

to cease and desist issued herein on October 7, 1965 [68 F.T.C. 87]; and that court on September 29, 1967 [8 S.&D. 556], having issued its opinion and order remanding the proceeding to the Federal Trade Commission for dismissal of the complaint; and the Supreme Court having denied a petition for a writ of certiorari on April 8, 1968, 390 U.S. 1012;

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

IN THE MATTER OF
AMERICAN SAVINGS LIFE INSURANCE COMPANY
ET AL.

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

Docket C-1332. Complaint, May 8, 1968—Decision, May 8, 1968

Consent order requiring a Phoenix, Ariz., mail-order insurance firm to cease misrepresenting its insurance policies by using "Military Life Insurance Policy," "Military Department" and similar terms in its advertising, failing to disclose that the insurance offered is not government sponsored or approved, and using application forms which indicate the policy is already in force.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as that Act is applicable to the business of insurance under the provisions of Public Law 15, 79th Congress (Title 15, U.S. Code, Sections 1011 to 1015, inclusive), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Savings Life Insurance Company, a corporation, and Frihoff N. Allen, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent American Savings Life Insurance Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona, with its principal office and place of business at 3336 North 7th Street, in the city of Phoenix, State of Arizona.

Respondent Frihoff N. Allen is an officer of said corporation. He formulates, directs and controls the acts and practices of said corpora-

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tion, including the acts and practices hereinafter set forth. His address is the same as that of said corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged as insurers in the business of insurance in commerce, as "commerce" is defined in the Federal Trade Commission Act. As a part of said business in "commerce," said respondents have entered into insurance contracts with insureds located in various States of the United States other than the State of Arizona in which States the business of insurance is not regulated by State law to the extent of regulating the practices of said respondents alleged in this complaint to be illegal.

PAR. 3. Respondents, in conducting the aforesaid business, have sent and transmitted, and have caused to be sent and transmitted, by means of the United States mails and by various other means, letters, application forms, contracts, checks, completed preendorsed policy forms and papers and documents of a commercial nature from their place of business in the State of Arizona to purchasers and prospective purchasers located in various other States of the United States and have thus maintained a substantial course of trade in said insurance contracts, policies and other papers and documents of a commercial nature in commerce between and among the several States of the United States.

PAR. 4. Respondent American Savings Life Insurance Company is licensed, as provided by State law, to conduct the business of insurance only in the States of Arizona and Utah. Said respondent is not now and for some time last past has not been, licensed as provided by State law to conduct the business of insurance in any State other than the ones designated in this paragraph.

PAR. 5. Respondents have solicited business by mail in various States of the United States in addition to the States named in Paragraph Four above. As a result thereof, they have entered into insurance contracts with insureds located in many States in which they are not licensed to do business. Said respondents' business practices are, therefore, not regulated by State law in any of those States in which respondents are not licensed to do business as they are not subject to the jurisdiction of such States.

PAR. 6. In the course and conduct of the said business, and for the purpose of inducing the purchase of said policies, respondents have made numerous statements and representations concerning said policies by means of circular letters, policy forms, ownership certificates, allotment forms and other advertising material disseminated throughout various States of the United States. Three mailings were used to elicit purchases of policies. The original mailing of said advertising

material consisted of a transmittal window envelope with the name and address of the beneficiary as printed on the policy form plainly visible, as follows.*

The envelope described and pictured above contained a "Dear Parent" type form letter, what purported to be a valid completed insurance policy, a so-called ownership certificate and a postage paid self-addressed return envelope directed to the company's "Military Department" as shown below.*

The form letter was addressed to and contained the names and home address of the parents or other relatives of newly inducted servicemen. The name of the serviceman appeared as the "insured" on the face of the policy form, together with the name of the beneficiary, a policy number, dispatch date, face amount of the policy, and signatures and titles of the secretary and president of the corporation.

The second mailing did not involve the use of a preendorsed completed policy form but did include a transmittal envelope, "Dear Parent" letter, a return envelope bearing the designation "Military Department," and a copy of a form titled "Allotment Certificate," as shown below.*

The third mailing was substantially the same as the second except for a slight difference in the "Allotment Certificate" form.

PAR. 7. By and through the use of the aforesaid acts, practices, statements and representations and others of a similar nature and import, respondents have represented, directly or by implication:

1. That the insurance offered for sale by respondents was being made available to servicemen by the United States Government; or that said insurance had been approved, endorsed or recommended by the United States Government.

2. That the insurance offered for sale by respondents was initiated by the serviceman named as the "insured" therein or was issued with his knowledge and consent.

3. That the policy form offered and sent to the addressees was a valid, completed insurance policy in force at the time of its receipt.

4. That the insurance offered for sale by respondents would be issued regardless of the military status or duty assignment of the insured.

PAR. 8. In truth and in fact:

1. The insurance offered for sale by respondents was not being made available to servicemen by the United States Government nor had

*Pictorial material omitted in printing.

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said insurance been approved, endorsed or recommended by the United States Government.

2. The insurance offered for sale by respondents was not initiated by the serviceman named as the "insured" therein and it was not issued with his knowledge or consent.

3. The policy form offered and sent to the addressees was not an insurance policy in force at the time of its receipt; on the contrary, said policy form was merely a proposed or sample policy which did not become effective until the required premium and certificate were received from the addressee.

4. The insurance offered for sale by respondents was not issued regardless of the military status or duty assignment of the insured.

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

PAR. 9. In the conduct of its business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of insurance of the same general kind and nature as that sold by respondents.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' policies by reason of said erroneous and mistaken beliefs.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were all to the prejudice and injury of the public and of respondents' competitors and constituted 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.

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The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent American Savings Life Insurance Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona, with its principal office and place of business located at 3336 North 7th Street, in the city of Phoenix, State of Arizona.

Respondent Frihoff N. Allen is an officer of said corporation and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents American Savings Life Insurance Company, a corporation, and its officers, and Frihoff N. Allen, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or indirectly through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of any insurance policy or policies, in commerce, as "commerce" is defined in the Federal Trade Commission Act, except in those states where respondents are licensed and regulated by State law to conduct the business of insurance, do forthwith cease and desist from:

1. Using the expressions "Special \$10,000 Military Life Insurance Policy," "Allotment Certificate," "Military Department,"

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"No Military Restrictions" or any other words or terms of similar import or meaning.

2. Using any letter or other solicitation material in contacting parents or other relatives of members of the Armed Forces of the United States which does not reveal in a prominent place, in clear language and in type at least as large as the largest type used on said material; (a) that the insurance offered for sale by respondents is in addition to, and separate from, the insurance made available to servicemen by the United States Government; (b) that said insurance has not been approved or recommended by the United States Armed Forces or any agency of the United States Government; and (c) that said insurance is being offered without the knowledge or consent of the serviceman who appears as the insured therein.

3. Using any policy form or similar document, prior to the receipt by respondents of the required premium, which contains the name of the insured, designation of the beneficiary, policy number, or signature of any representative of respondents; or which contains any indicia of an executed, inforce insurance policy.

4. Representing, directly or by implication, that the insurance offered for sale by respondents has been made available by, or has been approved, endorsed or recommended by, the United States Government or any agency or office thereof.

5. Misrepresenting in any manner the conditions or circumstances under which such insurance was initiated or issued.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

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

IN THE MATTER OF

ARK-LA-TEX WAREHOUSE DISTRIBUTORS, INC., ET AL.

ORDER OF DISMISSAL, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC.
2 (f) OF THE CLAYTON ACT*Docket 7592. Amended complaint, Mar. 8, 1960—Decision, May 9, 1968*

Order terminating a proceeding against nine distributors of automotive parts for allegedly inducing discriminatory prices from their suppliers, principal respondent has been dissolved.

AMENDED COMPLAINT

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

PARAGRAPH 1. Respondent Ark-La-Tex Warehouse Distributors, Inc., hereinafter sometimes referred to as respondent Ark-La-Tex, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 310 Grand Avenue, Paris, Texas.

Respondent Ark-La-Tex, although using corporate form, is a membership organization, organized, maintained, managed, controlled and operated by and for its members. The membership of respondent Ark-La-Tex is composed of corporations, partnerships, and individuals whose business consists of the jobbing of automotive products and supplies.

Respondent Ark-La-Tex, as constituted and operated, is known and referred to in the trade as a buying group.

PAR. 2. The following respondent corporations and individuals, sometimes hereinafter referred to as respondent jobbers, constitute respondent Ark-La-Tex:

Respondent Automotive Appliance Company, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 1820 Canton Street, Dallas, Texas.

Respondent Auto Parts & Equipment Co., Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oklahoma, with its principal office and place of business located at 18 North Ninth Street, Duncan, Oklahoma.

Respondent Ferguson Auto Supply Co., Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 1710 Avenue J, Lubbock, Texas.

Respondent Harold, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, with its principal office and place of business located at 1112 Oak Avenue, Lafayette, Louisiana.

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Respondent Ada Motor Sales, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oklahoma, with its principal office and place of business located at 209 East Main, Ada, Oklahoma.

Respondent Standard Parts Co. of Houston, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 1602 McKinney, Houston, Texas.

Respondent Tri-State Automotive Co., Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Louisiana, with its principal office and place of business located at 953 Louisiana Avenue, Shreveport, Louisiana.

Respondent Westbrook Supply Co., Inc.,¹ is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Arkansas, with its principal office and place of business located at 3rd and Hazel Streets, Texarkana, Arkansas.

Respondents Rezi J. Cogdell, Louis W. Barnett,² and Eleanor R. Bradshaw are copartners doing business under the firm name and style of Cogdell Auto Supply Co., a partnership, with their office and principal place of business located at 301 Calhoun Street, Fort Worth, Texas.

Respondents Leo H. Bradshaw, Sr., and Eleanor R. Bradshaw are copartners doing business under the firm name and style of Cogdell Auto Supply Co., a partnership, with their office and principal place of business located at 1004 Franklin Avenue, Waco, Texas.

Respondents John A. Scarborough and R. Leon Hodges are copartners doing business under the firm name and style of Grand Auto Parts, a partnership, with their office and principal place of business located at 310 Grand Avenue, Paris, Texas.

Respondents Gene Mahanay and F. W. Mahanay are copartners doing business under the firm name and style of Mahanay Brothers Auto Parts, a partnership, with their office and principal place of business located at 215 Frisco Avenue, Clinton, Oklahoma.

Respondents H. R. Wilson, Patrick Ferchill, and Jack W. Durrett, Sr., are copartners doing business under the firm name and style of Mt. Pleasant Service Parts Company, a partnership, with their office and principal place of business located at 312-14 North Jefferson, Mt. Pleasant, Texas.

¹ The correct name of respondent is Westbrook Supply, Inc., as noted in the initial decision.

² The correct name of respondent is Louie W. Barnett, as noted in the initial decision.

Respondents Henry C. Nichols and Percy E. Nichols are copartners doing business under the firm name and style of Nichols Brothers, a partnership, with their office and principal place of business located at 310-12 Kansas, Chickasha, Oklahoma.

Respondents Wallace M. Fontaine and Patrick Ferchill are copartners doing business under the firm name and style of Reliable Motor Supply Company, a partnership, with their office and principal place of business located at 301 East Broadway, Gladewater, Texas.

Respondents Patrick Ferchill, Vic Ferchill, and Joe Ferchill are copartners doing business under the firm name and style of Reliable Motor Supply Company, a partnership, with their office and principal place of business located at 201 South High, Longview, Texas.

Respondents Sam Bonham and Charles Strickland are copartners doing business under the firm name and style of Sulphur Springs Parts Company, a partnership, with their office and principal place of business located at Main Street, Sulphur Springs, Texas.

Respondent Aubrey W. Byrd³ is a sole proprietor doing business under the firm name and style of Byrd Service Parts, with his principal office and place of business located at 605 East Erwin Street, Tyler, Texas.

Respondent Wilfred L. Smith is a sole proprietor doing business under the firm name and style of The Motor Supply, with his principal office and place of business located at 124 North Lafayette, Marshall, Texas.

Respondent W. E. Sells is a sole proprietor doing business under the firm name and style of Sells Auto Supply, with his principal office and place of business located at 519-23 East Kleberg, Kingsville, Texas.

Respondent James E. Walker is a sole proprietor doing business under the firm name and style of Walker Auto Parts, with his principal office and place of business located at 407-411 East Third Street, Big Spring, Texas.

Respondent Dee White is a sole proprietor doing business under the firm name and style of White Auto Supply Company, with his principal office and place of business located at 107 Charlevois Street, Henderson, Texas.

PAR. 3. The respondent jobbers set forth in Paragraph Two have purchased and now purchase in commerce from suppliers engaged in

³ The correct name of respondent is William Aubrey Byrd, as noted in the initial decision.

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commerce numerous automotive products and supplies for use, consumption, or resale within the United States. Respondent jobbers and said suppliers cause the products and supplies so purchased to be shipped and transported among and between the several States of the United States from the respective State or States of location of said suppliers to the respective different States of location of the said respondent jobbers.

PAR. 4. In the purchase and the resale of said automotive products and supplies, respondent jobbers are in active competition with independent jobbers not affiliated with respondent Ark-La-Tex; and the suppliers selling to respondent jobbers and to their independent jobber competitors are in active competition with other suppliers of similar automotive products and supplies.

PAR. 5. Respondent Ark-La-Tex, since its formation in 1948, has been and is now maintained, managed, controlled, and operated by and for the respondent jobbers set forth in Paragraph Two and each said respondent has participated in, approved, furthered, and cooperated with the other respondents in the carrying out of the procedures and activities hereinafter described.

In practice and effect, respondent Ark-La-Tex has been and is now serving as the medium or instrumentality by, through, or in conjunction with, which said respondent jobbers exert the influence of their combined bargaining power on the competitive suppliers hereinbefore described. As a part of their operating procedure, said respondent jobbers direct the attention of said suppliers to their aggregate purchasing power as a buying group and, by reason of such, have knowingly demanded and received, upon their individual purchases discriminatory prices, discounts, allowances, rebates, and terms and conditions of sale. Suppliers not acceding to such demands are usually replaced as sources of supply for the commodities concerned and such market is closed to them in favor of such suppliers as can be and are induced to afford the discriminatory prices, discounts, allowances, rebates, and terms and conditions of sale so demanded.

Respondent jobbers demand that those suppliers who sell their products pursuant to a quantity discount schedule shall consider their several purchases in the aggregate as if made by one purchaser and grant quantity discounts, allowances, or rebates on the resultant combined purchase volume in accordance with said suppliers' schedule. This procedure effects a discrimination in price on goods of like grade and quality between respondent jobbers and competing independent jobbers whose quantity discounts, allowances, or rebates from such suppliers are based upon only their individual purchase volumes. From

other suppliers the respondent jobbers demand the payment or allowance of trade discounts, allowances, or rebates which such suppliers do not ordinarily pay or allow to jobber customers. This procedure effects a discrimination in price on goods of like grade and quality between respondent jobbers and competing independent jobbers who are not afforded such trade discounts, allowances, or rebates.

When and if a demand is acceded to by a particular supplier, the subsequent purchase transactions between said supplier and the individual jobber respondents have been and are billed to, and paid for through, the aforesaid organizational device of respondent Ark-La-Tex. Said corporate organization thus purports to be the purchaser when in truth and in fact it has been and is now serving only as agent for the several respondent jobbers and as a mere bookkeeping device for facilitating the inducement and receipt by the aforescribed respondent jobbers of the price discriminations concerned.

PAR. 6. Respondents have induced or received from their suppliers, in the manner aforescribed, favorable prices, discounts, allowances, rebates, terms and conditions of sale which they knew or should have known constituted discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

PAR. 7. The effect of the knowing inducement or receipt by respondents of the discriminations in price as above alleged has been and may be substantially to lessen, injure, destroy, or prevent competition between suppliers of automotive products and supplies and between respondent jobbers and independent jobbers.

PAR. 8. The foregoing alleged acts and practices of respondents in knowingly inducing or receiving discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, are in violation of subsection (f) of Section 2 of said Act.

Mr. Hugh B. Helm and Mr. Roy C. Palmer, Jr., supporting the complaint.

Fisher, McLaughlin & Harrison, Paris Texas, by *Mr. J. D. McLaughlin*, originally counsel for all respondents except respondents *Mr. Jack W. Durrett, Sr.*, *Mr. Dee White*, *Westbrook Supply, Inc.*, and *Mr. Leo H. Bradshaw, Sr.*

Goodwin & Cavin, Tyler, Texas, for respondent *Mr. Jack W. Durrett, Sr.*

Mr. Gordon R. Wellborn, Henderson, Texas, for respondent *Mr. Dee White*.

Smith & Sanderson, Texarkana, Arkansas, for respondent *Westbrook Supply, Inc.*

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INITIAL DECISION BY EDWARD CREEL, HEARING EXAMINER

FEBRUARY 18, 1965

The Federal Trade Commission on September 22, 1959, issued its original complaint and on March 8, 1960, its amended complaint against the respondents herein, charging them with knowingly inducing or receiving discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, in violation of subsection (f) of Section 2 of the Clayton Act, as amended. The complaint charged specifically that the respondent jobbers induced manufacturer-suppliers of automotive products and supplies to grant preferential prices to them for the commodities they purchased through their wholly owned and controlled organization, Ark-La-Tex Warehouse Distributors, Inc. The complaint alleged that the effect has been and may be to adversely affect competition between suppliers of automotive products and supplies, and between respondents and competing independent jobbers.

After the answers were filed, the case was tried and an initial decision was issued October 13, 1961, which included an order prohibiting respondents from inducing or receiving price discriminations. On June 5, 1963 [62 F.T.C. 1557], the Commission vacated the initial decision and remanded the case to the hearing examiner, ordering that the hearing examiner further consider this matter in the light of the opinion of the Court of Appeals in *Alhambra Motor Parts, et al. v. F.T.C.*, 309 F.2d 213 (1962), which was issued subsequent to the initial decision herein, and that the new initial decision include specific findings and references to the evidence relied upon with respect to all issues, including five specified issues, and provide for the reception of such further evidence as may be necessary. A prehearing conference and hearings were thereafter held and the record was closed October 23, 1964.

Thereafter, proposed findings of fact, conclusions of law, and order were filed by the parties on December 10, 1964, and replies thereto were also filed. Such proposals, including supporting briefs, have been considered, and those findings not herein adopted either in form or in substance, are rejected as not being supported by the record or as involving immaterial matters, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom, and order:

FINDINGS OF FACT

In this industry, which includes respondents and is sometimes referred to as the automotive aftermarket industry, manufacturers gener-

ally sell to wholesalers, wholesalers sell to dealers, and dealers sell to motorists. There are two levels of wholesalers; one is the warehouse distributor who generally sells only to the other level of wholesalers known as jobbers, and both levels of wholesalers buy from manufacturers.

Respondent Ark-La-Tex Warehouse Distributors, Inc., hereinafter sometimes referred to as Ark-La-Tex, was a Texas corporation with its principal office and place of business located at 310 Grand Avenue, Paris, Texas. This corporation was dissolved on May 1, 1963, under the Texas laws and no longer exists. (Exhibit A to motion filed August 31, 1964.)

At the time of the issuance of the complaint in this proceeding, or for a substantial period of time after its organization, the members of Ark-La-Tex were as follows:

Respondent Automotive Appliance Company, Inc., a Texas corporation, with its principal office and place of business located at 1820 Canton Street, Dallas, Texas.

Respondent Auto Parts & Equipment Co., Inc., an Oklahoma corporation, with its principal office and place of business located at 18 North Ninth Street, Duncan, Oklahoma.

Respondent Ferguson Auto Supply Co., Inc., a Texas corporation, with its principal office and place of business located at 1710 Avenue J, Lubbock, Texas.

Respondent Harold, Inc., a Louisiana corporation, with its principal office and place of business located at 1112 Oak Avenue, Lafayette, Louisiana.

Respondent Ada Motor Sales, Inc., an Oklahoma corporation, with its principal office and place of business located at 209 East Main, Ada, Oklahoma.

Respondent Standard Parts Co. of Houston, Inc., a Texas corporation, with its principal office and place of business located at 1602 McKinney, Houston, Texas.

Respondent Tri-State Automotive Co., Inc., a Louisiana corporation, with its principal office and place of business located at 953 Louisiana Avenue, Shreveport, Louisiana.

Respondent Westbrook Supply, Inc. (erroneously named in the complaint as Westbrook Supply Co., Inc.), an Arkansas corporation, with its principal office and place of business located at Third and Hazel Streets, Texarkana, Arkansas.

Respondents Rezi J. Cogdell, Louie W. Barnett (erroneously named in the complaint as Louis W. Barnett), and Eleanor R. Bradshaw, copartners, doing business under the firm name and style of Cogdell

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Auto Supply Co., with their office and principal place of business located at 301 Calhoun Street, Fort Worth, Texas.

Respondents Leo H. Bradshaw, Sr., and Eleanor R. Bradshaw, copartners, doing business under the firm name and style of Cogdell Auto Supply Co., with their office and principal place of business located at 1004 Franklin Avenue, Waco, Texas.

Respondents John A. Scarborough and R. Leon Hodges, copartners, doing business under the firm name and style of Grand Auto Parts, with their office and principal place of business located at 310 Grand Avenue, Paris, Texas.

Respondents Gene Mahanay and F. W. Mahanay, copartners, doing business under the firm name and style of Mahanay Brothers Auto Parts, with their office and principal place of business located at 215 Frisco Avenue, Clinton, Oklahoma.

Respondents H. R. Wilson, Patrick Ferchill, and Jack W. Durrett, Sr., copartners, doing business under the firm name and style of Mt. Pleasant Service Parts Company, with their office and principal place of business located at 312-14 North Jefferson, Mt. Pleasant, Texas.

Respondents Henry C. Nichols and Percy E. Nichols, copartners, doing business under the firm name and style of Nichols Brothers, with their office and principal place of business located at 310-12 Kansas, Chickasha, Oklahoma.

Respondents Wallace M. Fontaine and Patrick Ferchill, copartners, doing business under the firm name and style of Reliable Motor Supply Company, with their office and principal place of business located at 301 East Broadway, Gladewater, Texas.

Respondents Patrick Ferchill, Vic Ferchill, and Joe Ferchill, copartners, doing business under the firm name and style of Reliable Motor Supply Company, with their office and principal place of business located at 201 South High, Longview, Texas.

Respondents Sam Bonham and Charles Strickland, copartners, doing business under the firm name and style of Sulphur Springs Parts Company, with their office and principal place of business located at Main Street, Sulphur Springs, Texas.

Respondent William Aubrey Byrd (erroneously named in the complaint as Aubrey W. Byrd), a sole proprietor, doing business under the firm name and style of Byrd Service Parts, with his principal office and place of business located at 605 East Erwin Street, Tyler, Texas.

Respondent Wilfred L. Smith, a sole proprietor, doing business under the firm name and style of The Motor Supply, with his principal office and place of business located at 124 North Lafayette, Marshall, Texas.

Respondent W. E. Sells, a sole proprietor, doing business under the firm name and style of Sells Auto Supply, with his principal office and place of business located at 519-23 East Kleberg, Kingsville, Texas.

Respondent James E. Walker, a sole proprietor, doing business under the firm name and style of Walker Auto Parts, with his principal office and place of business located at 407-411 East Third Street, Big Spring, Texas.

Respondent Dee White, a sole proprietor, doing business under the firm name and style of White Auto Supply Company, with his principal office and place of business located at 107 Charlevoix Street, Henderson, Texas. (Answers, CXs 4, 602.)

Ark-La-Tex was maintained, managed, controlled, and operated by and for the members above-named, and each member actively participated in, approved, furthered, and cooperated with the other members in carrying out the acts and practices hereinafter found which were knowingly designed and intended to induce the granting of discriminatory and illegal prices, discounts, allowances, rebates, terms, and conditions of sale to the members. Such participation included service as officers and directors of Ark-La-Tex and as members of various committees of said group organization. (CXs 4-29-C; Tr. 19, 112, 595, 821, 835.)

At all times, the jobber-members had complete control of their central organization, Ark-La-Tex. Each member of Ark-La-Tex was a director of Ark-La-Tex, and all of the business of Ark-La-Tex was conducted by its board of directors. The membership, as a whole, approved the acceptance of new lines of merchandise and the terms and conditions with respect thereto; and approved the admission of new members. The members retained the right to withdraw from the group at any time and to dissolve the corporation. The members of Ark-La-Tex were corporations, partnerships, and individuals whose business consisted principally of the jobbing of automotive products and supplies. Ark-La-Tex, as constituted and operated, was known and referred to in the trade as a buying group. (CXs 1, 2, 9, 172-C.)

The members of Ark-La-Tex purchased in interstate commerce from suppliers engaged in interstate commerce numerous automotive products and supplies for resale within their trade areas. (CXs 36-143, 144-50, 601, 608.) One situation which shows that the members were, in fact, the buyers from suppliers rather than Ark-La-Tex, and that Ark-La-Tex, the members of Ark-La-Tex, and the suppliers all recognized this fact, was a dispute which arose regarding the acceptance of a new group member as a customer of one of the suppliers. In a

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letter from the supplier to Ark-La-Tex, dated March 11, 1954, it was stated:

Acceptance of a new group member is at our discretion, and until we can talk with the Ferguson Auto Supply, we will not accept Ark-La-Tex purchase orders for this new member. (CX 183-A.)

In a letter of March 16, 1955, the member wrote to this supplier:

Enclosed is our signature on your form #4427.

We want to protest again the fact that we are not allowed to buy through Ark-La-Tex Warehouse Distributors, Inc., our buying group.

Your line is included in our group and we are buying your merchandise and have been for years. There is no real reason why we should not be allowed to buy through our group in order to obtain the better rebates that are extended to others. (CX 183-B.)

On March 18, 1955, the president of Ark-La-Tex wrote to this supplier:

I have a copy of the letter Mr. Fred Pinkston, of Ferguson Auto Supply, Lubbock, Texas, wrote you on March 16, with reference to buying Federal-Mogul through Ark-La-Tex.

As you know, Mr. Pinkston has been a member of our organization for quite some time, and I am at a loss to understand why you do not honor Ark-La-Tex purchase orders issued by him.

Since I am completely in the dark on this situation, I shall appreciate your bringing me up to date. (CX 183-C.)

The members and suppliers caused the automotive products and supplies, so purchased, to be shipped and transported among and between the several States of the United States from the respective State or States of location of the suppliers to the respective different States of location of the members. (CXs 5, 150.)

The members of Ark-La-Tex, in the purchase and resale of automotive products and supplies, were in active and substantial competition with other corporations, partnerships, firms, and individuals who were also engaged in the purchase and resale of such automotive products and supplies of like grade and quality, in interstate commerce, which automotive products and supplies had been purchased from the same and competing sellers. It is apparent from the nature of the automotive jobbing business and from the testimony of jobbers that automotive jobbers located in the same towns and even those located in cities as large as Dallas are in competition with each other in such towns and cities selling to dealers and fleets. (Tr. 129, 599, 648, 704, 754, 782, 820, 1503, 1548.) The suppliers selling to the members and to their competitors were also in active and substantial competition with other suppliers of like or similar automotive products and supplies in interstate commerce. (Tr. 212, 368, 445, 537, 585.)

The member-owners organized, maintained, controlled, and operated Ark-La-Tex for the purpose of inducing the granting or allowance of lower and more favorable prices by manufacturers and sellers of automotive products and supplies. It was a membership corporation serving only members. Participation of the members in the net income of Ark-La-Tex was based on a percentage of their individual purchases through the group organization. (CX 2; Tr. 1241.)

Ark-La-Tex had no capital stock, and the purpose of its organization was not to make a profit as a corporation but, as stated in the bylaws, "The purpose of this association shall be to purchase from manufacturers goods, wares and merchandise for such of its members who desire the same, in order to receive quantity-purchase discounts or prices." It was referred to in its bylaws as an association and was referred to by its members as an association, and its directors were referred to as members. (CXs 1, 2.) The ownership of Ark-La-Tex was not a transferable asset of its members, and membership in Ark-La-Tex was not subject to sale or transfer. (CX 2-A.)

The members paid an entrance fee, which was sometimes referred to as a "deposit," and such funds were used by Ark-La-Tex to pay for the products ordered by its members. One result of this method of inventory financing was that the products ordered by the members were paid for in advance. (CX 2-F.)

In accordance with its bylaws, Ark-La-Tex did not order products except upon previous order from its members, until after it had established a warehouse. After it commenced warehousing products, some orders were sent by Ark-La-Tex to the suppliers. (CX 2-I.) Ark-La-Tex did not enter into a contract for the purchase of products from suppliers unless at least 75 percent of its members voted to accept the contract and unless at least 75 percent of its members voted to support the line. Ark-La-Tex did not enter into contracts until it had the agreement just stated (CX 2-D), and, in accordance with the bylaws, the members became bound by such contracts. (CX 2-I.) Ark-La-Tex did not deal with or sell to any jobbers except its own member-owners. (Tr. 149, 1812.)

Certain suppliers granted annual volume discounts to jobber-customers. At the end of the year a discount was rebated to these customers based on their volume of purchases during the preceding year. It had been one of the original purposes in organizing Ark-La-Tex to enable its members to receive the benefit of the aggregate quantity of purchases made by all of its members from suppliers who granted volume discounts or who could be persuaded to grant such discounts. (CX 2-A.) Through the operation of Ark-La-Tex as their buying

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agent, the members were granted a volume discount by certain suppliers based on the total volume of purchases of all the members. This percentage discount was greater than the percentage discount which would have been granted by the suppliers based on the individual volume of purchases made by each member and was greater than the percentage discounts granted to independent jobbers who competed with the members of Ark-La-Tex. (CXs 79, 127, 150-A to 150-Z-3, 151, 276-79; Tr. 105.)

It was the regular procedure for the members, acting through Ark-La-Tex, to either notify or allow competing manufacturers of various lines of automotive products and supplies to submit prices and to appear before the members of the group. The so-called "product committee" of Ark-La-Tex first investigated the lines. If the lines were acceptable to this committee, it related its approval to the president of Ark-La-Tex, who in turn, notified the suppliers to appear before the group members and explain their group deals. The members then considered the offers and voted to accept certain of the lines to the exclusion of the lines of these manufacturers' competitors. A majority vote of 75 percent was necessary before the lines were approved and adopted as group lines. Although it was not a rigid requirement that the members handle all of the group lines, in actual practice almost all of the members of the group purchased and sold the particular manufacturers' lines accepted and handled by the group. (CXs 6-29.)

When and if a demand was acceded to by a particular supplier, the subsequent purchase transactions between the supplier and the individual members were billed to and paid for through the organizational device of Ark-La-Tex which purported to be the purchaser, when in fact it had been, and was, serving only as agent for the several members and as a device for facilitating the inducement and receipt by the members of the price discriminations concerned. In effect, the members were pooling their bargaining power to obtain better deals than they could obtain separately. (CXs 1, 2.)

The members ordered the lines, which were billed to Ark-La-Tex, from their suppliers by using a standard form of order blank. The suppliers granted to the respondents discounts and rebates on their purchases in various ways. Some suppliers deducted the discount and billed Ark-La-Tex at "net price"; some gave the discounts on the face of the invoice; and some allowed rebates at various intervals of time. Ark-La-Tex, in turn, billed its members monthly and remitted the rebates due the members semiannually. (CXs 2, 3, 35; Tr. 50-60, 91, 103, 1228.)

After a seller's line was accepted by Ark-La-Tex, notice was sent to all members giving full information as to the contract terms agreed upon. These notices were in the form of "Approval Sheets" which were supplied to the members. Each member was supplied with a discount book in which all these group arrangements were kept. When purchasing lines not handled by Ark-La-Tex, the members dealt directly with the suppliers. (CXs 36-143, 185-C; Tr. 45, 72, 79, 113, 124, 625, 772, 799, 1166, 1186, 1199, 1218.)

There were approximately 115 suppliers that sold the group lines to respondents, and the purchases of the members of group lines through or from Ark-La-Tex were substantial. (Tr. 1211.) The rebates and discounts received from the various suppliers by respondents on these purchases were also substantial. For the years 1955 through 1960, they were as follows:

Years	Group purchases	Group rebates in dollars	Group rebates as percentage of purchases
1955.....	\$696, 157. 59	\$87, 713. 58	12. 6
1956.....	704, 484. 60	86, 091. 65	12. 2
1957.....	759, 203. 67	103, 235. 72	13. 6
1958.....	1, 057, 324. 60	147, 538. 42	13. 9
1959.....	1, 515, 597. 91	222, 623. 95	14. 6
1960.....	1, 443, 360. 12	219, 498. 88	15. 2

(CXs 30-4, 145-50-A, 597, 599, 604.)

The figures for several months of 1961 showed a comparable volume and percentage rebate. (CXs 607-09.)

A substantial number of lines accepted by the group were not stocked in the group warehouse. When a member wished to purchase products from the warehouse, an order was sent to Ark-La-Tex, which either procured the merchandise from the supplier or filled the order from its own warehouse stock. When a delivery had been made, Ark-La-Tex billed the member receiving the merchandise. Many suppliers also "drop shipped" directly to the members. Approximately 48 percent of the members' purchases through Ark-La-Tex were "drop shipped" to the members. Each member settled monthly with Ark-La-Tex for his own individual purchases. The group office, in turn, made monthly settlements with the suppliers for the aggregate purchases of all members and semiannually distributed to the members all discounts and rebates received, less operating expenses, in proportion to

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the amount of each member's individual purchases. (CXs 2, 3; Tr. 50-58, 91-94, 147, 1226, 1241.)

The members demanded that those suppliers who sell their products pursuant to a quantity discount schedule consider their several purchases in the aggregate, as if made by one purchaser, and grant quantity discounts, allowances, or rebates on the resultant combined purchase volume in accordance with said suppliers' schedules. This procedure effected a discrimination in price on goods of like grade and quality between members of Ark-La-Tex and competing independent jobbers whose quantity discounts, allowances, or rebates received from such suppliers were based upon only their individual purchase volumes. From other suppliers, the members demanded the payment or allowance of trade discounts, allowances, or rebates which such suppliers did not ordinarily pay or allow to jobber-customers. The members demanded that Ark-La-Tex be classified as a warehouse distributor. This procedure effected a discrimination in price on goods of like grade and quality between the members and competing independent jobbers who were not afforded such trade discounts, allowances, or rebates. (CXs 6-29.)

Almost all of the lines handled by Ark-La-Tex were purchased at the equivalent of warehouse distributor prices. (Tr. 1229.)

The volume rebate granted by certain suppliers to members was a retroactive volume rebate based upon the aggregate purchases of all the members. Typical of such practices was the agreement with Standard Motor Products, Inc., which generally maintained a sliding scale of volume rebates on net amount purchased per year as follows:

Under:	Percent
\$1,800-----	3
\$2,800-----	5
\$4,200-----	10
\$7,200-----	12
\$9,000-----	13
\$12,000-----	15
\$25,000-----	16
\$50,000-----	17
\$75,000-----	18
\$100,000-----	20

In the case of Ark-La-Tex, these rebates were not based on the purchases of the individual member, but instead were based upon the total purchases of all the members of the group organization. (CXs 273-4, 276-8.)

When Ark-La-Tex made payment to this supplier for purchases made during the month by the members, it was permitted to deduct the maximum rebate of 20 percent on paying the invoices. While the aggregate purchases of the members reached the maximum volume of

\$100,000 required for the 20 percent discount, no individual member purchased near this amount. In fact, in 1959 the purchases of only two members reached the 16 percent bracket, two reached the 15 percent bracket, one member earned no discount whatever, and yet all members received the maximum 20 percent volume rebate. In the same trading area there were competitors of respondent members purchasing merchandise of like grade and quality from Standard Motor Products, Inc., who received no discount, or a lower discount, based upon the actual amount of their own individual purchases as provided by Standard's volume rebate discount schedule. (CXs 276, 278: Tr. 463-502.)

Certain manufacturer-suppliers sold their products on a two-price basis. Jobbers were sold at a price that is generally termed as the jobber price. A discount of approximately 20 percent was offered to a class of customers generally termed warehouse distributors. Members of Ark-La-Tex, purchasing through Ark-La-Tex, purchased at a price approximately 20 percent lower than the normal jobber price, said price being termed the warehouse distributor price. (CXs 36-148, 150-A through 150-Z-3, 203, 231, 278-79, 284, 292, 626-1492.)

Independent jobbers, competing with members of Ark-La-Tex and purchasing products of like grade and quality as those purchased by members of Ark-La-Tex, purchased at the normal jobber price. Independent jobbers purchased said products at the jobber prices during the same time period that members of Ark-La-Tex purchased said products through Ark-La-Tex at 20 percent discount off the jobber prices. (CXs 202, 231, 256, 276-77, 285, 291, 294.)

One of the matters that was of concern to the Court of Appeals in the *Alhambra* case, which the Commission referred to in its remand order, was whether the jobber-members of the buying-group organization involved in that case were, in fact, the buyers from the manufacturers and were, accordingly, the recipients of the redistribution discount, or whether the group-buying organization should be considered under the statute to be the buyer. In this case, it is clear from the original plan of the buying organization, as well as the methods employed in its operation, that the members of the organization were the buyers. It is not necessary to disregard the fiction of the separate corporate entity of Ark-La-Tex, which could be done, because it is obvious that it was organized solely as a buying agent for the members. Originally, the orders were actually sent by the members to the suppliers and the goods were ordered in the name of the members. So by any standard, since the goods were bought by the members and the

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discriminatory discounts were paid to the members after subtracting expenses, it is clear that the members were, in fact, the buyers. (CX 2.)

Another issue which concerned the court in the *Alhambra* case was whether the price differentials before the court were cost justified within the meaning of the first proviso of Section 2(a) of the Clayton Act. In this case the costs to be compared are the costs of suppliers in manufacturing, selling, or delivering to independent jobbers who competed with the members of Ark-La-Tex and the costs incurred by these suppliers in selling the members of Ark-La-Tex. There is no indication that any goods were manufactured specially for either group of customers, since both purchased suppliers' regular lines. The evidence does not indicate any substantial difference in the costs of selling to the classes of buyers. In some instances it appears that the suppliers' salesmen called on the members less frequently than other jobbers, but this applied only to a few suppliers. The suppliers maintained sales representatives to call on members purchasing through Ark-La-Tex, and to call on direct-buying, competing jobbers. These sales representatives generally treated these two classes of customers about the same way. Since Ark-La-Tex did not employ salesmen, all sales work, stock checking, explaining, and other missionary work, that was done had to be done by the suppliers' salesmen who were in many instances also required to call regularly on Ark-La-Tex in Paris, Texas, as well as to attend to the sales and promotional meetings held for the members of Ark-La-Tex. (Tr. 1631, 1701-03, 1756, 2006.)

Respondents contend that the furnishing of catalogs to the group members through the group-buying organization resulted in a savings. Ark-La-Tex neither printed nor caused to be printed any price lists or catalogs for its manufacturer-suppliers' products. All price lists and catalogs relating to products that members purchased through Ark-La-Tex were provided by the manufacturer-suppliers. In many cases the manufacturer-suppliers distributed the price lists and catalogs directly to members of Ark-La-Tex. (Tr. 672, 1635, 1703-04, 1756, 1801-04, 1857, 2007.)

It is contended with regard to the portion of purchases which was warehoused by Ark-La-Tex that such warehousing resulted in a savings to suppliers as opposed to shipments made directly to the independent jobbers. While it might appear at first blush that this is true, an analysis of the jobber agreements with suppliers, in the record, will show that when the jobber buys a smaller quantity than the seller will ship from the factory or when for some other reason the buyer desires not to receive direct shipments he pays a higher price—usually about 5 percent—for the privilege of buying through a factory

warehouse or through a commercial warehouse so that the granting of the privilege of buying in small quantities from the suppliers does not result in additional costs to the suppliers.

It is also contended that there was a difference in transportation costs to the suppliers, but if the independent jobber purchased sufficient quantities to obtain a supplier's prepayment of freight, which was in many instances 200 pounds, the independent jobber had the freight paid by the supplier the same as the members of Ark-La-Tex, regardless of whether the shipment went to the Ark-La-Tex warehouse or directly to the member. If the independent jobber bought less than the minimum amount required to obtain freight, then the jobber paid the freight which, of course, was not a cost to the supplier. (Tr. 1638-39, 1706-07, 1759-60, 1849-52, 1856.) Bills were sent to Ark-La-Tex and were paid by Ark-La-Tex, but copies of all bills were sent to the members who ordered the merchandise. It would thus appear that there was no saving in billing costs to the suppliers by virtue of the bills having been paid by Ark-La-Tex.

It appears from the foregoing that there is little, if any, difference between costs of selling and delivering to independent jobbers and to members of Ark-La-Tex. In any event, such difference could not approximate the discounts—usually about 20 percent—which were granted to the members of Ark-La-Tex. Even if all of the costs which Ark-La-Tex incurred, including its payments to members for attending meetings, could be considered as costs which suppliers would have borne but for the existence of Ark-La-Tex, the costs would still not have approached the amount of the discounts, because approximately 11 to 12 percent of net purchases was rebated to the members. There are references in this decision, and contentions by the parties, with respect to the similarity of the functions of Ark-La-Tex to the functions of a so-called legitimate warehouse distributor. This is brought about, in part, because many of the discounts received by the members of Ark-La-Tex were referred to by the suppliers and by the members as warehouse distributor discounts. It is also true that some of Ark-La-Tex's functions were similar to the functions of the warehouse distributor, but the relevant comparison of costs were those which the sellers incurred in dealing with independent jobbers and with respondents because the complaint alleged that the independent jobbers who pay higher prices were the competitors of respondents.

The members of Ark-La-Tex at all times had complete knowledge or had access to complete knowledge of every detail of the operations of Ark-La-Tex. Ark-La-Tex furnished each member with a monthly report, showing purchases of each member from each supplier. Twice

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a year Ark-La-Tex furnished each member with a statement showing Ark-La-Tex's expenses and each member's "profit" on the lines which the member had purchased through Ark-La-Tex during the preceding six-month period. Twice a year Ark-La-Tex rebated to each member the difference between the discriminatory and preferential warehouse distributor functional allowance granted to members on the product lines which they purchased through Ark-La-Tex and the normal jobber price, less the member's proportionate share of Ark-La-Tex's expenses. Each year Ark-La-Tex furnished each member with a certified audit of its operations for the year. (CXs 2-I; Tr. 92-94, 1785-87, 1880-84, 9092, 2075-76.)

From time to time each member of Ark-La-Tex was provided in writing with a complete description of the terms and conditions of sale on the items that the members purchased through Ark-La-Tex. The prices were described in terms of discounts off the jobber prices. Therefore, each member of Ark-La-Tex knew not only the prices paid on purchases through Ark-La-Tex, but also exactly how much more advantageous these prices were than the prices generally paid by non-affiliated, competing jobbers. (CXs 13-143; Tr. 79, 87, 88, 1810.)

Approximately 48 percent of the members' purchases through Ark-La-Tex did not pass through Ark-La-Tex's warehouse in Paris, Texas. These products were shipped directly from the suppliers to the members. This type of shipping is sometimes called drop shipping. Independent, competing, direct-buying jobbers were also shipped directly, although they could in some instances take delivery at a warehouse. Dealing with the members of Ark-La-Tex did not save these suppliers money in warehousing, handling, or shipping because Ark-La-Tex neither warehoused, handled nor shipped these products. (CXs 36-143, 604-06; Tr. 145-49, 1898.)

Ark-La-Tex did not maintain delivery trucks. All products purchased by the members through Ark-La-Tex were either drop shipped directly from the manufacturer or sent as commercial freight from Ark-La-Tex's building in Paris, Texas. (Tr. 19, 20, 1215, 31.)

The members of Ark-La-Tex were experienced operators in the automotive parts aftermarket and were generally aware of market conditions and prevailing jobber and dealer prices in their trade areas. The members knew that the prices they paid for the products purchased through Ark-La-Tex were lower than the prices charged the jobbers who competed with them. They knew this because they had previously purchased as jobbers themselves, because the catalogs they received from the suppliers showed current jobber prices, and because the presentations made to them by the suppliers' representa-

tives spelled out the advantages they were obtaining, which jobbers did not normally obtain. They knew that the quantity rebates allowed them were not based upon the quantities or other factors involved in a particular sale and were not based upon the quantities sold by them to other jobbers; but they were based on the combined dollar amount of all sales to all of them, because of their membership in Ark-La-Tex without any regard to the actual cost of production, sale, or delivery. The members knew or should have known that the discounts which they received, which were comparable to warehouse distributor discounts, did not represent a savings in like amount to the sellers, because some of them had previously bought comparable quantities directly from the same suppliers at jobber prices. They knew that the discounts which they received resulted in profits to warehouse distributors who received the same or comparable discounts after warehousing and sales expenses were incurred, and they knew that they had no sales expense. They knew that the penalty payment for drop shipments directly to them, instead of to the Ark-La-Tex warehouse, was frequently 5 percent, and they knew or should have known that the suppliers who charged this percentage considered this to approximate their difference in cost between selling and delivering to jobbers generally and to warehouse distributors. (CXs 6-29-C, 13-143, 172, 173, 181-83, 186-A; Tr. 87, 730, 1173, 1197, 1229-36, 1810-11, 2074-77; See *American Motor Specialties Co., Inc., et al. v. F.T.C.*, 278 F. 2d, 225 (2d Cir.).)

The automotive parts industry is a highly competitive business, involving small margins of profit. The net margin of profit of a number of member witnesses, as well as nonmember witnesses, who testified, was from 2 percent to 4 percent after taxes. (Tr. 48, 123, 133, 615, 645, 720, 734, 755, 840, 860, 892, 922.) The importance of the discriminatory prices allowed by the various suppliers is pointed up by the importance given by the witnesses to the 2 percent cash discount they received from their suppliers which, they testified, increased their margin of profit and reduced the cost of acquisition of their merchandise. This 2 percent discount was considered by the jobber witnesses to be an important factor in determining their profit margins, and they took advantage of this discount when their financial position permitted them to do so. Through the lower cost of merchandise resulting from such discriminatory prices, the members obtained a substantial competitive advantage over their competitors who sell the same or comparable merchandise in the same trade areas and who receive discounts or rebates based only upon their own individual purchases. (Tr. 47, 124, 133-34, 618, 770, 800, 817, 860, 892-93, 923, 957, 979, 1004, 1020, 1048, 1067, 1118.)

The Commission's reasoning *In the Matter of National Parts Warehouse et al.*, Docket No. 8039 [63 F.T.C. 1692, 1728], seems appropriate here. In that case the Commission said:

Those who receive price concessions of this magnitude can use the money they pocket in a host of ways, *e.g.*, by the opening of "branch" stores, to gain competitive advantages that cannot fail to make them, in the end, victors over their nonfavored competitors. The amended Clayton Act, unlike the Sherman Act, looks not merely to results that have already come to pass, but also to those that can be reasonably anticipated in the future. "The statute is designed to reach such discriminations 'in their incipency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." *Corn Products Refining Co. v. Federal Trade Commission*, *supra*, 324 U.S. at 738. See also *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 46 (1948); *Forster Mfg. Co., Inc.*, Dkt. 7207, Opinion of the Commission, 21-22 (January 3, 1963) [62 F.T.C. 888, 904]. We do not see how a price advantage of 11.43% in an industry where net profit margins rarely exceed 3 percent, could fail to injure competition over a sufficient period of time.

Ark-La-Tex performs several of the functions of an automotive warehouse distributor. It warehouses a portion of the products purchased by its members; this portion grew from nothing up to about 52 percent of the total volume of purchases. It also billed its members and collected from them.

The principal function of a warehouse distributor, for which suppliers usually pay about 20 percent, is the selling function, and this is a function which Ark-La-Tex did not perform. The sellers sold their product lines to the members of Ark-La-Tex at regular meetings, and the warehouse distributor discounts and quantity discounts were granted in anticipation of large sales. (Tr. 149, 1041, 1056, 1063, 1078, 1089, 1104, 1226, 1845, 1936, 1937, 1943, 1970, 2041, 2042, 2064; CXs 605, 606.)

One important function of a warehouse distributor was to keep up to date the catalogs used by the jobbers by making necessary changes in the products as well as in the prices. This function was not performed by Ark-La-Tex for its members.

Another function normally performed by a warehouse distributor was the delivery of goods from the warehouse to the jobber-customer's place of business. This function was not performed by Ark-La-Tex.

The importance of the functions performed by a warehouse distributor was shown by the fact that it normally spends approximately 17 percent of its 20 percent discount in selling and servicing its jobber accounts. The cost of operating Ark-La-Tex was about 8 percent; the remaining profit was paid to the members in the form of a rebate based on their volume of purchases. The effect of this was for the members to

receive an extra 11 or 12 percent discount from the suppliers which their jobber-competitors did not receive. (CXs 36-143, 144-50, 603, 608; Tr. 1042, 1064, 1090, 1825, 1964, 2054-57, 2075.) This extra discount, added to their normal profit, enabled the members to net a profit of 14 to 15 percent on their purchases through Ark-La-Tex, as compared to the net profit of 2 to 4 percent earned by their independent jobber-competitors. The result of the members' purchasing through Ark-La-Tex was that they were able to produce a net profit several times greater than that of their direct-buying jobber-competitors who purchased the same lines during the same period of time. (Tr. 6-7, 644, 701, 753, 807, 819, 859-60, 892-93, 922, 956-57, 979, 1388-91, 1447-50, 1506-08, 1548-50, 1600-02, 1660-62.)

Respondents have contended that since warehouse distributors own or have a major financial interest in jobbers, and sell through such jobbers, goods bought at warehouse distributor prices, to dealers at jobber selling prices (which apparently occurs in the trade areas of some of the respondent jobbers), the law should permit jobbers to own a warehouse distributorship like Ark-La-Tex and purchase the goods which they resell to dealers at warehouse distributor prices. The fault with this argument is that under normal circumstances warehouse distributors cannot lawfully buy at warehouse distributor prices the goods which they resell in competition with jobbers. (See *The Sherwin Williams Co., et al.*, 36 F.T.C. 25.)

Evidence received since the remand shows that the jobbers who were members of Ark-La-Tex became members or customers of a new organization which was incorporated under the name of Alto Warehouse, Inc. (Tr. 1807.) This organization acquired all of the assets of Ark-La-Tex for the sum of \$156,000, which sum was pledged by notes of Alto Warehouse, Inc., to each of the stockholders of Ark-La-Tex in the sum of \$6,500, bearing interest from September 1, 1961. While there may have been some changes, the members of Ark-La-Tex became customers or members of the new organization which apparently has been engaged in business as a buying organization for its members or customers and has operated in a manner similar to the manner in which Ark-La-Tex had been operated. The former manager and president of Ark-La-Tex became president of the new organization. (CX 1493.)

The questions on which the Commission requested specific findings are included generally in the foregoing in some detail, but additional findings are also made at this point.

1. Respondents' suppliers discriminated between respondents and other customers in the sale of goods of like grade and quality, and

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such sales were sufficiently contemporaneous to be compared for purposes of determining whether the discriminations and proscribed effects on competition existed. The total purchases in selected cities were prepared by certain suppliers on an annual basis, but all the evidence points to the conclusion that jobbers maintained representative stocks to keep their dealer-customers adequately supplied with parts needed for popular makes of automobiles and trucks. (CXs 202, 231, 256, 276-77, 285, 291.)

2. Respondents and nonfavored jobber-customers of their suppliers competed in the sale of the products which were the subject of the alleged price discriminations. (Tr. 129, 704, 820, 1503, 1548; CXs 202, 231, 256, 276-77, 285, 291.)

3. The direct-buying, independent competitors of the members of Ark-La-Tex were not able to purchase the same products at the preferential prices charged the members, either from Ark-La-Tex or as a member of it or from a similar group or as member of a similar group. This is not to say, however, that it would have been impossible for these independent competitors to form a similar group or groups to buy directly from manufacturers at warehouse distributor prices or to join one of the buying groups already in existence. Some of these independents could have joined or formed such a group if they had chosen to do so, although it is doubtful that enough groups could have secured sources of supply to accommodate all of the independents. They were not able to purchase from Ark-La-Tex, because Ark-La-Tex acted only as an agent for its members in the purchase of merchandise and did not sell to others at any price. They could not have joined Ark-La-Tex, because Ark-La-Tex was selective about whom it admitted to membership, and its membership committee was composed of those located near the applicant. The original bylaws limited the membership in Ark-La-Tex to 20 members, but there was an amendment to the bylaws on February 19, 1955, abolishing this limitation, and in 1960 there were about 27 members. (CXs 5, 602.) During the period 1955 through 1959, only a few jobbers were admitted to membership in Ark-La-Tex. (Tr. 1802; CX 2-E.) There is no evidence from which it can be concluded that at least some of these independent jobbers could not have joined or formed a buying group which would have enabled them to purchase the same products at prices charged the respondents. There is testimony that some jobbers were not offered an opportunity to join a buying-group organization. (Tr. 1403-05, 1458, 1515, 1608, 1664.)

4. Ark-La-Tex was not a legitimate wholesale distributor entitled, as such, to a wholesale distributor discount, as the term is ordinarily used, because, as hereinabove found, it did not perform the usual function of selling. It was merely a sham and the alter ego of its jobber-members, who should be viewed as the actual purchasers of the products involved for purposes of Section 2(f) of the Robinson-Patman Act. (CXs 6-29.) It is clear from the articles of incorporation and by-laws of the organization that the sole reason for the existence of Ark-La-Tex was to induce lower prices for its members and it is clear from the entire record that it operated solely for this purpose. (CXs 1, 2.)

5. As hereinabove found, "respondents knew or should have known that the quantity and warehouse distributor discounts" induced and received by them could not be cost justified. (Tr. 87, 1810-11, 2074-77; CXs 13-143.)

CONCLUSIONS

1. The manufacturer-suppliers of members of Ark-La-Tex discriminated in price in the sale of goods of like grade and quality, in interstate commerce, by selling said goods to the members of Ark-La-Tex, through Ark-La-Tex, at lower prices than the prices charged direct-buying, competing jobbers, during the same period of time.

2. The effect of the receipt by the members of Ark-La-Tex of discriminatory prices was or may have been substantially to lessen, injure, destroy, or prevent competition between the members of Ark-La-Tex and competing, nonfavored jobbers in trade areas served by respondents. The evidence does not support the allegation that competition between suppliers was or may have been substantially affected.

3. The members of respondent Ark-La-Tex, purchasing through Ark-La-Tex, knew or should have known that the quantity discounts and warehouse distributor discounts induced and received by them were not differentials which made only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities were sold or delivered to them.

4. The acts and practices of respondent members of respondent Ark-La-Tex in knowingly inducing or receiving discriminations in price prohibited by subsection (a) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, were in violation of subsection (f) of Section 2 of said Act, as amended.

5. Ark-La-Tex Warehouse Distributors, Inc., a corporation, was dissolved under the provisions of the laws of Texas, and a Certificate

Initial Decision

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of Dissolution was issued May 1, 1963, by the Secretary of the State of Texas.

ORDER

It is ordered, That respondents Automotive Appliance Company, Inc., a corporation; Auto Parts & Equipment Co., Inc., a corporation; Ferguson Auto Supply Co., Inc., a corporation; Harold, Inc., a corporation; Ada Motor Sales, Inc., a corporation; Standard Parts Co., of Houston, Inc., a corporation; Tri-State Automotive Co., Inc., a corporation; Westbrook Supply, Inc., a corporation; Rezi J. Cogdell, Louie W. Barnett, and Eleanor R. Bradshaw, copartners doing business under the firm name and style of Cogdell Auto Supply Co. (Fort Worth); Leo H. Bradshaw, Sr., and Eleanor R. Bradshaw, copartners doing business under the firm name and style of Cogdell Auto Supply Co. (Waco); John A. Scarborough and R. Leon Hodges, copartners doing business under the firm name and style of Grand Auto Parts; Gene Mahanay and F. W. Mahanay, copartners doing business under the firm name and style of Mahanay Brothers Auto Parts; H. R. Wilson, Patrick Ferchill, and Jack W. Durrett, Sr., copartners doing business under the firm name and style of Mt. Pleasant Service Parts Company; Henry C. Nichols and Percy E. Nichols, copartners doing business under the firm name and style of Nichols Brothers; Wallace M. Fontaine and Patrick Ferchill, copartners doing business under the firm name and style of Reliable Motor Supply Company (Gladewater); Patrick Ferchill, Vic Ferchill, and Joe Ferchill, copartners doing business under the firm name and style of Reliable Motor Supply Company (Longview); Sam Bonham and Charles Strickland, copartners doing business under the firm name and style of Sulphur Springs Parts Company; William Aubrey Byrd, doing business under the firm name and style of Byrd Service Parts, a sole proprietorship; Wilfred L. Smith, doing business under the firm name and style of The Motor Supply, a sole proprietorship; W. E. Sells, doing business under the firm name and style of Sells Auto Supply, a sole proprietorship; James E. Walker, doing business under the firm name and style of Walker Auto Parts, a sole proprietorship; Dee White, doing business under the firm name and style of White Auto Supply Company, a sole proprietorship; and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering to purchase or purchase of any automotive products

or supplies in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

(1) Knowingly inducing or knowingly receiving or accepting, any discrimination in the price of such products and supplies, by directly or indirectly inducing, receiving, or accepting from any seller a net price which respondents know or should know is below the net price at which said products and supplies of like grade and quality are being sold by such seller to other customers who compete with respondents.

(2) Maintaining, operating, or utilizing any organization as a means or instrumentality to induce or receive discounts or rebates which result in a net price respondents know or should know is below the net price at which said products of like grade and quality are being sold by such seller to other customers who compete with respondents in the resale and distribution of such products.

For the purpose of determining "net price" under the terms of this order, there shall be taken into account discounts, rebates, allowances, deductions or other terms and conditions of sale by which net prices are effected.

It is further ordered, That the complaint be, and it hereby is, dismissed as to Ark-La-Tex Warehouse Distributors, Inc., a corporation, which has been dissolved.

ORDER TERMINATING PROCEEDING

Because of the pendency of related proceedings, the disposition of this case—in which the amended complaint was issued on March 8, 1960—was held in suspense by the Commission. It now appears that the principal respondent, Ark-La-Tex Warehouse Distributors, Inc., has been dissolved; that many of the individual respondents are deceased or no longer in business; and that the acts and practices challenged in the complaint have been discontinued with no likelihood of resumption. In these circumstances, no useful purpose would be served by continuation of the proceeding. Accordingly,

It is ordered, That this proceeding be, and it hereby is, terminated. Commissioner MacIntyre not participating.

Complaint

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IN THE MATTER OF

CAPITOL MANUFACTURING CORPORATION ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE
COMMISSION ACT*Docket 8748. Complaint, Nov. 21, 1967*—Decision, May 9, 1968*

Order requiring a Providence, R.I., distributor of watches to cease preticketing its watches with fictitiously high retail prices, simulating nationally known brand names, falsely guaranteeing, and concealing indicia regarding composition or quality of its products.

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 Capitol Manufacturing Corporation, a corporation, and Louis Rafanelo, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Capitol Manufacturing Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island, with its principal office and place of business located at 672½ Broadway, in the city of Providence, State of Rhode Island.

Respondent Louis Rafanelo is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in offering for sale, sale and distribution of watches, appliances, novelties and other articles of merchandise to retailers for resale to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State

*Reported as amended by Hearing Examiner's order of Jan. 25, 1968, by changing the name of the respondent to "Capitol Manufacturing Corporation." The name of respondent was incorrectly stated as "Capital Manufacturing Corporation."