IN THE MATTER OF

CROWN CENTRAL PETROLEUM CORPORATION

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

Docket 8539. Complaint, Oct. 19, 1962—Decision, June 30, 1967.

Order dismissing complaint which charged a Baltimore, Md., petroleum company with fixing prices of gasoline at retail and suppressing competition by selling below cost to certain dealers.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, (U.S.C., Title 15, Sec. 45), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Crown Central Petroleum Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of Section 5 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 with respect thereto as follows:

COUNT I

PARAGRAPH 1. Respondent Crown Central Petroleum Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its

principal office and place of business located at the American Building, Baltimore 3, Maryland.

PAR. 2. Respondent is now, and for several years last past, has been, among other things, engaged in the offering for sale, sale and distribution of gasoline and other petroleum products in a thirteen State area including the States of Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Alabama, Florida and Texas. Said gasoline is offered for sale, and sold under the brand names of "Crown Gold" and "Crown Silver." Respondent comprises an integrated unit in the petroleum industry. It is engaged in the acquisition, development and exploitation of oil and other petroleum products as well as the purchase, sale and transportation of crude oil, and the refining of crude oil and its derivatives, and the subsequent marketing at wholesale and retail of the products of its refinery in the hereinabove named States of the United States. Respondent has a refinery in Houston, Texas. It also owns and operates pipe lines, terminals and bulk plants for the transportation, distribution, offering for sale and sale of its gasoline and other products to service station dealers. In 1961 its gross sales of petroleum products totaled $66,410,463.

PAR. 3. In the delivery and sale of its gasoline to its various marketing outlets located in the aforementioned States, respondent ships or otherwise transports its gasoline and other petroleum products from its refinery located in Houston, Texas, to bulk stations and other distributing points across State lines, from which said gasolines are distributed to service stations, dealers and other customers located in the various States in which it does business. Accordingly, respondent is now, and has been at all times mentioned herein, engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act, in the shipment and transportation of such gasoline between respondent's refinery, terminals and distribution points, its bulk storage plants and said wholesalers, jobbers and retail dealers purchasing said gasoline in the 13-State area. All of such purchases by wholesalers, jobbers and retail dealers in these States are and have been in the course of such commerce.

PAR. 4. Respondent has been and is now marketing its refined petroleum products, including gasoline, through a number of retail outlets, located in Baltimore, Maryland, among other areas, by the medium of contracts or lease agreements under the terms of which respondent agrees to sell and deliver and dealers agree to buy all of their requirements of gasoline from respondent. A

substantial number of these retail outlets are operated by independent businessmen, or those who would be such in the absence of the power and control exercised over them by respondent, who lease or sublease their service station properties from respondent and have entered into the aforementioned supply contracts for gasoline and certain other requirements wtih respondent.

In addition, respondent owns or operates through agents or representatives a number of retail service station outlets in Baltimore, Maryland, which are commonly known or referred to as "commission" stations.

PAR. 5. Except to the extent that competition has been hindered, frustrated, lessened and eliminated as set forth in this complaint, respondent has been and now is in substantial competition with other corporations, firms, partnerships and individuals engaged in the sale and distribution of gasoline in "commerce" as that term is defined in the Federal Trade Commission Act.

PAR. 6. It is now and has been for some time past the practice and policy of Crown Central Petroleum Corporation to enter into certain agreements, arrangements and understandings with various of its marketing outlets, located in the areas within which it does business including Baltimore, Maryland, whereby respondent, under the guise and pretext of giving assistance to said outlets, can and does establish control, manipulate or fix the retail price at which its gasoline is sold to motorists and others of the consuming public.

For example, commencing on or about June 12, 1962, Crown Central Petroleum Corporation initiated, adopted and directed the placing into effect of a policy or plan under which all of its retail dealer outlets, including both its own commission stations and those operated by independent lessee-dealers, in Baltimore, Maryland, would sell the "Crown Silver" brand of gasoline to consumers at a posted pump price of 17.9¢ per gallon. Under said pricing plan or policy, respondent offered to give and did grant price allowances of 12.5¢ per gallon to those of its said retail outlets selling "Crown Silver" gasoline to consumers at a posted retail pump price of 17.9¢ per gallon. By about 5:30 p.m. of June 12, 1962, almost all stations in the Baltimore City area were posting the said 17.9¢ per gallon retail price. By 7 p.m. of the same day all stations in the Baltimore City area had been contacted by respondent and the 17.9¢ per gallon retail price was in effect.

By means of various provisions in the leases, subleases and

supply contracts, including riders applicable thereto, and through a system of policing the business operations of the said independent lessee-dealers, the respondent is able to and does, to a substantial extent and degree, dominate and control the manner in which said lessee-dealers operate the service stations. The power resident in respondent through such domination and control is exercised, exerted and used by respondent to persuade, influence, coerce and induce said independent lessee-dealers to abide by, agree to, adhere to, follow or acquiesce in, various plans, policies or methods of doing business which may be suggested by respondent or which respondent may desire or elect to place in effect and operation, including the pricing policy or plan herein set forth. At all times the independent lessee-dealer is conscious and aware of the power of respondent and is influenced and persuaded by the presence of such power in the everyday decisions made by him in the conduct of his business.

As a result of the exercise of such power or the threat of the use thereof, respondent has caused its independent lessee-dealers to enter into or acquiesce in a course of dealing, cooperation, understanding, combination and planned common course of action, with respondent whereby the retail price at which gasoline was sold or offered for sale to the purchasing public at retail stations operated by the said lessee-dealers was and is fixed and maintained.

PAR. 7. This alleged unlawful planned common course of action, combination, agreement, understanding or course of dealing is singularly unfair, oppressive and to the prejudice of the public, and respondent's competitors and retailers of gasoline in the Baltimore, Maryland, area and other areas, and has a dangerous tendency to unduly restrain, hinder, suppress and eliminate competition between and among respondent's retail dealers and others, in the sale and distribution of gasoline in commerce within the meaning of the Federal Trade Commission Act, and constitutes an unfair method of competition and an unfair act and practice within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT II

PAR. 8. All of the allegations of Paragraphs One through Five of Count I of this complaint are hereby adopted and incorporated herein by reference and made a part of this Count II the same as if they were repeated herein verbatim.

PAR. 9. In the course and conduct of its business in commerce,

respondent offered to sell and deliver and has delivered and sold its gasoline at below cost prices with the intent and purpose, or under circumstances where the effect may be, to injure, restrain, suppress, or destroy competition in the sale of gasoline within the area of Baltimore, Maryland.

Pursuant to a policy or plan initiated, established and placed into effect on June 12, 1962, as alleged in Paragraph 6 of Count I, respondent offered to deliver and sell and has delivered, offered for sale and sold its gasoline to retail outlets located in Baltimore, Maryland, at a price of 3.4¢ per gallon while selling its gasoline of the same grade to other retail outlets in other areas at substantially higher prices.

The 3.4¢ per gallon price was below respondent's costs of producing, refining, distributing and selling such gasoline, and sales at such price were made for the purpose and with the intent or under circumstances where the effect may be as aforesaid.

PAR. 10. The effect and result of the pricing practice of respondent, as alleged in Paragraph Nine hereof, has been or may be to substantially lessen competition in the distribution and sale of gasoline, to the injury and prejudice of the public, and to the injury and prejudice of respondent's competitors, as aforesaid; and such pricing practice constitutes an unfair method of competition and an unfair act and practice in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Mr. Anthony Zabiegalski and *Mr. Harold Brandt* for the Commission.

Bergson & Borkland, by *Mr. Herbert Borkland, Mr. Howard Adler, Jr.*, and *Mr. James H. Kelley* of Washington, D.C.; with *Mr. Richard F. Cadigan*, of Baltimore, Md., for respondent.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

MARCH 17, 1964

Preliminary Statement

On October 19, 1962, the Federal Trade Commission issued its complaint against Crown Central Petroleum Corporation, a corporation (hereinafter called respondent or Crown), charging it with price fixing and selling below cost in violation of Section 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served on Crown. Count I

of the complaint alleges in substance that Crown entered into a resale price fixing agreement and combination with its retail dealers in violation of Section 5. The second count charges Crown with selling below cost in violation of Section 5.

Respondent appeared by counsel and filed answer admitting the corporate and certain other factual allegations of the complaint but denying the commerce allegations and all of the alleged violations. Pursuant to notice, prehearing conferences and hearings were held at various times and places before the undersigned hearing examiner duly designated by the Commission to hear this proceeding.

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

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following findings of fact, conclusions and order.

FINDINGS OF FACT

I. *Corporate Organization*

Crown is a Maryland corporation with its principal office and place of business located at the American Building, Baltimore 3, Maryland (Answer).

II. *Interstate Commerce and Competition*

Crown is now and for several years last past has been, among other things, engaged in the offering for sale, sale and distribution of gasoline and other petroleum products in a 13-State area, including the States of Connecticut, New York, New Jersey, Pennsylvania, Maryland, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Alabama, Florida and Texas (Answer). Crown offers for sale, sells and has sold gasoline under the brand names of "Crown Gold" and "Crown Silver" in the States of Connecticut, New Jersey, New York, Maryland,

[1] 5 U.S.C. 1007(b).

North Carolina, South Carolina, Pennsylvania, Texas, Virginia and West Virginia, and unbranded gasoline at wholesale in the above-mentioned thirteen States (Answer; CX 2A; RX 39).[2]

Crown is engaged in the acquisition and development of, and exploration for, oil producing properties and the production, purchase, sale and transportation of crude oil, the refining of crude oil and its derivatives, and the subsequent marketing of such refinery products (Answer). Crown has a refinery at Houston, Texas (Answer). It also owns and operates pipelines, terminals and bulk plants for the transportation, distribution and sale of its gasoline and other products to purchasers thereof, including service station dealers (Answer). An integrated unit in the petroleum industry consists of one engaged in the production, refining, transportation and marketing of petroleum products (Tr. 727; 1381). Thus Crown comprises an integrated unit in the petroleum industry (CX 1 B; CX 2A; CX 4 B–H; CX 1078). In 1961 Crown's gross operating income was $66,410,463 (Answer), with gross sales of petroleum products approximately $63,000,000 (CX 49).

In the delivery and sale of its gasoline to its various marketing outlets, Crown ships or otherwise transports its gasoline and other petroleum products from its Houston, Texas refinery across State lines to bulk stations and other distributing points, from which said gasolines are distributed to service stations, dealers or other customers (Answer). In the shipment, transportation and sale of gasoline from its refinery, terminals, bulk storage plants and other distribution points to said wholesalers, jobbers or retail dealers in the aforesaid States, Crown is now and at all times mentioned herein has been engaged in commerce within the meaning of the Act. Although Crown denies that it is engaged in commerce and that its sales to retail dealers (with which both counts of the complaint are concerned) are in commerce, the contrary is too well established to require extended discussion.[3]

In the course and conduct of such business, Crown has been and now is in substantial competition in commerce with others likewise engaged in the sale and distribution of gasoline in commerce within the meaning of the Act, including such fully integrated companies as Sun, Gulf, Humble, American, Shell,

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[2] The following abbreviations are used throughout this decision: CX (Commission exhibit); RX (Respondent exhibit); Tr. (transcript); CPF (Commission proposed finding); RPF (Respondent proposed finding).

[3] *Standard Oil Co.* v. *F.T.C.*, 340 U.S. 231 (1951); *Sun Oil Company*, 63 F.T.C. 1371, D.N. 6934 (1963), and cases cited therein.

Sinclair, Texaco and Cities Service (Answer; CX 1588; RX 38; 130–34; National Petroleum News Factbook, Mid-May, 1963, pp. 64–69 and 76–79, of which pages official notice was taken).

III. *The Unlawful Practices*

A. The Issues

Count I of the complaint alleges a resale price fixing agreement or combination between Crown and its retail dealers in the Baltimore, Maryland area. Count II alleges sales by Crown to said dealers below cost with the intent and purpose, or where the effect may be, to injure, destroy or substantially lessen competition.

B. Resale Price Fixing

Crown has been and now is marketing its refined petroleum products, including gasoline, in part through a number of retail outlets located, among other areas, in Baltimore, Maryland, and has entered into contracts or lease agreements under the terms of which it agrees to sell and deliver and the dealers agree to buy all of their requirements of gasoline at said outlets from Crown, and which require the purchase of specified minimum annual quantities (Answer; CX 5 A; CX 13 A). A substantial number of these retail outlets are operated by independent business men who lease or sublease their service station properties from Crown and have entered into such contracts to purchase gasoline, motor oil and greases from Crown (Answer). In addition, Crown owns or operates through agents or representatives a number of retail service stations in Baltimore, commonly known or referred to as "commission" stations (Answer). Crown in Baltimore also marketed its gasoline through one unbranded retail service station outlet (Tr. 237–40; Tr. 1156–60).

The complaint alleges a resale price fixing agreement or combination between Crown and its dealers, both as the result of actual agreements entered into with its dealers and, independently thereof, as the result of the existence of the aforesaid lease and dealer supply contracts between Crown and its dealers and certain actions by Crown thereunder. The issues, by agreement, are limited to the Baltimore area, Crown's regular brand gasoline, called Crown Silver, and February through June, 1962.

Prior to 1962, the "usual" or "regular" retail pump price for house-brand or regular major brand gasoline had been 30.9 cents per gallon, with the so-called "private" brands selling for 2¢ per

gallon less (Tr. 477, 593, 633, 709, 832). During the first six months of 1962, the Baltimore area experienced a series of gasoline price wars, resulting in substantial declines in the retail price of gasoline (Answer). These price wars were triggered by the introduction in that market of new sub-regular branded gasolines, particularly Gulftane and Sun 190, by major brand operators at pump prices lower than their regular gasolines and equal to the private brands (Answer; Tr. 364, 475, 594, 633, 704).

Crown's tank wagon price to its dealers for regular gasoline throughout this period was 25.9 cents, resulting at "usual" prices in a margin to the dealer of five cents per gallon (CX 137–482). The dealers could not meet prices below 30.9 cents and retain such margin. As a result of the declining pump prices, in order to protect the dealers' gallonage and margin of profit, Crown upon their request from time to time granted them temporary tank wagon price allowances to enable them to meet competition (Answer). On such temporary allowances, to meet the first cent of a reduced pump price the dealer was given only ½ cent, thus reducing his margin of profit to 4½ cents, which margin thereafter remained the same throughout succeeding price reductions (Tr. 336, 850).

Crown's policy and procedure with respect to granting such allowances required a dealer request, a survey of his competitors' prices by a Crown salesman, a recommendation to the Division office for an allowance to "protect" a specific pump price, the transmission thereof by telephone to Mr. Garrison, Crown's Assistant Manager of Marketing, who granted or denied such requests, and his approval thereof. In addition to such oral transmission, the Division office filled out a form, directed to Garrison, listing the dealer's pump price (the price to be protected), his 4.5 cents margin, the prevailing competitive prices, and the recommended allowance, which always equaled the price to be protected less the dealer's margin, subtracted from 25.9 cents, the tank wagon price (Tr. 329–37; 835–47; CX 53–73).

After approval, the Division office notified the salesman, who in turn advised the dealer that he was "protected" at a certain pump price (Tr. 329–31; 518; 544–5; 851). The record clearly establishes that the temporary price allowances were given to "protect" a specific pump price and that the salesmen so advised the dealers (CX 53–73; 46 B; Tr. 288; 331; 544–5; 518; 850).

The dealers were paid the allowances only upon the gasoline they actually sold rather than upon that bought, by means of the salesmen reading their pump meters at the time the allowance

was granted and thereafter periodically. Such readings were recorded on forms by the salesman with the appropriate computations, signed by him and the dealer, and credited by the Crown drivers against subsequent deliveries of gasoline (Tr. 347–9; CX 74–80; CX 586–685). A dealer could not receive any allowance unless he would allow Crown to read his pump meters (CX 47, Tr. 355–6). The record reveals that the dealers receiving allowances could post the protected price or a lower price, but not a higher price (Tr. 288; 324; 331; 518; 545; 550; 556–7).

On June 12, 1962, the prevailing retail price of major brand regular and Crown regular gasoline was 23.9 cents a gallon (Tr. 513; CX 44 D; CX 53–73; CX 89; CX 103; CX 133; RX 2). As a result of the price wars that year, Crown had expended substantial amounts of money because of allowances granted to dealers to support a price and enable them to meet competition (RX 126; Tr. 1280), had lost substantial gallonage because Crown did not act until the prices of others had gone down (RX 129), and the number of closed Crown stations had increased from one in January to five in June (CX 44 D; RX 60 B; RX 70 C). In addition, Crown had experienced a substantial decline in overall gross income (RX 128).

On June 12, 1962, Crown's top management decided to post and protect a retail price of 17.9 cents per gallon, 6 cents below prevailing prices, by placing such price into effect at its commission stations, and giving its independent dealers a 12.5 cent allowance to protect such price, which would continue their margin at 4.5 cents (Answer; CX 46 B; RX 7). This price was substantially below Crown's costs (CX 1078; 1548–49; 1587 A). The avowed purpose was to alleviate Crown's losses (Answer). Just how this action would accomplish such a result is not clear, but apparently the contention is that it might have shocked competitors into realizing the futility of the price war and restoring more normal prices (Tr. 714; 757–8).

About 2 p.m. Crown dropped its price at all commission stations to 17.9 cents and notified all of its dealers, through the salesmen, that a pump price of 17.9 cents would be protected (Answer; Tr. 341; CX 46 B; RX 7). Crown had 44 service stations in Baltimore, of which five were closed and 11, or approximately 28% of those open, were commission stations (CX 34). By about 5:30 p.m., almost all of the dealers were posting 17.9 cents, and by 7 p.m. all dealers contacted were posting 17.9 cents (CX 46 B; Tr. 346; 749). One dealer, who was not contacted and not given the allowance because he would not permit Crown

to read his meters, did not post the 17.9 price (CX 47; Tr. 335–6). The 12.5 cent allowance, and the 17.9 cent pump price, remained in effect until about 2 p.m., June 18 (CX 45 E).

With respect to the June 12 allowance, Mr. Burke, Crown's Baltimore division manager who supervised all of the salesmen, testified that he instructed them to offer each service station operator "a 12.5 cent allowance *in line with their going to a 17.9 price*" (Tr. 359–60; emphasis added). Mr. Newsom, Crown's General Manager of Marketing, who conveyed management's order to Burke on June 12, told Burke to instruct all the salesmen to tell the dealers: "If you will post or go to 17.9¢ a gallon at the pump we will protect that figure" (Tr. 283). Newsom testified that the dealers would get the allowance if they posted 17.9 or less, but not if they posted higher (Tr. 318; 324). Several dealers testified they were required to post the protected price or lower (Tr. 519; 554–57; 567–8), and one said he did not know what the allowance was on June 12 when he posted 17.9 (Tr. 554). Burke said that Crown wanted a 17.9 price sign at every station and if necessary the salesmen were to make the signs themselves on the spot and get them posted (Tr. 341).

It is clear that the allowance of 12.5 cents per gallon was given to dealers to "protect" the 17.9 price and upon condition that they post the 17.9 price, or lower. As found above, the dealers were regularly and on this occasion advised that the allowances were to protect a price, or that a certain price was protected. The allowances were only granted on gasoline sold, and the dealers knew this required the reading of their pump meters by Crown salesmen, which enabled them to ascertain the posted price.

Crown, while admitting the granting of the 12.5 cent allowance to protect a retail price of 17.9 cents and the "recommending" of such price to its dealers, contends that this allowance was unconditional and the dealers were free to do as they chose. In addition to the facts found above demonstrating that this allowance was conditioned upon the dealers posting the 17.9 price or lower, the surrounding circumstances likewise impel such a conclusion.[4] This allowance was not in accord with Crown's established policy, which required a dealer request for help, a survey of his competitors' prices, and an allowance based upon such facts. Here there was no request, no survey, and indeed a known

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[4] It is well established that a price-fixing agreement or conspiracy may be inferred from circumstantial evidence and does not have to be proved by direct evidence. *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208 (1939); *Theatre Enterprises, Inc.* v. *Paramount*, 346 U.S. 537 (1954).

prevailing higher price of 23.9, with sub-regular and private brands slightly lower. With respect to prior allowances, even though the dealers were told the allowances were to "protect" a price or that they were "protected" at a price, and their meters were read, nevertheless such allowances had been granted upon the dealers' request and a demonstrated need for help to meet competition, and it might be expected, without any conditions attached, that they would post such competitive prices. Here the expectation would be the contrary.

Given an unconditional 12.5 cent allowance, with competitors generally posting 23.9¢, and having been losing ½ cent of their normal margin for six months in order to meet lower prices, the dealers could easily have posted 18.9 (or indeed higher), been substantially below all competition, logically expected a substantial increase in gallonage, and restored their margin to normal or better. Yet all of the dealers given the allowance posted 17.9. While the record establishes, as Crown points out, that the dealers welcomed this allowance with joy (Tr. 315; 345; 720; 862) this does not negate their singular lack of self-interest in failing to restore a normal margin under such fortuitous circumstances.

It is concluded and found that the above found facts, particularly with respect to the allowance of June 12, 1962, demonstrate that Crown and its dealers entered into an agreement, arrangement, understanding, planned common course of action or conspiracy to fix, control and stabilize the retail price at which Crown gasoline was to be sold. That such agreements or arrangements are illegal *per se*, in violation of the Sherman Act, and unfair methods of competition under the Act is well settled.[5]

Counsel supporting the complaint also contend, as the complaint alleges, that the dealers were coerced or caused to agree to fix their retail prices by reason of their lease and dealer equipment and supply contracts with Crown, independently of the above-found facts demonstrating an agreement to fix prices. In this connection, counsel contend such written contracts, coupled with Crown's "policing" of the dealers' operations, gave Crown the power to dominate and control the dealers with such alleged effect. The leases and supply contracts are substantially the same as those used throughout the industry. The lease gives Crown the right to inspect the premises. Either party may cancel upon 5

[5] *Ethyl Gasoline Co.* v. *United States*, 309 U.S. 436 (1940); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *F.T.C.* v. *Cement Institute*, 333 U.S. 683, 691 (1948); *F.T.C.* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953).

days written notice (CX 6 A, B). These are customary and usual provisions. As found above, the supply contracts required the dealer to buy his station requirements from Crown, with a specified annual minimum. They ran from year to year, with 90 days termination notice required of the dealer, although Crown could terminate on 10 days notice at any time (CX 7 A and E).

There is no evidence, aside from the method of handling allowances discussed above, which method is unrelated to any of the provisions or requirements of the leases and supply contracts, that Crown in any manner "policed" the operations of the dealers. It was conceded that there was no evidence of actual or threatened coercion by Crown (Prehearing Conference Tr. 80; 95–6). In addition, the record establishes that Crown's dealers were frequently solicited by competing oil companies to transfer their allegiance (Tr. 244; 521).

It is concluded and found that the leases and dealer supply and equipment contracts between Crown and its dealers, and the operation thereof, have not coerced or caused the dealers to enter into price-fixing arrangements with Crown, independently of the actions and agreements with respect to the allowances hereinabove considered.

C. Selling Below Cost

1. *The Facts*

The complaint alleges that the same sales by Crown from June 12 through June 18, 1962, when the dealers were given a 12.5 cent allowance, were below cost with the intent and purpose, or where the effect may be, to injure or substantially lessen competition in violation of the Act. Crown's net tank wagon price, after deduction of the 12.5 cent allowance and the 10 cents Federal and state taxes, was 3.4 cents per gallon (Answer). This was substantially below Crown's costs (CX 1078; 1548–49; 1587 A). During the same period, Crown's net tank wagon prices to dealers in other areas where it operated were substantially higher (CX 45 A–J).

In addition to the major integrated companies above found, Crown was also in competition in Baltimore with a number of unbranded or private brand operators, including Cashin, Joe's, Hudson, Midway, Savon, Scot, Thriftway, Thrifty, and Thompson (CX 53–63; 70; 89; Tr. 461–2; 581; 630–31). Crown, in addition to its sales to its dealers, also made wholesale sales at its Baltimore terminal to various such unbranded or private brand operators (Tr. 737). Crown's regular wholesale price to such unbranded

operators was below its normal tank wagon price of 15.9 cents (less taxes), and from June 12 to June 18, 1962, was 11.3 cents per gallon (Tr. 737; CX 3). This was 7.9 cents higher than the 3.4 cent price to the dealers, and resulted in a net wholesale price, with taxes but not including delivery from terminal costs, of 21.3 cents to such unbranded operators, substantially above the retail price of 17.9 cents being posted by Crown and its dealers.

The drastic retail price reduction of June 12 to 17.9 cents was characterized by Crown officials as "rocking" the market (Tr. 279–81), with the avowed purpose of trying to restore normal prices by shocking competitors into realizing the futility of continued price wars, as found hereinabove. The normal retail or pump price differential between major and unbranded regular gasolines in Baltimore was two cents, as found above, and of course Crown knew that the unbranded operators could not meet the 17.9 price, let alone two cents less, with a terminal wholesale cost of 21.3 cents from Crown or the 20.4 cents prevailing unbranded terminal wholesale price (CX 44 F; 45 F), or even the limited gallonage 17.4 cent terminal wholesale subsidy price of some competitors (CX 45 F). In deciding to adopt the 17.9 cent retail price, Crown officials stated they were indifferent as to what might happen to their unbranded customers (Tr. 281).

Although Crown contends that its action was purely "defensive" (hereinafter considered in more detail), Crown also knew that such sales below cost and the resulting 17.9 cent retail price would, unless met, result in substantially increased sales at its stations (CX 45 E), with a corresponding decline in sales by competitors, particularly private brand operators who traditionally sold at a price two cents lower, and whose operations were geared almost exclusively to price (Tr. 477; 505; 593; 633; 809; 832). Mr. Diwoky, Crown's president, in effect so testified (Tr. 721; 740–41).

Crown argues that it is not a "major" oil company. However, as found above, it is an integrated unit in the petroleum industry, and markets as a major. Unquestionably it is much smaller than the major integrated companies, hereinabove found, with which it competes in Baltimore (CX 1588 A–Z; RX 130–34). On the other hand, it is much larger than the unbranded operators with which it competes in Baltimore, a number of which are intrastate operations (Tr. 490; 578; 628; 640). Whether Crown is or is not a "major" does not appear relevant to the allegations of Count II.

It is undisputed that the sales of all Crown dealers posting the

17.9 cent price from June 12 to June 18 increased substantially, from three to five times the gallonage sold the previous week (CPF 13; RPF 123, RX 129 A–K; CX 45 E). Crown's Baltimore sales returned to normal or less during the following week, and the following month (RX 129 A–K). As found above, Crown's sales in Baltimore in the first five months of 1962 had declined in comparison with 1961 (RX 129 A–K). Crown's 1962 Baltimore sales and Maryland share of the market also declined substantially compared with 1961 (RX 129 A–K; RX 41).

The unbranded or private brand operators in competition with Crown's stations lost substantial gallonage during the six days Crown's 17.9 price remained in effect (Tr. 474; RX 3; Tr. 584; RX 4). As found above, their wholesale cost price, including delivery, exceeded Crown's 17.9 retail price (Tr. 470; 582; 606; 631). Their retail pump prices varied from 20.9 to 21.9 cents per gallon during the period (RX 3; 4; Tr. 475; 610). These prices, 3 to 4 cents above instead of two cents below Crown's price, would necessarily cause a decline in sales. One private brand, Scot, elected to meet Crown's 17.9 price at two of its three stations, at which price it was selling below delivered costs, not including other operational costs (Tr. 631; CX 1544–46). It did so to prevent loss of customers to Crown (Tr. 631). Its gallonage increased (Tr. 632), which of course caused it to lose more money than if it had not.

2. *Intent*

Crown, while conceding that it intentionally sold below cost and posted the 17.9 cent price, argues that its intention or purpose was purely "defensive," in an effort to "rock" the market, shock competitors into restoring more normal prices and obviate its continued losses of both gallonage and income. Even assuming such intention as bona fide, which is subject to some doubt inasmuch as Crown had previously attempted a similar action in Houston with uncertain results (Tr. 279–80; 314), nevertheless, as found above, Crown knew the adverse competitive effect it would have upon private brand competitors. Crown knew that they traditionally sold two cents below the majors and Crown because their operations were geared to price, that their wholesale costs were higher than Crown's intended retail price, that unless they maintained their normal differential or at least met such price Crown's sales would increase and their sales would decline substantially, and that if, conversely, they maintained their

normal differential or met Crown's price they would be selling below cost and at a substantial loss.

A person must be presumed to intend the known and necessary consequence of his actions. As the Supreme Court stated in the *Griffith* [6] case:

> * * * And even if we assume that a specific intent to accomplish that result [the elimination of competition by the use of monopoly power] is absent, he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did. *United States* v. *Patten, supra,* p. 543.

In addition, both the Supreme Court and the Commission have held that sales below cost warrant an inference of predatory intent. In *Anheuser-Busch,*[7] the Supreme Court said:

> * * * For example, it might be argued that the existence of predatory intent bears upon the likelihood of injury to competition,[21] and that a price reduction below cost tends to establish such an intent. * * * [Footnote omitted.]

In its *Forster* [8] decision, the Commission said:

> [31] Express declarations of predatory intent—such as respondent Hodgkins' statement that "we will put you out of business"—are of course the most convincing evidence of such an intent. Even without such direct evidence, however, predatory intent could have been reasonably inferred from respondents' below-cost selling. *Federal Trade Commission* v. *Anheuser-Busch, Inc.,* 363 U.S. 536, 552 (1960). It is said that such predatory pricing is "foreign to any legitimate commercial competition," *Porto Rican American Tobacco Co.* v. *American Tobacco Co.,* 30 F. 2d 234, 237 (2d Cir. 1929), *cert. denied,* 279 U.S. 858, and that it "inevitably frustrates competition by excluding competitors from the market or deliberately impairing their competitive strength." *Report of the Attorney General's National Committee to Study the Antitrust Laws* 165 (1955).

It is concluded and found that Crown sold below cost with the intent and purpose to injure, restrain, suppress or destroy competition in violation of Section 5 of the Act.

3. *Effect*

Count II of the complaint alternatively pleads predatory intent and probable adverse competitive effect, and, as found above, such intent has been established. However, it is well settled that intent is not a necessary element of a violation of Section 5, or for that matter, of the Clayton Act or Section 1 of the Sherman

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[6] *United States* v. *Griffith,* 334 U.S. 100, 108 (1948).

[7] *Federal Trade Commission* v. *Anheuser-Busch, Inc.,* 363 U.S. 536, 552 (1960).

[8] *Forster Mfg. Co., Inc., et al.,* Docket No. 7207, 62 F.T.C. 852 (1963).

Act. Proof that the sales below cost had a reasonable probability of substantially lessening competition, as alleged, would also, independently of intent, establish a violation of Section 5 of the Act, for the reasons next discussed.

Section 3 of the Robinson-Patman Act [9] makes it a crime to sell at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor." The Supreme Court has held that selling below cost is encompassed within the words "unreasonably low prices." [10] Because Congress has declared such competitive conduct against public policy and indeed a crime, *a fortiori* it would be an unfair method of competition, for the reasons expressed by the Supreme Court in its *Motion Picture Advertising* decision.[11] Moreover, the same incipiency doctrine there relied upon by the Court would appear inapplicable.

Because Section 3 requires a purpose to destroy competition, Crown argues such intent or purpose is required to make selling below cost an unfair method of competition. However, it does not follow that intent is a necessary element under Section 5. It has long been established, even prior to the Federal Trade Commission Act, that sales below cost, absent acceptable business exigencies, are in violation of the Sherman Act.[12] The Supreme Court has delineated the type of business exigency required. In *National Dairy*,[13] the Court said:

> This opinion is not to be construed, however, as holding that every sale below cost constitutes a violation of § 3. Such sales are not condemned when made in furtherance of a legitimate commercial objective, such as the liquidation of excess, obsolete or perishable merchandise, or the need to meet a lawful equally low price of a competitor. 80 Cong. Rec. 6332, 6334; see *Ben Hur Coal Co.* v. *Wells*, 242 F. 2d 481 (C.A. 10th Cir. 1957). Sales below cost in these instances would neither be "unreasonably low" nor made with predatory intent. But sales made below cost without legitimate commercial objective and with specific intent to destroy competition would clearly fall within the prohibitions of § 3.

Of course violations of the Sherman Act are violations of Section 5.[14] Furthermore, incipient acts and practices which, when full blown, would violate the Sherman and Clayton Acts, are un-

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[9] 15 U.S.C. 13a.

[10] *United States* v. *National Dairy Products Corp.*, 372 U.S. 529 (1963).

[11] *F.T.C.* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 395 (1953); see also *Fashion Originators Guild* v. *F.T.C.*, 312 U.S. 457 (1941), and *F.T.C.* v. *Beech-Nut Co.*, 257 U.S. 441 (1922).

[12] *Standard Oil Co.* v. *United States*, 221 U.S. 1, 43 (1911); *United States* v. *American Tobacco Co.*, 221 U.S. 106, 160, 182 (1911); *United States* v. *National Dairy Products Corp.*, 372 U.S. 29 (1963).

[13] Footnote 12, *supra*.

[14] *F.T.C.* v. *Cement Institute*, 333 U.S. 683, 691 (1948).

fair methods of competition in violation of Section 5.[15] In addition, since incipient violations of the Clayton Act are violations of Section 5, it would seem that the requisite adverse competitive effect under Section 5 need be no greater than under the Clayton Act., *i.e.*, a reasonable probability of a substantial lessening of competition.

While predatory intent is not a requisite under Section 5 of the Act, where it is found, as here, it tends to make the injury to competition probable. The Supreme Court in *Anheuser-Busch* [16] said:

> * * * For example, it might be argued that *the existence of predatory intent bears upon the likelihood of injury to competition*,[21] and that a price reduction below cost tends to establish such an intent. * * * [Footnote omitted.] (Emphasis added.)

In *Balian*,[17] an area price discrimination case, the Court held:

> * * * Of course, intent is not an essential factor to a § 2(a) violation, although, if the intent to destroy were found to exist, it might tend to render the injury probable.

And in *Forster*,[18] the Commission said:

> * * * However, those events [selling below cost] strongly suggest that respondents, in the formulation of their pricing policies, were motivated by an *intent* to destroy their competitor, Farmington. And, while such a predatory intent is not a necessary element in a price discrimination case, it is certainly relevant in determining whether or not the discriminations in question may have the *effect* of substantially injuring competition. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 552 (1960); *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 120 (1954); *Atlas Building Products Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950, 956 (10th Cir. 1959), cert. denied, 363 U.S. 843 (1960); *Maryland Baking Co.* v. *Federal Trade Commission*, 243 F. 2d 716, 718 (4th Cir. 1957); *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 234, 237 (2d Cir. 1929), cert. denied, 279 U.S. 858.

Because of the relatively short duration (six days) of selling below cost, the fact that Crown's sales returned to normal or less thereafter, and the fact that competitors' gallonage and prices returned to normal, Crown argues that its selling below cost had no substantial adverse effect upon competition. While the period was of short duration and the gallonage and monetary losses did not permanently impair competition, this argument overlooks the ob-

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[15] *F.T.C.* v. *Motion Picture Advertising Service Co.*, 344 U.S. 392, 395 (1953).

[16] Footnote 7, *supra*.

[17] *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F. 2d 356, 369. See also, *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905).

[18] Footnote 8, *supra*.

vious, namely, if continued, it would have driven the private brands out of business. Two private brand operators graphically described the inevitable result of continued selling below cost by Crown as follows:

Mr. Barton (Tr. 505):

Q. Mr. Barton, if a branded operator went below you, if you know, would you have lost business?
A. Yes, If he kept it up long enough, I would probably go broke, bankrupt.
Q. Do you consider Crown a branded operator?
A. Yes.

Mr. Pickett (Tr. 605):

A. How can you stay in business and sell under cost? I haven't found out how to do this yet.

As the Court of Appeals observed in *Atlas Building Products*: "* * *, surely there is no more effective means of lessening competition or creating monopolies than the debilitation of a competitor." [19]

Selling below cost cannot be equated with a price reduction which could be met, albeit with less profit, and thus prevent substantial shifts in market share. While Crown was much smaller than its major competitors, it was much larger than most if not all of its private brand competitors. Under somewhat similar facts in the *Porto Rican Tobacco Co.* case,[20] in connection with a selling below cost charge brought under the price discrimination provisions of the original Clayton Act, where the smaller competitor met the below cost prices at substantial monetary losses but was still in business and did not suffer loss of market share, the Court of Appeals held:

* * * If this competition, resulting in such loss, continued, it is fair to assume that the appellee could not continue in business, and its elimination as a competitor was certain. Thus the appellant's discrimination will substantially lessen competition. * * *

Thus it may be seen that an actual effect, or elimination of a competitor, was not a prerequisite there. That such an actual effect on competition, as distinguished from a reasonable probability thereof, is not required under a Section 5 selling below cost charge was made clear by the Court of Appeals in the *Muller* case,[21] where the Court stated:

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[19] *Atlas Building Prod. Co.* v. *Diamond Block & Gravel Co.*, 269 F. 2d 950 (10th Cir. 1959).
[20] *Porto Rican American Tob. Co.* v. *American Tob. Co.*, 30 F. 2d 234 (2d Cir. 1929).
[21] *E. B. Muller & Co., et al.* v. *Federal Trade Commission*, 142 F. 2d 511, 517 (6th Cir. 1944).

* * * The fact that the sales were not greatly below cost does not aid the petitioners. It was not necessary that the evidence show that Schanzer suffered loss. *Federal Trade Commission* v. *Raladam Co.*, 316 U.S. 149, 152. The purpose of the Federal Trade Commission Act is to prevent potential injury by stopping unfair methods of competition in their incipiency. *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 466. * * *

It is concluded and found that the effect of Crown's selling below cost may be substantially to lessen competition in violation of Section 5 of the Act.

CONCLUSIONS OF LAW

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

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

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

4. The acts and practices of respondent hereinabove found in Section III C were with the intent and purpose, and under circumstances where the effect may be, substantially to lessen competition, and constitute unfair methods of competition and unfair acts and practices in commerce within the intent and meaning of the Act.

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

ORDER

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

1. Entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, contract or conspiracy with any person or per-

sons not parties hereto, to establish, fix, adopt, maintain, adhere to, or stabilize by any means or method, prices at which its gasoline is to be resold: *Provided, however,* That nothing contained in this section shall be construed to limit or otherwise affect any resale price maintenance contracts which respondent may enter into in conformity with Section 5 of the Federal Trade Commission Act, as amended by the McGuire Act (Public Law 542, 82nd Cong., 2nd Session, approved July 14, 1952).

2. Selling or offering to sell its gasoline at a price less than the cost thereof to respondent with the purpose or intent, or where the effect may be, substantially to lessen competition or tend to create a monopoly in the distribution or sale of gasoline.

ORDER VACATING INITIAL DECISION AND DISMISSING COMPLAINT

This matter having come before the Commission on the appeal of respondents from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having determined that the initial decision should be vacated and set aside and that the complaint be dismissed:

It is ordered, That the initial decision in this proceeding be, and it hereby is, vacated and set aside.

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

By the Commission, without the concurrence of Commissioner MacIntyre. Commissioner Jones did not participate.

IN THE MATTER OF

SIMON AND SCHUSTER, INC., ET AL.

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

Docket 8594. Complaint, Sept. 6, 1963—Decision, June 30, 1967.

Order dismissing complaint which charged a book publisher, advertising agency, and a physician with making false claims in advertising a book on dieting.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Simon and Schuster, Inc., a corporation, and Jason C. Berger, individually and as an officer of said corporation, and Richard L. Grossman, individually, Schwab, Beatty and Porter, Inc., a corporation, and Herman Taller, an individual, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Simon and Schuster, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. This respondent has offices and its principal place of business at 630 Fifth Avenue, in the city of New York, State of New York.

Respondent Jason C. Berger, an officer of Simon and Schuster, Inc., actually participates in the formulation, direction and control of the policies, acts and practices of said corporation including the acts and practices hereinafter set forth. His address is 630 Fifth Avenue in the city of New York, State of New York.

Respondent Richard L. Grossman was formerly an officer of Simon and Schuster, Inc., during which time he actively participated in the formulation, direction and control of the policies of said corporation in connection with the acts and practices set forth herein. His address is Valley Stream Road, in the city of Larchmont, State of New York.

Respondent Schwab, Beatty and Porter, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York. This respondent has offices and its principal place of business at 660 Madison Avenue, city of New York, State of New York.

Respondent Herman Taller is an individual, a licensed and practicing physician, whose address is 440 East 57th Street, New York, New York.

PAR. 2. Respondents Simon and Schuster, Inc., and Jason C. Berger are now, and for some time last past have been, engaged in the publication, promotion, sale and distribution of a book entitled "Calories Don't Count" by respondent Herman Taller. These respondents cause said book when sold to be transported from their place of business in the State of New York to pur-

chasers located in various other States of the United States and in the District of Columbia. These respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said book in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondent Richard L. Grossman has engaged in the business described herein and has participated in the acts and practices herein described.

Respondent Schwab, Beatty and Porter, Inc., is now, and at all times mentioned herein has been, the advertising agency of respondent Simon and Schuster, Inc., and now prepares and places, and has prepared and placed, for publication the advertising and promotional material, referred to herein, to induce the sale of the aforesaid book, and through such means has promoted the sale and distribution of Safflower Oil Capsules.

PAR. 3. Cove Vitamin and Pharmaceutical, Inc., is a corporation organized and existing under and by virtue of the laws of the State of New York.

Harry Bobley, Edward Bobley and Peter M. Bobley are officers of Cove Vitamin and Pharmaceutical, Inc. They each participate in the formulation, direction and control of the policies, acts and practices of said corporation, including the acts and practices hereinafter set forth.

CDC Pharmaceutical Corporation is a corporation organized and existing under and by virtue of the laws of the State of New York. It is a subsidiary of Cove Vitamin and Pharmaceutical, Inc.

Kenneth Beirn is an individual who resides in the city of New York, State of New York.

Cove Vitamin and Pharmaceutical, Inc., CDC Pharmaceutical Corporation, Harry Bobley, Edward Bobley and Peter M. Bobley have been engaged in the promotion, sale and distribution of safflower oil capsules designated "CDC Capsules" and have participated in the acts and practices set forth below. They have caused said capsules when sold to be transported from the place of business in the State of New York to purchasers located in various other States of the United States and in the District of Columbia. They have maintained, at all times material to this complaint, a substantial course of trade in said capsules in commerce, as "commerce" is defined in the Federal Trade Commission Act.

Kenneth Beirn participated in the promotion, sale and distribution of the book entitled "Calories Don't Count" and the

safflower oil capsules designated "CDC Capsules" and has participated in the acts and practices herein described.

PAR. 4. In the course and conduct of the business of jointly promoting, selling and distributing the book "Calories Don't Count" and the safflower oil capsules, "CDC Capsules," all respondents named herein and the corporations and individuals referred to in Paragraph Three herein, at all times mentioned herein, have been in substantial competition, in commerce, with other corporations, firms and individuals in the sale of books and safflower oil capsules.

PAR. 5. In the course and conduct of their businesses, and for the purpose of inducing the purchase in commerce of said book and of safflower oil capsules, respondents and the corporations and individuals named in Paragraph Three herein have made certain statements and representations with respect thereto in said book and in other advertisements inserted in newspapers and magazines, and in other promotional material, having a general circulation throughout the various States of the United States and in the District of Columbia.

PAR. 6. Among and typical, but not all inclusive, of the statements and representations made and appearing in said advertisements and other promotional material disseminated as herein set forth are the following:

News about a revolutionary reducing plan, based on a new biochemical discovery * * *.

UNBELIEVABLE—but true! You need to eat fat if you are to be slim. It isn't how many calories you consume that matters—but what kind of calories. The inclusion of polyunsaturated fatty acids in your diet is the essential step toward loosening the body's long-stored fat. It is the key to your losing only excess fat rather than vital body tissue.

In this just-published book, CALORIES DON'T COUNT, Dr. Herman Taller explains the principles behind this new understanding of the body's chemistry—and tells you in full detail:

1. How to eat three full meals a day and lose weight in the safest way possible.

* * * * * * *

4. How this radical new way of losing weight is linked with a low cholesterol count, better skin condition, and resistance to colds.

5. Why you may eat fried foods every day and keep slim—what kind of fats to fry them in.

After painstaking research he put his program into practice on a group of 93 problem dieters with extraordinary success. Today patients from all over the country come to Dr. Taller for treatment. And his principles have won ever widening interest in the medical field. In the preface to the book he writes:

"The concept this book advances is revolutionary. Perhaps all I need

say in support of my nutrition principle is that it works. It has been tested in medical laboratories and among large numbers of patients. There have been no failures, nor can there be any when the principle is properly applied. For it is based on new knowledge—a medical breakthrough."

* * * * * * *

How this radical way of losing weight is linked to a low cholesterol count, better skin condition and resistance to colds and sinus trouble.

* * * * * * *

CALORIES DON'T COUNT

* * * * * * *

In addition, you must supplement your diet further in unsaturated fats. In all, you should take three ounces of highly unsaturated vegetable oil and eat two ounces of margarine every day * * *.

* * * * * * *

The key substance in vegetable oils is linoleic acid, an essential, unsaturated fatty acid. The oils with the greatest quantity of linoleic acid are most valuable in conquering obesity and in keeping cholesterol level low * * *.

Clearly, safflower oil is the most valuable by far. * * * Safflower oil is becoming more easily available, both in liquid form and in capsules obtainable at drug and department stores or through such mail-order sources as Cove Pharmaceuticals, New York.

PAR. 7. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondents and the corporations and individuals referred to in Paragraph Three herein, have represented, directly and by implication:

1. That the dietary principals expounded in said book are new, that they are based on a new discovery, new knowledge and new understanding, and that they constitute a medical breakthrough;

2. That a person will be able to loosen long-stored fat by the inclusion of polyunsaturated fatty acids in his diet;

3. That the book truthfully reflects an established scientific fact that polyunsaturated fatty acids are essential to an effective reducing diet, and that polyunsaturated fatty acids are more effective in a reducing diet than are other fats;

4. That said book enables a person to improve the condition of his skin and increase his resistance to colds and sinus trouble;

5. That all other reducing programs and principles will cause loss of vital body tissue or are less safe than those set forth in said book;

6. That the book truthfully reflects an established scientific fact that it is necessary for a person to eat fat in order to lose weight;

7. That calories are not important in relation to obesity, and that a person can reduce his body weight, regardless of the number

of calories consumed, by following the principles set forth in the book sold under the title "Calories Don't Count";

8. That Safflower oil capsules will be of substantial value as a part of diet in reducing body weight.

PAR. 8. In truth and in fact:

1. The dietary principles expounded in said book are not new. They are not based upon a new discovery, new knowledge or new understanding and do not constitute a medical breakthrough;

2. A person, by the inclusion of polyunsaturated fatty acids in his diet, will not be able thereby to loosen long-stored fat;

3. It is not an established scientific fact that polyunsaturated fatty acids are essential to an effective reducing diet, or that they are more effective in a reducing diet than are other fats;

4. Said book will not enable a person to improve the condition of his skin or increase his resistance to colds or sinus trouble;

5. Many reducing programs and principles other than those of respondents' and the corporations and individuals referred to in Paragraph Three herein when properly administered, will not cause loss of vital body tissue and are no less safe than the reducing programs and principles of the respondents and the corporations and individuals referred to in Paragraph Three herein.

6. It is not an established scientific fact that it is necessary for a person to eat fat in order to lose weight;

7. Calories are important in their relation to obesity, and the number of calories consumed by the individual is important to, and directly related to, the reduction of his body's weight. Contrary to representations of the respondents and the corporations and individuals referred to in Paragraph Three herein, a person cannot, by following the principles set forth in the book "Calories Don't Count," reduce his body weight without regard to the number of calories consumed;

8. Safflower oil capsules are not of substantial value as a part of a diet in the reduction of body weight.

Therefore, the statements and representations as set forth in Paragraphs Five and Six were and are false, misleading and deceptive.

PAR. 9. In the course and conduct of their businesses, the respondents and the corporations and individuals referred to in Paragraph Three herein have entered into understandings, agreements, and planned courses of action to mislead and deceive the public into believing that the reducing plans outlined in said book, including the use of safflower oil capsules, would produce the

results in bringing about reduction in body weight specified and implied through the representations contained in said book. Thus, through their understandings, agreements and planned courses of action, respondents and the corporations and individuals referred to in Paragraph Three herein conceived the scheme to make the book entitled "Calories Don't Count" and advertising material which would promote the sale of safflower oil capsules. In doing so the respondents and the corporations and individuals referred to in Paragraph Three herein and each of them acted to induce members of the public to purchase said book and also to purchase safflower oil capsules in commerce.

Pursuant to the said understandings, agreements, arrangements, planned courses of action, combination and conspiracy and in furtherance thereof respondents and the corporations and individuals referred to in Paragraph Three herein have acted in concert and in cooperation in the performance of the things hereinabove alleged and in order to assist them in the effectuation of their scheme, respondents and the corporations and individuals referred to in Paragraph Three herein performed the following acts and practices:

1. Respondent Herman Taller, the nominal author of "Calories Don't Count," presented a draft of the manuscript of his original version of the aforesaid book to the respondent publisher, Simon and Schuster, Inc. Respondent Berger and his associates concluded that in order to further the schemes of the respondents and the corporations and individuals, the book should be revised by some professional writer. Therefore, arrangements were made with Roger Kahn, a sports writer, to revise the manuscript. When the revision was completed, Mr. Kahn had made substantial contributions to the content of the book. Kahn also conceived the title for the book, "Calories Don't Count."

2. During the period of time that Kahn was rewriting the book, respondents and the corporations devised the scheme to make the book a piece of advertising material which would promote the sale of safflower oil capsules. That was done. Respondents and the corporations and individuals referred to in Paragraph Three herein thereupon embarked upon a joint sales campaign for advertising the book "Calories Don't Count" and of advertising through it the sale and distribution of safflower oil capsules. It was their hope that they would develop, through the advertising contained in the book a market for the safflower oil capsules. In this way it was intended that the owners of Cove Vitamin and

the officials of Simon and Schuster would profit at the expense of deceiving and misleading the public through the misleading and false statements contained in the book.

3. By agreement and general understandings, respondents and the corporations and individuals referred to in Paragraph Three herein made it the primary responsibility of respondent Richard L. Grossman and the advertising agency of respondent Schwab, Beatty and Porter, Inc., to prepare, disseminate and make effective various forms of advertising to induce the sale and distribution of the book "Calories Don't Count," and through it the advertising, sale and distribution of safflower oil capsules.

4. This scheme and planned course of action of respondents and the corporations and individuals referred to in Paragraph Three herein went so much further in deceiving and misleading the public than the original version of the manuscript prepared by respondent Taller that he took the position privately, but did not inform the public, that the portion of the book "Calories Don't Count" which referred to safflower oil capsules was without justification.

5. By arrangement of respondents and the corporations and individuals referred to in Paragraph Three herein CDC Pharmaceutical Corporation planned to, and did, use the title of the book "Calories Don't Count," pictures of its cover, and abstracts from its pages for use in the promotion of safflower oil capsules.

6. Respondents and the corporations and individuals referred to in Paragraph Three herein carried out newspaper campaigns and other advertising and promotional activities promoting the sale of the book "Calories Don't Count" and the sale and distribution of safflower oil capsules.

PAR. 10. Each of the respondents and the corporations and individuals referred to in Paragraph Three herein have acted to promote the dissemination and circulation of false and misleading advertising, including the publication, sale and distribution of the advertising material contained in the book "Calories Don't Count" and the advertising material appearing in newspapers, magazines, counter displays and in other forms, to induce not only the sale and distribution of the book "Calories Don't Count" but also of safflower oil capsules. Among the acts thus committed were those involving the advertising hereinafter alleged.

(1) Two advertisements side by side in New York Times, Sunday, December 17, 1961.

(a) for the book "Calories Don't Count":

Read the book the whole country's talking about CALORIES DON'T COUNT by Dr. Herman Taller.

(b) for "CDC Capsules":

Crash! Go Crash Diets * * *. "Eat and lose weight" says Dr. Herman Taller, prominent N.Y. Physician. A Revolutionary new way to lose pounds, inch by inch, while eating and enjoying three square meals a day supplemented by CDC Capsules * * *.

(2) Counter display pictures bottle of "CDC Capsules" and cover of book "Calories Don't Count":

We've Got It!
CDC
Capsules
Calories Don't Count
Weight Control Program.

PAR. 11. The use by the respondents of the foregoing false, misleading and deceptive statements has had, and now has, the tendency and capacity to mislead and deceive members of the purchasing public into the erroneous and mistaken belief that such statements were, and are, true and into the purchase of substantial quantities of the aforesaid book and safflower oil capsules by reason thereof.

PAR. 12. The aforesaid acts and practices of respondents, including the aforesaid understanding, agreement, and planned course of action, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Garland S. Ferguson and *Mr. Richard W. Whitlock* supporting the complaint.

Mr. Selig J. Levitan, for respondents Simon and Schuster, Inc., and *Mr. Jason C. Berger,* as an officer of said corporate respondent; *Mr. Jason C. Berger,* as an individual, *pro se; Mr. Charles Rembar,* for respondent Mr. Richard L. Grossman; *Paul, Weiss, Rifkind, Wharton & Garrison,* for respondent Schwab, Beatty and Porter, Inc.; and *Mr. Emil K. Ellis,* for respondent Mr. Herman Taller, all of New York, N.Y.

INITIAL DECISION BY JOHN LEWIS, HEARING EXAMINER
MAY 27, 1966

STATEMENT OF PROCEEDINGS

The Federal Trade Commission issued its complaint against the above-named respondents on September 6, 1963, charging them with engaging in unfair methods of competition and unfair and deceptive acts and practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act. Said complaint alleges, in substance, that respondents and certain other named corporations and individuals, (a) made false, misleading and deceptive statements and representations in advertisements and other promotional material used in connection with promoting the sale of the publication entitled "Calories Don't Count," and certain safflower oil capsules designated as "CDC Capsules," and (b) entered into understandings, agreements and planned courses of action to mislead and deceive the public in connection with the sale of said publication and capsules. After being served with said complaint, respondents appeared by counsel (except for the individual respondent Berger), and thereafter filed their respective answers denying, in substance, having engaged in the illegal practices charged, and raising certain affirmative defenses in connection therewith, including the defenses that, (a) the activities engaged in by certain of the respondents are protected by the First Amendment to the Constitution of the United States, and (b) this proceeding has become moot by reason of the cessation of the activities complained of prior to the issuance of the complaint herein.

Upon notice duly given, a prehearing conference was held on December 20 and 23, 1963, at New York, New York, before a hearing examiner of the Commission, then assigned to this proceeding. Following said conference a stipulation as to certain of the facts was entered into and signed by counsel supporting the complaint and counsel for all respondents, except respondent Herman Taller. Said stipulation was transmitted to the then hearing examiner on April 30, 1964. Said hearing examiner issued a prehearing order, dated May 4, 1964, defining the principal issues in the case and providing for a stay of all proceedings herein due to the pendency of a criminal proceeding in the United States District Court for the Eastern District of New York against respondent Herman Taller. Such stay was made "subject to motion by any party that the case be set for trial."

The undersigned hearing examiner was substituted as hearing

examiner in this proceeding, in place and stead of the former hearing examiner, by order of the Director of Hearing Examiners, dated December 11, 1964. No hearings were scheduled by the present hearing examiner, based on his understanding that complaint counsel did not desire to proceed to hearing in this proceeding until after the disposition of the criminal proceeding because of the immunity that might be conferred on certain of the witnesses who were expected to testify herein. On March 4, 1966, the undersigned hearing examiner issued an order to show cause why hearings should not be scheduled to begin in the above proceeding at an early date. In response to said order, a series of motions to dismiss the complaint were filed on March 15 and 18, 1966, by all respondents, except respondent Herman Taller who submitted a statement opposing the resumption of hearings herein. Counsel supporting the complaint filed answer, on March 18, 1966, to the order to show cause and to the motions of respondents to dismiss the complaint.

The principal motion to dismiss was filed on behalf of respondent Simon and Schuster, Inc. Said motion requests that this proceeding be dismissed, without prejudice, for the following reasons: (1) Said respondent has neither printed nor advertised the book "Calories Don't Count" since May 1962, has removed said book from the backlist, as well as the current list, of respondent's catalogs since 1964, and said respondent has no intention of printing, advertising or promoting the sale of said book; (2) the exclusive grant to it in the publishing agreement is now subject to termination at will by the author; (3) certain corporations and individuals named in the complaint as being jointly involved with respondents in the sale and promotion of the book and safflower oil capsules have pleaded guilty to certain counts of a criminal indictment filed in the United States District Court for the Eastern District of New York, arising out of the sale and promotion of said capsules, and respondent Herman Taller awaits trial as the only other defendant named in the aforesaid criminal indictment; (4) respondent Simon and Schuster, Inc., has entered into an agreement to merge with another corporation, effective June 30, 1966; and (5) there is no public interest in the resumption of the instant proceeding in view of the foregoing facts and circumstances.

The motions to dismiss filed on behalf of the other respondents, except Herman Taller, adopt the grounds for dismissal set forth in the motion of respondent Simon and Schuster, Inc., and set forth the following additional grounds: (1) Respondent Richard

L. Grossman has not been employed by respondent Simon and Schuster, Inc., since June 1962, has no publishing rights in the book, and has no intention of publishing, promoting or advertising it; (2) respondent Jason C. Berger has not been connected with the sale, advertisement or promotion of the book "Calories Don't Count" since service of a copy of the complaint herein, and has no intention of engaging therein hereafter; and (3) respondent Schwab, Beatty and Porter, Inc., has not caused the book "Calories Don't Count" to be advertised since May 1962, and has no intention of ever advertising such book again. Respondent Herman Taller has filed a statement requesting that this matter not be scheduled for hearing in view of the pendency of the criminal proceeding, in which similar issues are involved.

In the answer filed by them to the order to show cause, complaint counsel state that respondent Herman Taller was indicted on March 11, 1964, by a grand jury in the United States District Court for the Eastern District of New York, on charges of mail fraud, mislabeling in violation of the Federal Food, Drug and Cosmetic Act, and conspiracy in connection with the advertising and sale of the book "Calories Don't Count," and the sale of safflower oil capsules sold under the name of "CDC Capsules." Counsel also state that the three officers of the corporation which manufactured said capsules and which is referred to in Paragraph 3 of the complaint herein, were indicted at the same time. Counsel supporting the complaint express the opinion that the action by the hearing examiner then in charge of this proceeding, in staying any further proceedings herein until the conclusion of the litigation against respondent Taller, was "well taken [since] any further proceeding by the Commission in regards to its litigation against Taller would have raised the grave question of his immunity to the criminal proceedings." Counsel also point out that it was their intention to call as witnesses herein the three officers of the corporations indicted with Taller, and state that such officers would have been unavailable to testify in the Commission proceeding during the pendency of the criminal proceeding. Complaint counsel request that no hearings be scheduled herein while the proceeding against respondent Taller remains pending in the District Court. Counsel advise the examiner that, on the basis of present information, the criminal proceeding against respondent Taller "may be tried sometime in April of 1966."

With respect to the motion to dismiss filed on behalf of respondents other than Taller, complaint counsel state:

Because of the reasons set forth in said motions and in the supporting affidavits, as well as the great lapse of time since the issuance of the complaint in this matter due to the fault of no party to this proceeding, and because of all of the circumstances enumerated herein, counsel supporting the complaint do not oppose the dismissal of the complaint as to said respondents nor in its entirety. It is believed that in consideration of the circumstances, and of the nature of the complaint, if it is dismissed against the moving parties, it should be dismissed as to all respondents. It is further believed that any dismissal should be without prejudice to the Commission to take future corrective action if warranted by the facts.

Ruling on the motions to dismiss was held in abeyance by the undersigned, pending possible disposition of the criminal proceeding against respondent Taller in April. However, the undersigned has been advised by complaint counsel that, according to information recently received from the Assistant United States Attorney for the Eastern District of New York, the criminal proceeding against respondent Taller was not brought to trial in April, and that it appears unlikely such trial will commence prior to the 1966 fall term of court. Accordingly, the examiner has concluded that ruling on said motions to dismiss should not be further deferred.

This matter is now before the examiner for final consideration on the complaint, the answers of respondents, the motions of respondents (other than Taller) to dismiss, and the answer thereto of complaint counsel. It appearing that there is no dispute as to the facts on which respondents base their motions to dismiss, and that complaint counsel do not oppose such motions because of the reasons therein set forth and because of the great lapse of time which has occurred since the issuance of the complaint herein, the undersigned makes the following findings with respect to the facts involved in respondents' motions to dismiss:

FINDINGS

1. The complaint herein, which was issued September 6, 1963, challenges the activities of respondents and certain other corporations and individuals in connection with the publication, promotion, sale and distribution of a book entitled "Calories Don't Count," and the promotion, sale and distribution of certain safflower oil capsules designated as "CDC Capsules."

2. Respondent Simon and Schuster, Inc., has not printed nor advertised for sale the book "Calories Don't Count" since May 1962,* has removed the title of said book from its backlist and

* Among the facts stipulated to in the Stipulation of Facts entered into by all parties except respondent Taller, is the fact that said book was published by Simon and Schuster, Inc., on or about September 27, 1961, and that said respondent has not advertised or promoted the sale of said book since May 20, 1962.

current list in catalogs since 1964, and has no intention of printing, advertising or promoting the sale of said book. The exclusive grant to said respondent in the publishing agreement with the author is now subject to termination at will, and said respondent's corporate existence is expected to terminate June 30, 1966.

3. Respondent Jason C. Berger, an officer of respondent Simon and Schuster, Inc., has not, since the service of the complaint herein, engaged in the sale, advertising or promotion of the book "Calories Don't Count" and does not intend hereafter, in any way, directly or indirectly, to participate or engage therein.

4. Respondent Richard L. Grossman has not been employed by respondent Simon and Schuster, Inc., since June 1962, has no publishing rights in the book "Calories Don't Count" nor any intention of publishing, advertising, or promoting the sale of said book, and has never engaged in the business of selling safflower oil capsules.

5. Respondent Schwab, Beatty and Porter, Inc., has not caused the book "Calories Don't Count" to be advertised since May 1962, and has no intention of ever advertising such book again.

6. The corporations, Cove Vitamin and Pharmaceutical, Inc., and CDC Pharmaceutical Corporation, and/or their officers, Harry Bobley, Edward Bobley and Peter M. Bobley, named in Paragraphs 3 and 4 of the complaint as having engaged in the promotion, sale and distribution of safflower oil capsules designated as "CDC Capsules," and as having participated with respondents in jointly promoting, selling and distributing said capsules and the book "Calories Don't Count," have pleaded guilty to certain counts of an indictment filed in the United States District Court for the Eastern District of New York, relating to the sale, promotion and labeling of safflower oil capsules, and are awaiting sentence therein.

7. Respondent Herman Taller was also indicted in the aforesaid criminal proceeding and is now awaiting trial.

CONCLUSION

In view of the facts above found, the great lapse of time which has occurred since the issuance of the complaint herein, the lack of opposition by counsel supporting the complaint to the motions to dismiss, and the request of counsel supporting complaint that if the complaint is dismissed as to the moving parties, it should be dismissed as to all parties, it is concluded that there is no public interest in the continuance of this proceeding and that the

complaint herein should be dismissed as to all parties, without prejudice to the right of the Commission to take such further corrective action as future events may warrant.

ORDER

It is ordered, That the complaint in the above-entitled proceeding be, and the same hereby is, dismissed, without prejudice to the right of the Commission to take such further corrective action as future events may warrant.

FINAL ORDER

No appeal from the initial decision of the hearing examiner, dismissing the complaint, having been filed, and the Commission having determined that the case should not be placed on its own docket for review and that pursuant to § 3.21 of the Commission's Rules of Practice (effective August 1, 1963), the initial decision should be adopted and issued as the decision of the Commission:

It is ordered, That the initial decision of the hearing examiner shall, on the 30th day of June, 1967, become the decision of the Commission.