Shot from rear of moving car. Super: "Bristol-Myers".

Audio:

Anner: Tonight's episode of Peter Gunn is brought to you by Bristol-Myers, makers of * * *

Bufferin bottle, package.

Bufferin. For faster relief of headaches, neuralgia, painful cold miseries, take Bufferin.

430

Complaint

Video:

Audio:

Super on cue: **"Twice as fast."** Bufferin works twice as fast as aspirin for millions, thanks to its exclusive Speed Ingredient, Di-Alminate.

"Peter Gunn" Show, American Broadcasting Company
television network, September 12, 1960.

1. (Open on) Dark screen with Annor: (VO) What's the greatest cause of title: **"What's the Greatest Cause of Headache?"** headache? * * *
2. (Wipe to) Reveal woman It's Tension! Sound: Ticking as of clock. It starts feeding baby in high chair. low and builds till we reach the clock shot in Child spills milk. Super scene #3. "Tension" up from zero.
3. (Cut to) Child falling off Tension! tricycle. Super "Tension" up again.
4. (Cut to) Woman in kitchen Tension! burning clothes on ironing board. Super "Tension" zooms up again.
5. (Cut to angle shot of) Same When things go wrong, Tension can build up and woman in bed, tossing, turn- up! * * * ing. Clock in foreground.
On word, "Suddenly," she puts Suddenly * * * you've got a miserable headache! hand to head.
6. (Diss to angle shot of) Nerves and muscles tighten! Woman on edge of bed, hold- ing neck.
7. (Diss to angle shot of) Stomach feels uneasy * * * queasy! Woman standing beside bed, Sound: Ticking out. holding stomach.
8. (Diss to) Dark gray back- You need Bufferin! Bufferin relieves headache, ground. Bufferin bottle in tight nerves, jittery stomach—fast! Look center of screen. It moves to * * * left of screen, reducing in size as it goes. Snap in first: "Relieves." Then in order: "Headache, Tight Nerves, Jittery Stomach."

Complaint

67 F.T.C.

Video:

Audio:

9. (Diss to) Three acid containers against med. gray wall. As each of first two tablets drop, super name under tube, but take it off as soon as it has been read. On "As You See," pop on arrow pointing to competitive tubes where tablets are lying inactive. Then remove arrow after "Happening."
- Bufferin tablet falls into righthand glass. It starts to disintegrate at once. Super: "Bufferin," and leave it on. Super on cue over Bufferin container: "Fights headache." Then replace with "Twice as Fast."
10. (Zoom to) Close shot of Bufferin container, after dropping "Bufferin" super. Tablet now disintegrating very profusely. Put "Bufferin" super back again at end of zoom. Then super on cue: "Calms Stomach."
11. (Zoom back) We glimpse the three tubes again momentarily.
12. (Diss to) Woman in bed, now relaxed and sleeping happily. Super: "Headache Relieved," "Stomach Calmed," "Nerves Relaxed."
13. (Diss to) Bufferin bottle, package and two tablets. Suggestion of bathroom tile background.

Here's the most expensive aspirin * * * and this combination-of-ingredients product, in ordinary stomach acid. As you see, not much is happening!

But instantly you see Bufferin's pain-reliever start into solution to fight your tension headache! For millions, Bufferin works twice as fast as aspirin.

And spreading quickly—to calm your jittery stomach—are tiny particles of Bufferin with Di-Alminate.

Only Bufferin adds these stomach-soothing anti-acids to aspirin!

Headache relieved * * * stomach calmed * * * and nerves relaxed!

When stress and strain cause headache pain * * * take two Bufferin!

"Candid Camera" Show, Columbia Broadcasting System
television network, March 19, 1961.

430

Complaint

(2) Excedrin:

For headache, arthritis, sinus, cramps: New extra-strength pain reliever
Excedrin combats cause of pain.

* * * * *

The symptom: Pain

Microscopic tissue cells surround nerves, joints, passages. Swelling of tissue
 is the immediate cause of most pain.

The immediate cause: Swelling

When tissues swell and nerves are squeezed you feel pain. Swelling may
 occur anywhere. Pain is only its symptom.

The treatment: Excedrin

Excedrin is a multi-action compound to simultaneously reduce swelling—
 relieve pain—make you feel "good all over."

Detroit (Michigan) Free Press Roto,
 October 11 and November 8, 1959.

Swelling: the immediate cause.

When tissue swells the nerve is squeezed and stretched—you feel pain. This
 swelling may occur in the head, at joints, around passages, anywhere.

Swelling is the immediate cause of most pain.

Excedrin: combats the cause.

Doesn't just dull senses, give pain special treatment (see nerve diagram).

Reduces tissue swelling, relieves pain.

Detroit (Michigan) Free Press Roto,
 February 21, 1960.

Video:	Audio:
Head shot of statue	Pain strikes * * *
Cut in on angle	Man recoils * * *
Cut closer more angle	Agonized * * *
ECU of hand on head	Demoralized * * *
ECU cut to other statues head	Why? * * *
Dolly back slowly	What * * * is the cause of pain.
Zoom to full length statue	Your body * * *
Animate nervous system	has a network of nerves. And only nerves feel pain.
Nerves spread out around body	each nerve cell is surrounded by tissue
Move into statue dissolve to tissues	And when tissues swell,
Show swelling, squeezing, stretching	nerves are squeezed * * * stretched * * * * * * This is the immediate cause of most pain.
Pop on lab dots animate up then pop on Bristol-Myers	From Bristol-Myers * * *

67 F.T.C.

1. That Bufferin provides relief from pain twice as fast as aspirin.
2. That Bufferin will relieve tension.

3. That Excedrin:

- a. Is an extra-strength pain reliever, is fifty per cent (50%) stronger than aspirin, and that two (2) Excedrin tablets equal three (3) ordinary pain tablets.
- b. Will combat the cause of pain by reducing the swelling of tissue.
- c. Will relieve tension.
- d. Will act as an anti-depressant.

PAR. 7. The said advertisements, were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact:

1. There is no significant difference between the rate of speed with which Bufferin provides relief of pain and the rate of speed with which aspirin provides relief of pain.
2. Bufferin will not relieve tension.
3. Excedrin:
 - a. Is not an extra-strength pain reliever, is not fifty per cent (50%) stronger than aspirin, and two (2) Excedrin tablets do not equal three (3) ordinary pain tablets in analgesic effect.
 - b. Will not reduce the swelling of tissue or otherwise combat the cause of pain.
 - c. Will not relieve tension.
 - d. Will not act as an anti-depressant.

PAR. 8. The dissemination by the respondent of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

COMPLAINT ⁴

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 Plough, Inc., a corporation, hereinafter referred to as respondent, 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 Plough, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business

⁴In the Matter of Plough, Inc., Docket No. 8320.

Complaint

67 F.T.C.

located at 3022 Jackson Avenue in the city of Memphis, State of Tennessee.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution of a preparation which comes within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

The designation used by respondent for said preparation, the formula thereof and directions for use are as follows:

Designation: "St. Joseph Aspirin"

Formula: Each tablet contains five (5) grains of aspirin.

Directions: (Take) one (1) or two (2) tablets with water. May be repeated every four (4) hours. If pains persist, or are unusually severe, see physician.

PAR. 3. Respondent causes the said preparation when sold, to be transported from its place of business in the State of Tennessee to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said St. Joseph Aspirin by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers and magazines, and other advertising media and by means of television and radio continuities broadcast over networks through stations located in various States of the United States and in the District of Columbia, and by means of other radio and television continuities broadcast over stations having sufficient power to carry such broadcasts across State lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said St. Joseph Aspirin; and has disseminated, and caused the dissemination of, advertisements concerning said St. Joseph Aspirin by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical, but not all-inclusive of the statements and representations contained in said advertisements and television

430

Complaint

and radio broadcasts disseminated as hereinabove set forth are the following:

Ready to go to work *faster than other leading pain relief tablets!* * * * St. Joseph Aspirin * * * is ready to go to work faster than all three other leading pain relief tablets.

Ladies Home Journal, February 1961.

For the * * * fastest relief from headaches, pains and aches of colds and flu * * * millions have found * * * All they need is * * * St. Joseph Aspirin * * *.

St. Joseph Aspirin * * * *is ready to go to work faster than any other pain reliever tested.*

Ladies Home Journal, March 1959.

Scientific Disintegration Test Proves Which Pain Relief Tablet is the Fastest

* * * * *

When you have a headache, cold, fever or muscle pain, you want relief—fast. St. Joseph Aspirin is ready to go to work faster to ease your pain and distress—*faster than all three other leading pain relief tablets!*

The Birmingham (Alabama) News, January 18, 1960.

Scientific tests prove that St. Joseph Aspirin * * * actually starts to work faster than all three other leading pain relief tablets.

Radio Station KNUZ, Houston, Texas, March 7, 1960.

PAR. 6. Through the use of said advertisements, and other similar thereto not specifically set out herein, respondent has represented and is now representing, directly and by implication, that St. Joseph Aspirin provides relief of pain faster than any other analgesic preparation available and offered for sale to consumers.

PAR. 7. The said advertisements were and are misleading, in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act. In truth and in fact, there is no significant difference between the rate of speed with which St. Joseph Aspirin provides relief of pain and the rate of speed with which other analgesic preparations available and offered for sale to consumers provide relief of pain.

PAR. 8. The dissemination by the respondent of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

COMPLAINT⁵

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 Sterling Drug, Inc.,

⁵ In the Matter of Sterling Drug, Inc., Docket No. 8321.

Complaint

67 F.T.C.

a corporation, hereinafter referred to as respondent, 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 Sterling Drug, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 1450 Broadway in the city of New York, State of New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution of two preparations which come within the classification of drugs as the term "drug" is defined in the Federal Trade Commission Act.

The designations used by respondent for said preparations, the formulas thereof and directions for use are as follows:

(1) Designation: "Bayer Aspirin"

Formula: Each tablet contains five (5) grains of aspirin.

Directions: Take one (1) or two (2) tablets with water three (3) or four (4) times daily as required.

(2) Designation: "Bayer Aspirin for Children"

Formula: Each tablet contains one-and-one-quarter ($1\frac{1}{4}$) grains of aspirin.

Directions: Under three (3) years, as prescribed by physician; three (3) to six (6) years, two (2) to four (4) tablets; six (6) to twelve (12) years, four (4) tablets. Dose may be repeated every three (3) hours but not more than three (3) times in one (1) day.

PAR. 3. Respondent causes the said preparations, when sold, to be transported from its place of business in the State of New York to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its said business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said Bayer Aspirin and Bayer Aspirin for Children by the United State mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, magazines, and other advertising media, and by means of television and radio continuities broadcast over networks through stations located

430

Complaint

in various States of the United States, and in the District of Columbia, and by means of other radio and television continuities broadcast over stations having sufficient power to carry such broadcasts across State lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said Bayer Aspirin and Bayer Aspirin for Children; and has disseminated, and caused the dissemination of, advertisements concerning said Bayer Aspirin and Bayer Aspirin for Children by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparations in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical, but not all-inclusive, of the statements and representations contained in said advertisements and television and radio broadcasts disseminated as hereinabove set forth are the following:

(Bayer Aspirin)

* * * Bayer is ready to go to work *instantly*, for the fastest pain relief you can get.

National Broadcasting Company,
Television Network, December 3, 1960.

(Bayer Aspirin for Children)

Bayer Aspirin enters the stomach as thousands of tiny flakes, to bring the fastest, gentlest relief your child can get from a headache or the pains and fever of a cold.

Good Housekeeping magazine, February 1961.

(Bayer Aspirin and Bayer Aspirin for Children)

BAYER
BRINGS FASTEST RELIEF!
... the fastest, most gentle to the stomach relief you can get from the aches, pains and fever of a cold or flu!

Look magazine, February 14, 1961.

PAR. 6. Through the use of said advertisements, and other similar thereto not specifically set out herein, respondent has represented, and is now representing, directly and by implication:

(1) That Bayer Aspirin provides relief of pain faster than any other analgesic preparation available and offered for sale to consumers.

(2) That Bayer Aspirin for Children provides relief of pain faster than any other children's analgesic preparation available and offered for sale to consumers.

PAR. 7. The said advertisements were and are misleading in material respects and constituted, and now constitute, "false advertisements"

as that term is defined in the Federal Trade Commission Act. In truth and in fact:

(1) There is no significant difference between the rate of speed with which Bayer Aspirin provides relief of pain and the rate of speed with which other analgesic preparations available and offered for sale to consumers provide relief of pain.

(2) There is no significant difference between the rate of speed with which Bayer Aspirin for Children provides relief of pain and the rate of speed with which other children's analgesic preparations available and offered for sale to consumers provide relief of pain.

PAR. 8. The dissemination by the respondent of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices, in commerce, within the intent and meaning of the Federal Trade Commission Act.

OPINION OF THE COMMISSION ⁶

On March 14, 1961, the Commission issued four complaints charging respondents therein with dissemination of false and misleading advertising in connection with their sale of analgesic products. On June 25, 1962, the Commission, being of the view that an investigation should be conducted to determine whether other firms in the industry were falsely advertising their analgesic preparations and, further, that the proceedings with respect to these four complaints should be suspended during such investigation, directed that the four cases be placed upon the suspense calendar until further notice.

On December 22, 1964, Bristol-Myers Company, respondent in Docket No. 8319, filed a motion "to dismiss the within proceeding with prejudice due to failure of the Commission to proceed with reasonable dispatch to conclude said proceeding, as required by Section 6(a) of the Administrative Procedure Act." In the alternative, respondent Bristol-Myers has moved that the Commission grant it leave to engage in certain discovery, by deposition and interrogatory, and to suspend its duty to respond to a recent Commission "Order to Submit Special Report" until after the completion of such discovery. Complaint counsel oppose the motion to dismiss the proceeding "with prejudice" and move in the alternative that the complaint be dismissed "without prejudice." At the same time, complaint counsel have filed substantially identical motions to dismiss the complaints in the other three proceedings that have been suspended. Respondents

⁶ In the *Matters of American Home Products Corp.*, Docket No. 8318, *Bristol-Myers Company*, Docket No. 8319, *Plough, Inc.*, Docket No. 8320, *Sterling Drug, Inc.*, Docket No. 8321.

Bristol-Myers, American Home Products, and Sterling Drug have filed answers to the staff motions, all objecting to a dismissal without prejudice.

During the period in which these four matters have been held in suspense, the Commission has undertaken the general, industry-wide investigation of analgesic advertising previously announced. Pursuant to a resolution authorizing a general investigation of the advertising of analgesic products, the Commission has ordered the filing of special reports by a number of companies who do not themselves sell any over-the-counter analgesic product, but who are believed to have conducted tests with regard to the safety or efficacy of such products or their constituent drugs. Pursuant to the same resolution, the Commission has also served additional orders to file special reports upon these four respondents and several other companies that are currently engaged in the advertising of over-the-counter analgesic products.

As a consequence of a continuing survey of the advertising of analgesic products, the Commission has become aware of the prevalence of many advertising claims which may be subject to question under Sections 5 and 12 of the Federal Trade Commission Act, but which are not fairly put in issue by the complaints in the four suspended proceedings. Thus, even if the Commission were to determine that the purposes specified in its June 25, 1962, order would be best served by individual complaint proceedings under Section 5(b) of the Federal Trade Commission Act, it would not be in the public interest to adjudicate the issues raised by these four complaints as they now stand.

While the Commission could order amendment of the complaints in order to include additional or different charges, it seems more appropriate in this instance, in view of the lapse of time since the complaints were issued and the relatively early stage to which the proceedings have advanced, to withdraw the complaints and institute any future Section 5(b) proceedings by means of entirely new complaints. See *Druggists Service Council, Inc.*, Docket No. 8511 (order issued November 17, 1964) [66 F.T.C. 1124]. The Commission has concluded that the complaints heretofore placed upon the suspense calendar should now be withdrawn without an adjudication of the issues raised therein.

Several of the respondents have insisted that any such action of withdrawal or dismissal of the complaint should be made "with prejudice" whereas complaint counsel has strenuously urged that it be "without prejudice." We think this is a meaningless controversy over labels which have little applicability here. The Commission's

Order

67 F.T.C.

statutory duty in the investigation of analgesic advertising is to bring about a general compliance with the standards of the Federal Trade Commission Act for truthful and non-deceptive advertising, should there be reason to believe that practices in the industry depart from those standards. If any of the representations challenged by the Commission's 1961 complaints have been abandoned with the intention not to resume them, little, if any, purpose would be served by subjecting such representations to challenge in some future Section 5(b) proceeding; and the Commission does not intend to do so. But if any of the advertising practices challenged by the 1961 complaints have been continued without substantial modification, the mere lapse of time and the withdrawal of these complaints without an adjudication of the merits could in no event afford any vested rights to engage in practices in violation of the law or preclude the Commission from taking whatever enforcement action under the Federal Trade Commission Act may be required by the law and the public interest.

It is finally necessary to consider the effect of withdrawal of the complaints upon the Orders to Submit Special Reports, which were served upon the respondents and which have not yet been returned. Although the Orders bore the caption of the particular proceeding in which each of these four companies is named as a respondent, they were issued pursuant to the resolution whereby the Commission entered upon a general investigation of analgesic advertising and they were plainly not merely discovery orders incident to the eventual litigation of those cases. Consequently, it does not appear that withdrawal of the complaints impairs the validity of the Orders under Section 6(b) of the Federal Trade Commission Act. Nevertheless, in order to avoid any possible doubt about the continuing validity of the orders and, in addition, to provide an opportunity to consider the clarification or simplification of a number of the questions, the Commission is now rescinding the Orders to Submit Special Reports.

ORDER WITHDRAWING COMPLAINT AS TO BRISTOL-MYERS COMPANY,
DOCKET No. 8319

APRIL 7, 1965

The Commission having issued its amended and supplemental complaint in this matter and the proceedings with respect to the complaint having been placed upon the suspense calendar until further notice by order of June 25, 1962; and

The Commission having determined for the reasons stated in the accompanying opinion that the complaint in the above-captioned matter should now be withdrawn:

It is ordered, That (1) the complaint be, and it hereby is, withdrawn; (2) the Order to Submit Special Report, issued to the above-named respondent pursuant to the Resolution of September 9, 1964, be, and it hereby is rescinded; and (3) respondent's motion for pre-hearing discovery and depositions be, and it hereby is, denied on the ground of mootness.

ORDER WITHDRAWING COMPLAINTS AS TO AMERICAN HOME PRODUCTS CORP., DOCKET No. 8318; PLOUGH, INC., DOCKET No. 8320; STERLING DRUG, INC., DOCKET No. 8321

APRIL 7, 1965

The Commission having issued its amended and supplemental complaints in these matters and the proceedings with respect to the complaints having been placed upon the suspense calendar until further notice by order of June 25, 1962; and

The Commission having determined for the reasons stated in the accompanying opinion that the complaint in each of the above-captioned matters should now be withdrawn:

It is ordered, That (1) the complaints be, and they hereby are, withdrawn; and (2) the Orders to Submit Special Report, issued to the above-named respondents pursuant to the Resolution of September 9, 1964, be, and they hereby are, rescinded.

IN THE MATTER OF
NANCY GREER, INC.