

Complaint

IN THE MATTER OF

THE SPERRY AND HUTCHINSON COMPANY

ORDER, OPINIONS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 8671. Complaint, Nov. 15, 1965—Decision, June 26, 1968*

Order requiring the Nation's largest trading stamp company to cease setting a maximum number of stamps to be dispensed by its retail licensees in relation to the price of the goods sold, conspiring with others to enforce its policy of limitation, and suppressing the operation of trading stamp exchanges and other stamp redemption activity.

COMPLAINT

The Federal Trade Commission, having reason to believe that the Sperry and Hutchinson Company, a corporation, hereinafter referred to as respondent, has violated and is now violating the provisions of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), 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:

1. *DEFINITIONS.* For the purposes of this complaint, the following definitions shall apply:

(a) "Trading stamps" are small, gummed pieces of paper about the size of postage stamps, bearing on their face the name, trademark, or like insignia of the company which originally issued them. Customarily, retail merchants dispense them to their customers in connection with the sale of goods or furnishing of services, pursuant to the terms and conditions of contracts between such merchants and the company from which they secured the stamps.

(b) "Redemption of trading stamps" is the exchange of goods, wares, or merchandise, referred to at times hereinafter as "redemption merchandise," for trading stamps. Such redemption customarily takes place at a "redemption store."

(c) A "trading stamp company" is a firm engaged in the business of issuing and selling trading stamps to retail merchants and of redeeming such stamps from the customers of such merchants. The respondent herein is a trading stamp company.

(d) A "contracting retailer" is a retail merchant or business man who has entered into a contract with a trading stamp company, pursuant to the terms and conditions of which contract such retail merchant or businessman purchases trading stamps from such trading stamp company and dispenses them to members of the consuming pub-

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lic in connection with the sale of goods or furnishing of services to consumers.

(e) "Trading stamp exchanges" are persons or businesses engaged in the exchange of trading stamps issued by one trading stamp company for those issued by another, or engaged in the sale and/or purchase of trading stamps to and/or from members of the consuming public.

(f) "Double stamping" is the dispensing of two trading stamps for each ten cents worth of goods or services.

(g) "Bonus stamping" is the dispensing of a number of extra stamps in connection with the sale of a specified item or in connection with total purchases exceeding a specified amount.

(h) "Free stamping" is the dispensing of stamps to customers other than in connection with the sale of goods or services.

2. Respondent, The Sperry and Hutchinson Company, more commonly known as "S&H" and hereinafter sometimes referred to either as "Sperry and Hutchinson" or "respondent," is a corporation organized and existing under the laws of the State of New Jersey, with its principal office and place of business located at 330 Madison Avenue, New York, New York. It is the leading trading stamp company in the United States, one of the few trading stamp companies operating on a nationwide or nearly nationwide basis, and has annual gross receipts of over \$300 million. It issues and sells approximately 40% of all trading stamps in the United States. About 60% of all households in the United States save its "S&H" trading stamps, also called "green stamps."

3. Trading stamp companies in the United States collect each year about \$800 million for the approximately 400 billion trading stamps they issue and sell to the more than 200,000 retail establishments with which they have entered into contracts. Such establishments include food supermarkets, drug stores, and gasoline stations, as principal customers, and a large variety of retail stores and service firms. Trading stamps are issued in connection with annual sales to the consuming public of over \$40 billion in goods and services, including at least half of all grocery sales.

4. As indicated hereinabove, trading stamp companies, including the respondent, sell or issue for valuable consideration pads of trading stamps to retailers, in accordance with the terms and conditions of the contracts entered into between such retailers and such trading stamp companies. Pursuant to the terms and conditions of such contracts, the retailers dispense trading stamps to members of the consuming public, in connection with the sale and furnishing of goods and services to

the latter. Pursuant also to such contracts, trading stamp companies, including the respondent, maintain redemption stores where members of the consuming public having stamps may exchange, or redeem, such stamps, when they have been pasted into books furnished for this purpose, for merchandise available from such redemption stores.

Sperry and Hutchinson operates over 850 trading stamp redemption stores throughout the United States, through which it annually distributes to stamp-holding members of the consuming public redemption merchandise purchased at a cost to Sperry and Hutchinson of over \$150 million. It has entered into contracts with more than 70,000 retail outlets for the distribution of S&H trading stamps. These contracting retailers annually dispense approximately 145 billion S&H stamps to members of the consuming public, pursuant to the terms and conditions of such contracts, in connection with the sale and furnishing to the public of goods and services valued at approximately \$13 billion annually.

5. The respondent causes, and has caused, its trading stamps to be transported, distributed, and sold across State lines, in commerce, as "commerce" is defined in the Federal Trade Commission Act, to retailers in the District of Columbia and in various States other than the State of origin of such stamps; has engaged in the negotiation and consummation of contracts for the issuance of such trading stamps across State lines and in such commerce; and has purchased, shipped and distributed, or purchased and caused to be shipped or distributed, various articles of merchandise across State lines either to redemption centers or to those members of the public who have ordered specific articles of merchandise by catalogues furnished by respondent in commerce for the redemption of trading stamps. Respondent maintains, and has continued to maintain, a course or current of trade in trading stamps and in the redemption of merchandise, in such commerce, as hereinbefore defined, and the volume of business in such commerce is now and has been substantial.

In the course and conduct of its business, respondent has been for many years, and is now, in substantial competition in the distribution or sale of trading stamps, with other trading stamp companies, except insofar as such competition has been lessened, restrained, or otherwise injured, as alleged hereinafter.

COUNT I

6. Paragraphs 1 through 5 of this complaint are incorporated into this count, as if they were stated verbatim herein.

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7. It is now, and has been for some time past, the practice or policy of respondent, Sperry and Hutchinson, to enter into, place into effect, and carry out certain agreements, understandings, and arrangements with various retailers, by means of conditions contained in its contracts with such retailers, whereby respondent compels or requires, or attempts to compel or require, such contracting retailers not to dispense more than one trading stamp for each full ten cents worth of goods or services, not to give "free stamps," and not to engage in "double stamping" or "bonus stamping," without special authorization or permission from respondent. By means of the conditions in its contracts with retailers and various other means and methods hereinafter described, respondent has entered into and effectuated the aforesaid practice and policy whereby it can and does control, establish, manipulate, and fix the number of trading stamps dispensed by such contracting retailers in relation to said retailers' sale of goods or services to consumers.

8. With respect to and in furtherance of the aforesaid practice or policy respondent has caused and is causing said contracting retailers to enter into or acquiesce in a combination, conspiracy, agreement, understanding, or planned common course of dealing, with respondent whereby the ratio of the number of trading stamps said retailers dispense to the price of goods or services offered for sale and sold by said retailers was and is fixed and maintained. More specifically, the aforesaid ratio of number of stamps to price of goods or services has been and is determined and established by respondent and observed by said retailers at one stamp for each ten cents of purchase price; **further, it** has secured or attempted to secure adherence by contracting retailers, sometimes at the behest of or on behalf of other contracting retailers, to the aforesaid practice and policy determined and established by respondent which restricts or limits the dispensing of trading stamps to not more than one trading stamp for each ten cents worth of goods or services sold by retailers; and it has threatened to cancel, and has actually cancelled, the contracts of retailers who would not adhere to or comply with the aforesaid practice and policy of respondent which restricts or limits the dispensing of trading stamps to not more than one trading stamp for each ten cents worth of goods or services sold by retailers.

9. The effect of the foregoing acts and practices has been and is:

(a) To tamper with price structures, price mechanisms or price levels, or otherwise to interfere with the free play of market forces in the merchandising of goods in the markets in which the affected contracting retailers operate, including the retail food market;

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(b) To restrain competition between retail merchants, including competition in the form of giving greater numbers of trading stamps;

(c) To induce and to put together a combination among retail merchants, in competition with one another, to limit such competition, including competition in the form of giving greater numbers of trading stamps;

(d) To deprive the members of the consuming public of a great number of additional trading stamps that might be dispensed to them but for the aforesaid acts and practices;

(e) Unfairly to deprive retail merchants of the opportunity to conduct their businesses, and dispose of trading stamps for which they have paid money, in accordance with their own decisions as to how best to serve the public.

10. The foregoing acts, practices, contractual provisions, and understandings are all to the prejudice and injury of the public, have restrained and hindered, or have a tendency to restrain and hinder, competition unduly, thereby constituting unfair methods of competition and unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

11. Paragraphs 1 through 5 of this complaint are incorporated into this count, as if they were stated verbatim herein.

12. In the conduct of its business, respondent and other trading stamp companies not named herein as respondents, including but not limited to Top Value Enterprises, Inc., Gold Bond Stamp Company, E. F. MacDonald Stamp Company, King Korn Stamp Company, Merchants Green Trading Stamp Company, and Stop and Save Trading Stamp Corporation, for some years past and continuing to the present time, have and are now engaged in understandings, agreements, combinations, or conspiracies, and have pursued and cooperated in a common course of action or course of dealing between and among themselves, and with full knowledge of each other's activities in this respect as alleged below, to hinder, lessen, restrict, restrain, suppress, and eliminate competition in the course of the aforesaid commerce. In furtherance thereof, respondent, in combination with one or more of the other stamp companies hereinbefore named, and said other trading stamp companies, directly or indirectly, have on different occasions engaged in and carried out, and are now engaging in and carrying out, by various means and methods, the following acts and practices, among others:

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(a) They have each attempted to prevent and have prevented, by conditions contained in contracts with contracting retailers or otherwise, the dispensing of more than one trading stamp for each ten cents worth of goods or services sold by said retailers;

(b) They have each attempted to adopt, effectuate, enforce, and secure adherence to, and have adopted, effectuated, enforced, and secured adherence to, the uniform condition in contracts that the contracting retailers dispense not more than one stamp for each ten cents worth of services or goods sold;

(c) They have each attempted to induce and have induced contracting retailers not to dispense more than one trading stamp for each ten cents worth of goods or services sold by said retailers.

13. The effect of the foregoing acts and practices has been and is:

(a) To tamper with price structures, price mechanisms or price levels, or otherwise to interfere with the free play of market forces in the merchandising of goods in the markets in which the affected contracting retailers operate, including the retail food market;

(b) To restrain competition between retail merchants, including competition in the form of giving greater numbers of trading stamps;

(c) To induce and to put together a combination among retail merchants, in competition with one another, to limit such competition, including competition in the form of giving greater numbers of trading stamps;

(d) To deprive the members of the consuming public of a great number of additional trading stamps that might be dispensed to them but for the aforesaid acts and practices;

(e) Unfairly to deprive retail merchants of the opportunity to conduct their businesses, and dispose of trading stamps for which they have paid money, in accordance with their own decisions as to how best to serve the public;

(f) To limit and restrain competition between or among trading stamp companies in the distribution and sale of trading stamps.

14. The foregoing acts, practices, contractual provisions, and understandings are all to the prejudice and injury of the public, have restrained and hindered, or have a tendency to restrain and hinder, competition unduly, thereby constituting unfair methods of competition and unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT III

15. Paragraphs 1 through 5 of this complaint are incorporated into this count, as if they were stated verbatim herein.

16. For some years past and continuing to the present, respondent, by itself or in combination, cooperation, agreement, understanding with others has entered into, placed in effect and carried out a practice or policy to prevent and suppress the operation of trading stamp exchanges or the free and open redemption of trading stamps by persons or firms desiring to enter or operate such businesses other than respondent through or by means of, inter alia, the following acts or practices:

(a) It has attempted to require, and has required, contracting retailers to agree not to engage in such activity;

(b) It has pursued or carried out a planned common course of action or course of dealings with other trading stamp companies to exchange information about trading stamp exchanges and free and open redemption, and to furnish assistance in connection with legal actions brought against persons engaged in such activity;

(c) It has requested or caused other trading stamp companies, which are otherwise in competition with it, to cause their contracting retailers, who are in competition with the respondent's contracting retailers, and other persons not to engage in such activity;

(d) It has surreptitiously or otherwise policed the activities of persons it suspected of engaging in such activity, by unfair means including surveillance and efforts to deceive and entrap such persons;

(e) It has threatened litigation, and has brought highly publicized legal actions, in order to restrain, deter, suppress, or eliminate such activity.

17. The effect of the foregoing acts and practices has been, among others:

(a) To suppress independent trading stamp exchanges, unfairly to the detriment of the persons engaged in such business or activity and unfairly to the detriment of the members of the consuming public who have thereby been deprived of the opportunity of exchanging one type of trading stamp for another in order to facilitate their redemption;

(b) To deny to the public the opportunity to redeem such stamps through persons other than the respondent, to the injury of both the public and such other persons;

(c) To interfere unjustly, oppressively, and unreasonably with the right of the consuming public to enjoy the full use of their personal property and to transfer, alienate, or otherwise deal with such personal property as they see fit.

18. The foregoing acts and practices are in unreasonable restraint of trade, are to the prejudice and injury of the public, have restrained and hindered, or have a dangerous tendency to restrain and hinder,

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competition unduly, and thereby constitute unfair methods of competition and unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Morton Needelman, Mr. Sidney A. Steinitz, and Mr. John J. Ursu supporting the complaint.

Mr. Samuel M. Lane, Casey, Lane and Mittendorf, New York, N.Y., Mr. Samuel K. Abrams, Mr. George B. Haddock and Mr. Jack Louis Lipson, Morison, Clapp, Abrams and Haddock, Washington, D.C., for respondent.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

FEBRUARY 10, 1967

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PRELIMINARY STATEMENT

This proceeding charges respondent, The Sperry and Hutchinson Company, the largest trading stamp company in the United States, with engaging in unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

The complaint questions respondent's practices of limiting the number of stamps issued by its licensees and of restricting the subsequent transfer of such stamps by its licensee's customers. The complaint also charges a combination with trading stamp companies and with others, the elimination of trading stamp exchanges, and the accomplishment of illegal price fixing.

Pleadings

The complaint dated November 15, 1965, contains three counts. There is an elaborate description of the business, which is repeated in each count.

The first count attacks the policy of The Sperry and Hutchinson Company of compelling its retail licensees not to dispense more than one trading stamp for each 10 cents worth of goods or services. This policy is allegedly embodied in respondent's contracts and is enforced both at the instance of respondent and at the instance of competing licensees.

The second count charges that respondent and certain named trading stamp companies are engaged in understandings, agreements, combinations, and conspiracies and have pursued a common course of action to eliminate competition by engaging in, among other acts, the prevention of the dispensation of more than one trading stamp for each 10 cents worth of goods, by securing adherence to uniform conditions in contracts to that effect, and by inducing retailers not to dispense more than one trading stamp for each 10 cents worth of goods.

The third count charges that respondent, either by itself or in combination with others, has carried out a practice or policy to prevent and to suppress the operation of trading stamp exchanges. This is done, among other means, by requiring contracting retailers to agree not to enter into or to engage in such activity, by exchanging information with other trading stamp companies or by furnishing assistance in connection with legal actions; by requesting other trading stamp companies to cause their contracting retailers and other persons not to enter into or to engage in trading stamp exchange activity; by policing and by unfair means including surveillance, deceit, and entrapment; and by threatening to bring and by bringing highly publicized legal actions.

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In each count, effects detrimental to the public interest are alleged.

In its answer filed December 23, 1965, respondent admitted generally the description of its business but denied that it is engaged in selling trading stamps, denied that the statistical allegations of the complaint are correct, and denied that it is engaged in commerce and in competition in commerce.

With respect to the first count, respondent denied the allegations generally but admitted that it has a policy in its licensing agreements with its licensees of agreeing to issue one stamp for each 10 cents of purchase price and that it refers to those agreements. It also admitted that it attempts to secure adherence to its contracts, sometimes after complaints from other licensees, and that it has cancelled the license of one licensee for violation of contract terms. It further denied the effects that are alleged.

With respect to the second count, respondent denied all of the allegations.

As to the third count, respondent denied the allegations except it admitted that it had tried to prevent trading stamp exchanges from buying, selling and exchanging its stamps.

Prehearing

On November 30, 1965, the hearing examiner ordered a prehearing conference to be held January 5, 1966. This order crossed respondent's motion for a more definite statement of charges filed November 29, 1965, in the mail distribution. Respondent's motion was denied after argument held December 10, 1965. During the course of the argument, complaint counsel disclosed their theory of the case.

Thereafter, extensive prehearing procedures took place. These resulted in: elaborate discovery of the names of witnesses, the documents to be offered, and the charts and tabulations to be used; and pretrial decision on the *in camera* character of certain information secured from respondent and from third parties was made. The Commission authorized deviation from the continuous hearing rule and denied further discovery of Commission documents.

The parties made admissions of the genuineness of documents and of facts stated in them and took depositions of two witnesses. The parties exchanged underlying data for charts and reached agreement on their mathematical accuracy. Further discovery of documents of respondent was secured. Finally, both parties placed documents to be offered initially by them in loose leaf binders. The hearing examiner heard and ruled upon objections thereon in advance of the commence-

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ment of formal hearings. These procedures materially reduced the formal hearing time.

During the course of prehearing, respondent brought suit in the Southern District of New York against the Commission and the hearing examiner, seeking an injunction against further proceedings unless the discovery denied to respondent by the Commission was granted. Honorable Frederick Van Pelt Bryan denied a preliminary injunction on June 14, 1966, and the suit was thereafter discontinued by stipulation.

The Formal Hearings

Hearings commenced in Washington, D.C. on June 15, 1966, and continued there until June 20, 1966. Then, pursuant to authorization by the Commission, hearings were held in Dallas, Texas, commencing June 28, 1966, and continued until July 6, 1966. Hearings were suspended for the purpose of taking depositions in Corpus Christie, Texas, but were resumed in Washington, D.C. July 11, 1966. Hearings then continued with brief adjournments, customary in judicial proceedings, until the close of the case of complaint counsel on August 5, 1966. There was then a Commission-authorized interval until August 22, 1966, before the case continued with brief adjournments until October 12, 1966, when both sides rested. On October 12, both parties by agreement amended their lists of exhibits to include all exhibits and to describe the action taken thereon. (See CX 1B-1Z58; RX 4-4Z42.)

Posthearing Submissions and Argument

Both parties requested additional time for filing findings, objections thereto, conclusions, briefs and reply briefs, and for the hearing examiner to submit his initial decision. These requests were granted in a conditional order dated October 13, 1966, that also set oral argument. The order and request were certified the same day to the Commission for approval.

By order dated October 21, 1966, the Commission extended the time for filing initial decision to March 15, 1967. The hearing examiner withdrew his conditional order of October 13, 1966, and issued a new order scheduling earlier times for the posthearing filing of briefs, conclusions, and findings of fact, and for oral argument in accordance with the Commission's decision.

Oral argument was had January 13, 1967, on the proposed findings, conclusions and order.

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Motion to Dismiss

At the conclusion of complaint counsel's case, counsel for respondent moved to dismiss. Decision was reserved. The motion is now denied.

Basis for Decision

This decision is based upon the entire record and upon the hearing examiner's observation of the witnesses called. References ¹ to particular portions of the record are examples only. Proposed findings and conclusions not adopted in substance or as proposed are rejected as irrelevant, immaterial, or erroneous. The following findings, conclusions and order are adopted.

FINDINGS OF FACT

A. Glossary

Terms frequently used in the testimony with their meanings are: (See C & A.)

(1) "Trading stamps" are small, gummed pieces of paper about the size of postage stamps, bearing on their face the name, trademark, or like insignia of the company that originally issued them. Customarily, retail merchants dispense them to their customers in connection with the sale of goods or furnishing of services, pursuant to the terms and conditions of contracts between such merchants and the company from which they secured the stamps.

(2) "Redemption of trading stamps" is the exchange of goods, wares, or merchandise, referred to at times hereinafter as "redemption merchandise," for trading stamps. Such redemption customarily takes place at a "redemption store," also known as a "redemption center" or a "branch" (Tr. 5142, 5179).

¹ The following abbreviations are sometimes used:

CX = Commission Exhibit.

RX = Respondent Exhibit.

Tr. = Transcript page.

C = Complaint.

A = Answer.

S = Stipulation.

Adm. = Admission.

CPF = Commission Proposed Findings.

CCPF = Commission Counter-proposed Findings and Objections.

RPF = Respondent's Proposed Findings.

RCPF = Respondent's Counter-proposed Findings and Objections.

Due to time limitations, reliance has been placed on counsel's proposed findings for references in many instances and references to their respective findings are intended to include their citations. Appendix D is a key to locating the parties' proposed findings and conclusions for comparison with this initial decision.

(3) A "trading stamp company" is a firm engaged in the business of issuing trading stamps to retail merchants and of redeeming such stamps from the customers of such merchants.

(4) A "contracting retailer" is a retail merchant or businessman who has entered into a contract with a trading stamp company, pursuant to the terms and conditions of which contract such retail merchant or businessman secures trading stamps from such trading stamp company and dispenses them to members of the consuming public in connection with the sale of goods or the furnishing of services to consumers. The term "licensee" is often used to describe a contracting retailer who is sometimes also described as a franchise holder (Tr. 5022).

(5) "Trading stamp exchanges" are persons or businesses engaged in the exchange of trading stamps issued by one trading stamp company for those issued by another, or engaged in the sale or purchase of trading stamps to or from members of the consuming public (Tr. 5438).

(6) "Double stamping" is the dispensing of two trading stamps for each ten cents worth of goods or services (Tr. 5231).

(7) "Bonus stamping" is the dispensing of a number of extra stamps in connection with the sale of a specified item or in connection with total purchases exceeding a specified amount (Tr. 5231, 7129).

(8) "Free stamping" is the dispensing of stamps to customers other than in connection with the sale of goods or services.

(9) "Extra stamps" include those received from double or bonus stampings (Tr. 7129, 7130).

(10) "Institutional stamping" includes free stamping and issuing of bonus stamps in connection with total purchases exceeding a specified amount (Tr. 6872, 7131).

B. The Respondent

(1) Respondent, The Sperry and Hutchinson Company, more commonly known as "S&H" (and hereinafter sometimes referred to as "Sperry and Hutchinson," "the company," or "respondent") is a corporation organized and existing under the laws of the State of New Jersey, with its principal office and place of business located at 330 Madison Avenue, New York, New York (C; A).

(2) Respondent, when incorporated in 1900, succeeded a partnership that had been organized in 1896 by a relative of Willim Sperry Beinecke, the present president and chairman of the board. Members of the Beinecke family beneficially owned, directly or indirectly, on the date the complaint was filed, substantially all of the common stock and, together with foundations of which various family members are

trustees or members, approximately 65 percent of the outstanding preferred stock of the company (RX 924b).

(3) Sperry and Hutchinson is engaged primarily in furnishing a trading stamp service for retail merchants and their customers—a business which it has conducted for the past seventy years. The company is the oldest and largest trading stamp company in the United States (RX 924b).

(4) The company estimates that there are presently more than 35 million American households saving “S&H Green Stamps,” which they obtain from retailer licensees of the company. The number of retailers licensed by the company to use its trading stamps service presently approximates 55,000, and these licensees distribute S&H Green Stamps to over 70,000 retail outlets located throughout the United States. The company maintains more than 850 redemption centers where savers of S&H Green Stamps may redeem them for a broad range of merchandise. Approximately 32 million copies of the company’s catalogue illustrating and describing such merchandise were distributed in 1965 (RX 924b). The merchandise is of high quality made by well-known and reliable manufacturers and is selected carefully and with a view to meeting consumer desires (RPF 15-33).

(5) In recent years, the company also extended the application of its trading stamp service to its incentive programs, which were developed primarily for industrial and commercial companies, and these programs now represent a small part of its business (RX 924b).

(6) Respondent is the leading trading stamp company in the United States—one of the few trading stamp companies operating on a nationwide or nearly nationwide basis—and it has annual gross receipts of over \$300 million. It issues between 37 percent and 40 percent of all trading stamps in the United States. Between 56 percent and 61 percent of all households in the United States save S&H Trading Stamps (C; A; CXs 3a, 5, 10A-10B, 413).

(7) Respondent employs approximately 9,000 people on a regular basis, approximately 6,300 of whom are employed in redemption centers, distribution centers, and department stores. It also employs a substantial number of additional people at certain times of the year to meet seasonal requirements (RX 924b).

(8) In each of the past 30 years the company has paid cash dividends on its common stock (RX 924b).

(9) From 1914-1964 S&H issued 1120 billion stamps. During that period 964 billion stamps were redeemed. At the end of the period there was a total of 156 billion stamps unredeemed (CX 444). During the year 1964, almost 145 billion stamps were issued and a little more than

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132 billion were redeemed (CX 399b). The company operates on the basis that 95 percent of its stamps will eventually be redeemed (RX 924b).

C. The Trading Stamp Business

(1) Trading stamp companies in the United States in 1964 collected about \$800 million for the approximately 400 billion trading stamps they issued to more than 200,000 retail establishments under contract. Such establishments include food supermarkets, drug stores, and gasoline stations, as principal customers, and a large variety of retail stores and service firms. Trading stamps are issued in connection with annual sales to the consuming public of about \$40 billion in goods and services, including about half of all grocery sales (C; A; CX 3b, 411; see Adm. 113).

(2) Such trading stamp companies, including the respondent, issue for valuable consideration pads of trading stamps to retailers, pursuant to contracts. Such contracts authorize the retailers to dispense trading stamps to members of the consuming public in connection with the sale and furnishing of goods and services. Such contracts also require trading stamp companies, including the respondent, to maintain redemption stores where members of the consuming public who have stamps may exchange or redeem such stamps (after they have been pasted into books furnished for this purpose) for merchandise available at such redemption stores (C; A; CX 43-58 inclusive, CX 11).

(3) The number of companies engaged in the trading stamp business is somewhere between 200 and 400, according to estimates made at various times by or on behalf of respondent (CX 10a-c; RX 924; see also Tr. 6285-6286). Respondent's estimated share of the industry in 1964 was 38 percent of the stamps issued and 40 percent of the dollar volume received (CX 5). In the same year five other companies collectively accounted for 50 percent of the stamps issued and 43 percent of the dollar volume received. Accordingly, the six largest companies represented between 83 percent and 88 percent of the industry. No other trading stamp company accounted for a share greater than 3 percent of the dollar volume or 4 percent in the number of stamps issued (CX 5.)

(4) Respondent competes with other trading stamp companies in the price at which it sells its service and in the value of the redemption merchandise which it supplies (Tr. 3699-3700, 4965, 5289-5290, 4992, 5713, 6156-6161, Prehearing Order No. 3). Respondent's position

varies State by State and in some areas companies issuing other stamps are dominant (*e.g.* in California, Blue Chip Stamps account for about three quarters of the stamp business (Tr. 6522). Plaid Stamps are important in certain areas in the East, Top Value in certain areas in the Midwest, and Gold Bond and Gold Strike probably in the State of Utah (Tr. 4982, 6235)).

(5) The trading stamp business increased rapidly after 1950, when food supermarkets began issuing stamps (Tr. 5010, 6304). From 1950 to 1962, the share of retail grocery store sales made by stores using trading stamps increased from 1 percent to 47 percent. The percentage has since declined to 43 percent (Tr. 6430-31, 6505; see CX 681). Most of the major competitors of respondent have come into the business or become factors in it since 1950 (Tr. 6288, 6289). The major supermarket chains have given impetus to the increase in the trading stamp business. Some have issued trading stamps of different companies in different outlets or areas (Tr. 6511-16). Others developed or bought their own trading stamp companies (Tr. 6291-2). In a number of metropolitan areas stamp dispensing supermarkets account for a major, sometimes overwhelming, proportion of the retail food business (see RX 1012, CPF pp. 10-11). Respondent has increased its sales 1,000 percent since 1950, and it has derived the majority of its revenue from food stores, supermarkets being its most significant block of business (Tr. 5010-11, 6304; RX 924b p. 7). Despite its increase in business its share of the market has declined (Tr. 6157). Twelve supermarket chains which accounted for a third of respondent's revenue in 1965, all became its customers since the 1950's (Tr. 5240). On the other hand in 1965, respondent served twice as many independent food stores as it did chain food outlets (Tr. 6493).

(6) Respondent through deliberately adopting a policy of franchising only one competing retailer in a given area has limited its share of the market (Tr. 4994). While this is subject to exceptions (see Tr. 5016-7, 5200-1) and while there are a number of instances where a competitive overlap exists between different types of stores or because of extension of the trading area beyond the immediate vicinity of respondent's licensee (see Appendix A), this limitation leaves prospective customers available for other trading stamp companies who have from time to time entered the business (see Tr. 4994, 6087-88, 6157).

Most trading stamp companies place less emphasis on the development of families of merchants than respondent does (Tr. 4177, 4871, 6068-69).

(7) Respondent requires a stamp saver to fill at least one book before she can present stamps for redemption (Tr. 4893, RX 924b). Respondent's purpose is to encourage stamp savers to continue to patronize its licensees and to make the minimum redemption article of sufficient value to keep the stamp savers' interest alive (Tr. 4893-4894).

(8) Respondent takes the position that it redeems its stamps no matter how long ago they were issued and it has redeemed a small number of stamps that had been outstanding for many years (Tr. 4952, 5126-9, RX 924b, p.8).

(9) The trading stamp promotion unlike promotional devices such as games and types of lotteries has no element of chance. Of course, stamps can and are sometimes used in lottery type promotions. The stamp saver who follows the instructions in the stamp collection book knows in advance what she can secure for her stamps, and provided she secures the minimum number has a wide choice in the selection of articles. Except in States where cash redemption is mandatory or optional, respondent ordinarily makes redemption only in merchandise and in the optional States does not encourage cash redemption. The choice that a stamp saver secures at the redemption center, while not as wide as if the saver might patronize any other store she desired, secures goods for her of greater average retail value than is the average cost of the stamps or the cash redemption value (see Tr. 4045-46, 4188-89, 5617-19, 7151-52; CX 402-3, 586).

(10) State legislation or regulation affecting the trading stamp business has been succinctly summarized by the company in its April 27, 1966, Prospectus filed with the Securities and Exchange Commission, which reads in part as follows:

Sixteen states (California, Connecticut, Florida, Indiana, Maine, Maryland, Massachusetts, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, South Dakota, Utah and Vermont) require that the stamp saver be given an option to redeem stamps in cash. The States of Wisconsin and Wyoming require redemption of trading stamps in cash only and the State of Washington achieves the same result by imposing a prohibitive tax on merchants who use, and on trading stamp companies which supply, trading stamps redeemable in merchandise. With the exception of Wyoming, states requiring redemption in cash only, or in cash at the option of the stamp saver, also require that he be permitted to redeem less than a full book of stamps when redemption is made in cash if stamps having a minimum aggregate value specified by statute are presented for redemption. With the same exception, these states also require that a cash redemption value be printed on the face of trading stamps. Certain of these states also require annual registration of trading stamp companies and in some cases the posting of bonds to assure redemption. The State of Kansas prohibits the issuance of trading stamps on sales of merchandise. (RX 924b.)

D. Interstate Commerce and Competition

(1) Respondent and a number of its competitors are engaged in "commerce" as defined in the Federal Trade Commission Act (Tr. 4982, 6285-6320).

(2) Respondent has its main office at 330 Madison Avenue, New York, New York (C; A.). There through a computerized operation it keeps track of all of its merchandise operations (see Tr. 7927 *et seq.*). There are over 850 redemption centers, one or more of which are located in 44 of the 50 States of the United States (CX 586, p. 100); and there are nine distribution centers, each located in a different State. These distribution centers store the merchandise and ship it to the 850 redemption centers. Purchasing is centralized in the New York office (Tr. 5698), and the computer is also located there. Thus, of necessity, numerous communications must pass between the redemption and the distribution centers and between those centers and the New York office—substantially all across State lines (see CX 586). Moreover, the merchandise from the distribution centers in many instances must pass across State lines to the redemption centers. In addition, in the granting of its licenses and in the delivery of its stamps, respondent has a separate system of control and distribution (CX 413e-g; Tr. 4911-13; RX 924b). Its stamps of necessity are transported across State lines. Negotiations for its contracts with its 70,000 franchised retailers likewise involve communications that cross State lines (CX 413), because its contract must be accepted at New York, New York, to be valid (RX 3).

(3) Respondent, accordingly, maintains and has continued to maintain a course or current of trade in the issuance of trading stamps and in the redemption of merchandise in such commerce as hereinbefore defined. The volume of business in such commerce is now and has been substantial (RX 924b).

(4) In the course and conduct of its business, respondent has been for many years and is now in substantial competition, in the distribution of trading stamps with other trading stamp companies (Tr. 5759, 6160-61; RPF 91).

E. Respondent Sells a System Not Stamps

(1) At the threshold of this initial decision, a difference of views concerning the character of respondent's business must be considered.

(2) Complaint counsel initially contended in the complaint that respondent was in the business of selling trading stamps that carried with them the right of redemption in merchandise. (C 1d, 2, 3, 4, 5, 6; denied in A.) Respondent, on the other hand, took the position that it

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was selling an integrated service to retailers and that only one of the facets of that service was the delivery of stamps and their redemption in merchandise.

(3) In its prospectus of April 27, 1966 (RX 924b), issued during the course of this proceeding, respondent's position is spelled out in detail as follows:

BUSINESS

Method of Operation

The Company's trading stamp service is used by retailers primarily as a method of promotion which will enable them to increase and maintain their volume of sales. By offering S&H Green Stamps with each sale, they seek to attract new customers and to encourage steady patronage. The Company's stamp service also provides retailers with a convenient means of offering customers a discount for the payment of cash or for prompt payment of credit balances.

An important feature of the Company's service is its general practice of not licensing more than one retailer in the same type of business within a given marketing area. This practice enhances the value of the Company's service to the retailer, since it enables him to differentiate his establishment from those of his competitors. The size of the marketing area for which exclusive rights are given varies depending upon the type of business. For example, a supermarket will ordinarily have a larger exclusive area than a service station.

Another important feature of the Company's service is its "cooperative" nature. The Company endeavors to license a group of non-competing retailers within a marketing area, generally including a store which attracts a large number of customers, such as a supermarket. As a result, consumers who are attracted to one retail establishment because of their interest in obtaining S&H Green Stamps tend to become customers of other licensees in the area.

The promotional value of a trading stamp service such as that offered by the Company is greatly influenced by the degree of consumer acceptance of the stamp's brand name. The Company has for several years engaged in an extensive national advertising program aimed at increasing consumer preference for S&H Green Stamps.

The Company's license agreements are generally entered into for a period of one year, although some are for longer periods, and provide for annual renewal unless either party gives notice of termination at least 30 days prior to the stated expiration date. The licensee pays the Company for the use of its service an amount based upon the number of stamps distributed by him. The license agreement provides that title to the stamps remains in the Company. In most areas the rates charged by the Company for licensing its trading stamp service decrease as the volume of usage increases. For retailers in certain categories who reach a certain annual level of stamp distribution, the company guarantees that the cost of its service will not exceed two per cent of the retailer's sales.

The licensee agrees to advertise the use of S&H Green Stamps, to furnish his customers with stamp saver books and catalogs of redemption merchandise, both of which are supplied to him by the Company, and to offer stamps on every purchase at the rate of one stamp for each 10 cents paid. In practice, the latter provision is not strictly adhered to by some licensees. Though contrary to Company policy, some licensees do not offer stamps with every purchase and others offer extra stamps in connection with special promotions.

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Retailer Licensees

The Company licenses the use of its trading stamp service to retailers engaged in almost every type of retail business conducted in the United States. However, the Company's service has been used most often in those fields of retail trade which are characterized by similarity in the products and services offered and a high frequency of purchase, such as food stores and service stations. This is indicated by the following table which sets forth the percentage breakdown of the Company's total service revenue for the year 1965 between the major categories of licensees:

	<i>Percent</i>
Supermarkets and other food stores-----	61.6
Service Stations-----	21.2
Department, clothing, dry goods, furniture and general stores-----	4.5
Drug stores-----	4.3
Other retailer licensees-----	5.6
Incentive programs-----	2.8
	100.0

The Company's trading stamp service has historically had its most widespread use among small independent merchants, who are often unable to afford other types of sales promotion available to their larger competitors. These small independent retailers still make up the numerical majority of the Company's licensees. However, a substantial portion of the growth in the Company's service revenue during the post-war period has resulted from the adoption of its trading stamp service by supermarket chains, which have become an increasingly important factor in food distribution during this period. Each of the 12 licensees accounting for more than one per cent of the Company's service revenue in 1965 was a supermarket chain. These 12 chains accounted for approximately one-third of the Company's 1965 service revenue, with no one of them representing more than 7.5% of service revenue.

Many of the Company's licensees have been using its trading stamp service for a long period of years. Eleven of the 12 largest licensees mentioned above, or predecessor companies, have distributed S&H Green Stamps for more than 10 years and the twelfth for more than five years. Although the Company experiences substantial turnover in its retail outlets each year, primarily among smaller licensees, the Company estimates that the outlets which discontinued the use of its service during 1965 accounted for less than 10% of the previous year's total service revenue. Most of the Company's large chain licensees do not offer its stamps in all of their retail outlets at any given time. A trading stamp service such as that offered by the Company is one of several merchandising techniques available to retailers and its relative effectiveness depends upon a number of factors, including the nature and degree of local competition, the relative competitive standing of the retail outlet and the extent of local consumer interest in trading stamps. For this reason, the Company's larger chain licensees frequently employ various methods of promotion in different marketing areas. For example, one of the Company's largest licensees discontinued the use of S&H Green Stamps in one of its marketing regions during 1965 and introduced them for the first time in a different region in the early part of 1966.

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The Company has a sales force of approximately 600 field representatives located throughout the country who solicit new licensees and service existing licensees.

Redemption

After filling at least one book containing 1200 stamps, a stamp saver may present them to the Company for redemption in merchandise. In certain states, as described under "Legislation", [see finding C 4] stamps may also be redeemed in cash, but such cash redemptions represented less than one per cent of the total redemptions made by the Company in those states during 1965.

The Company maintains more than 850 redemption centers located throughout the country. Of these, approximately 750 maintain inventories of merchandise from which redemptions can be made immediately. The remainder, many of which display samples of merchandise items, accept orders which are filled within a few days by one of the Company's nine distribution centers. A stamp saver who is not located near one of the Company's redemption centers can redeem stamps by mailing them directly to one of its distribution centers.

The Company offers its stamp savers a choice of over 2,000 merchandise items, most of which are nationally advertised brands. These include various household items such as textiles, flatware, kitchen utensils, lamps and small appliances, as well as leather goods, apparel, photographic equipment, sporting goods, jewelry and various other types of merchandise, which are illustrated and described in a catalog published each year by the Company.

The Company does not accept cash payment in whole or in part for any of its merchandise, distributing it only in redemption of its trading stamps. The number of filled stamp books required to redeem the items in the Company's latest catalog ranges from one to 385. The average redemption made by the Company in 1965 involved two and one-quarter books of stamps.

The retail value of the merchandise obtainable upon the redemption of a book of the Company's trading stamps varies somewhat, depending upon the item selected. Based upon surveys that have been made, however, the Company believes that the average retail value of its redemption merchandise is approximately \$3.00 per book of 1200 stamps, which exceeds the amount received by the Company in connection with the issuance of the same number of stamps. On the basis of this \$3.00 value, the redemption merchandise distributed by the Company in 1965 would represent a total retail value of approximately \$335 million. The Company purchases its redemption merchandise from over 600 suppliers, for some of which the Company is the largest single customer.

The Company stands ready to redeem all trading stamps it has ever issued, regardless of the length of time they have been outstanding. It frequently redeems stamps which were issued many years prior to their redemption. The Company is therefore unable to determine with absolute certainty the percentage of its stamps issued which will ultimately be presented for redemption. However, based upon the data available to it, the Company has for more than 40 years kept its financial records and filed its tax returns on the basis that 95% of all stamps issued will ultimately be redeemed, and it maintains liability accounts to provide for the cost of redeeming stamps on this basis. The 95% redemption rate is also reflected in the charges which the Company makes for the use of its trading stamp service and the values offered in the redemption of its stamps. As a matter of policy, the Company makes every effort to encourage and facilitate redemptions

because it believes that a high rate of redemptions is important to the continued participation of retail merchants and their customers in its trading stamp service. (Brackets added.)

(4) The testimony of witnesses called by respondent corroborated in major respects respondent's position (Tr. 4873-4886, 5016-18, 6063-64, 6087-91, 7135-39) as stated in its prospectus (RX 924b).

(5) The provisions of respondent's contract with its licensees generally in use (CX 11, Stip. 6) also confirm respondent's position as follows: (Respondent is referred to as licensor in such contracts and numbering and lettering refers to those in the contract.)

a. The Whereas clauses definitely show that a *system* is the subject of the contract:

WHEREAS, the LICENSOR has devised, extensively advertised, popularized and successfully put into operation in many cities in various states of the Union a CO-OPERATIVE CASH DISCOUNT SYSTEM whereby there may be offered to retail consumers a cash discount on all purchases, irrespective of their amount, thereby inviting and rewarding cash or prompt payment for goods sold for the purpose of decreasing the merchant's losses from slow or bad accounts and attracting and increasing the volume of his cash trade; and

WHEREAS, the LICENSEE desires to avail himself of the use of the LICENSOR'S aforesaid CO-OPERATIVE CASH DISCOUNT SYSTEM for said purposes:

b. The licensor (respondent) agrees to let the licensee install the system and to use its stamps as tokens or symbols; more specifically it states:

FIRST: THE LICENSOR AGREES:

(a) To license and authorize, and does hereby license and authorize, the Licensee to install and use in connection with his business at the aforesaid place and at the places listed on the reverse side hereof its said CO-OPERATIVE CASH DISCOUNT SYSTEM and to use its S&H CO-OPERATIVE CASH DISCOUNT STAMPS as cash discount symbols or tokens in connection therewith.

(b) To print the name and business address of the Licensee in any applicable directory of merchants, using its aforesaid CO-OPERATIVE CASH DISCOUNT SYSTEM, hereafter issued and distributed by it.

(c) To furnish to the Licensee advertising signs in quantities sufficient for use inside and outside his place or places of business to make known to the public that he has adopted its aforesaid CO-OPERATIVE CASH DISCOUNT SYSTEM.

(d) To furnish the Licensee with its S&H CO-OPERATIVE CASH DISCOUNT STAMPS to be issued to his customers as hereinafter provided.

(e) To furnish for distribution S&H collectors' books, in which customers may paste and accumulate S&H CO-OPERATIVE CASH DISCOUNT STAMPS.

(f) To redeem the S&H CO-OPERATIVE CASH DISCOUNT STAMPS, when collected in the manner herein prescribed and presented at any of its stores or redemption stations by the Licensee's customers, by giving them in exchange therefor, at the option of the Licensor or as required by law, cash or goods, wares or merchandise of their own selection, as described in its catalogues then current,

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and subject to the conditions herein and as printed in said catalogues and collectors' books.

c. The licensee in turn agrees to adopt and use the system (a) and to advertise the system and the fact that he issues S&H stamps.

d. The licensee, it is true, agrees to order a specified number of books of stamps (c) and

To pay the Licensor for the use of its CO-OPERATIVE CASH DISCOUNT SYSTEM an amount measured by the number of pads of stamps ordered and delivered at the rate of _____ dollars per pad payable on delivery of same.

Thus the respondent is paid in full at the time the stamps are delivered.

e. There is an express provision that stamps shall be issued one for each 10 cents of cash payment and that the stamps shall not be used except in the manner provided. That is, the licensee agrees:

(e) To offer S&H CO-OPERATIVE CASH DISCOUNT STAMPS to all customers making cash payments, and when accepted to issue to the customers one of said stamps for each ten cents, represented in such payments, as a discount in consideration of the payment of cash when made either C.O.D. or, at the option of the Licensee, on or before the 20th proximo, and only for redemption by the Licensor.

(f) In consideration of the license to use the Licensor's CO-OPERATIVE CASH DISCOUNT SYSTEM and the services to be performed by it and the initial and other expenses incurred in installing said system in the Licensee's place of business and in educating and making known to the public the advantages of the same, the Licensee agrees not to procure, use or dispose of the Licensor's S&H CO-OPERATIVE CASH DISCOUNT STAMPS in any manner except as herein provided.

f. The parties mutually agree that title to the stamps and signs shall remain in the licensor and shall not pass to anyone else; that the agreement shall be for a specified term and shall be automatically renewed unless terminated; that on termination the unissued stamps and the signs shall be returned to the licensor, and the licensee shall be repaid for the unissued stamps; that the agreement shall be nontransferable, shall be applied to the particular premises, and may be terminated by the licensor on breach of contract or in case of bankruptcy; that the contract shall constitute the entire agreement and shall be for the benefit of licensee's customers as well as for the parties (CX 11 ¶ Third a-f).

(6) Respondent, early in its history has, through its contracts with its licensees, reserved the title to its stamps and has provided that such stamps should be used as an inducement for cash trade; that they should be issued on a one stamp for each 10 cent purchase; and that the contract should be for the benefit of the licensee's customers (RX 1, 2). Its earlier agreements stressed the advertising phase of the system (RX 1,

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2). By 1915 respondent described its service as "a cooperative premium system of advertising the business of merchants and others and of rewarding continuous patronage and increasing cash trade" (RX 3). By 1936 the system was described as a cooperative discount system (RX 4).

(7) The collector's books, furnished by respondent to its licensees and described in paragraph First (a) of the licensing contract (CX 11), contain a notice reserving title to respondent. It reads as follows:

NOTICE

S&H Green Cooperative Cash Discount Stamps when redeemed in accordance with conditions printed below are your compensation for cash payments made.

All S&H Green Cooperative Cash Discount Stamps now or hereafter issued by The Sperry and Hutchinson Company are subject to all the provisions of the contracts between this Company and the merchants who issue them, and the following rights and conditions, which are expressly reserved by the Company, which the persons acquiring them expressly accept, and which are part of all contracts between this Company and its merchants, and are binding on the merchants' customers.

Neither the stamps nor the books are sold to merchants, collectors or any other persons, at all times the title thereto being expressly reserved in the Company, and the right to possession thereof is reserved to it, subject to the rights of the merchants and their customers under the contracts with the Company. The stamps are issued to you as evidence of cash payment to the merchants issuing the same. The only right which you acquire in said stamps is to paste them in books like this and present them to us for redemption. You must not dispose of them or make any further use of them without our consent in writing. We will in every case where application is made to us give you permission to turn over your stamps to any other bona-fide collector of S&H Green Cooperative Cash Discount Stamps; but if the stamps or the books are transferred without our consent, we reserve the right to restrain their use by, or take them from other parties. It is to your interest that you fill the book, and personally derive the benefits and advantages of redeeming it.

The stamps when received by you must be pasted in the book, as that is the method we have adopted for the purpose of preventing their further use. The use of our stamps is restricted to our merchants and their customers.

THE SPERRY AND HUTCHINSON COMPANY

(CX 208.)

The parties stipulated (Stip. Par. 42) that the phrasing of the notice had been substantially similar since the year 1896.

(8) Restrictions also are placed on redemption by a statement in respondent's catalogue (see CX 168, CX 586). These restrictions are that a full book of stamps is required before redemption can be made and that if the stamp saver lives within 25 miles of a redemption center, stamps cannot be redeemed by mail (CX 586). The latter restriction is sometimes waived.

(9) On the basis of the evidence submitted and exemplified by the foregoing, we find that respondent is in the business of selling an integrated service rather than selling stamps as such. We further find, so far as the licensees are concerned, that title to the stamps will be retained by respondent and that the licensee will not issue more than one stamp for each 10 cent purchase. We also find that notice is made available to those customers of the licensees who secure stamp collector's books; and that the customer may use the stamps solely for the purpose of redemption.

(10) Respondent has specifically urged that a number of findings, not deemed essential to this decision, are essential to its position. (Respondent's Appendix A to Reply Brief answer to question #1.) To the extent that these proposed findings, with the limitation stated, appear to have been established by proof, they are incorporated in Appendix C.

F. Practical Limitations of Respondent's System

(1) In theory, respondent licenses only one of a type of business in each marketing area. It obtains its volume and satisfies the wants of stamp savers by licensing other types of stores. For example, its key store might be a food store and the other stores in the family in a particular marketing area might be a drugstore, a cleaning establishment, a dry goods store, a hardware store, and a service station. Thus, according to respondent's theory, a stamp saver will be drawn to each of these stores; and because of the number of different noncompetitive stores, the customer will secure stamps sufficient to retain her interest (Tr. 7135-7138). As a matter of practice, however, in a number of cases either the competitive area was too narrowly circumscribed or the character of the stores was too strictly construed so that actual competition took place between licensees (see CX 450-470; Tr. 3808-3855, 3857-4012, see also Tr. 5017-9).

(2) In theory, respondent takes the position that multiple stamping is destructive of its system and that it should not take place. In practice, however, its enforcement activity was primarily precatory, only one case of cancellation of a license took place (C; A; Tr. 3465-3565; RX 924b, p. 6). Although actual cancellation was rare, in the case of the smaller store owner, located in a community where S&H stamps are particularly popular, a request to cease multiple stamping was sufficient to obtain the desired result (Tr. 3176-3189, 3200). But, for a large or medium-large chain, such a request would have little or no effect (Tr. 5426, 6983-89, 7020, 7060, 7089).

(3) In theory, respondent takes the position that under its notice in its collector's book, no one but the person to whom the stamps are issued by its licensee can redeem them. In practice, informal exchange among housewives is not, and perhaps cannot be, policed. Moreover, in recent years respondent has encouraged with its permission the pooling of S&H stamp savings by members of a church or of a charity or fraternal organization for the purpose of benefitting their organization (Tr. 5976-6024). Its attack has been upon a *commercial* attempt to buy, sell, or exchange stamps for a fee or other business consideration (see RX 120-186 inclusive).

(4) From the point of view of the consumer, there was no notice on the stamps as to their non-transferability (CX 1a). There was, moreover, some doubt apparent in the minds of the consumer witnesses who testified about the notice in the collector's book. One witness said she never read the notice (Tr. 2097, 2106); another thought she had a right to exchange stamps with friends (Tr. 2155-57); and a third was not aware of any necessity for getting permission from S&H before swapping stamps (Tr. 2173). Vice President Rossi of respondent had no knowledge of the extent of swapping (Tr. 5069) and knew of no action taken by respondent to stop it (Tr. 5070), except the notice in the collector's book (Tr. 5069).

(5) Although title is reserved to respondent under the contracts, Vice President Rossi knew of no taxes paid on stamps issued by the company and in the hands of licensees (Tr. 5076) and knew of no action to stop swapping by customers of licensees (Tr. 5070). Respondent does not replace stamps stolen from its licensees (Tr. 5076).

(6) Hence, we find that the theoretical method of conducting its business has varied in practice. We pass now to a consideration of the particular practices that are attacked in the complaint.

G. Alleged Unfair Practices

(1) *Respondent's Practice of Policing the Issuance of One Stamp for Each 10 Cents of Purchase Price*

a. Respondent admits in its answer that it enters into agreements with its licensees regarding the issuance of stamps by such licensees. It refers to such agreements. These agreements have heretofore been described (finding E5a to E5f), and stipulate that the licensee will issue only one stamp for every 10 cents of purchase price (hereinafter sometimes referred to as the "1-10" limitation) (C; A; see Tr. 4984).

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b. Respondent also admits that it attempts to dissuade its licensees from free, double, or bonus stamping (C; A).²

c. In this fashion respondent attempts to compel its licensees to issue only one stamp for each 10 cents of purchase price.

d. Respondent's urging has been effective in some cases but not in others (compare Tr. 3176-3189, 3200 with Tr. 5426, 6983-89, 7020, 7060, 7089). As a practical matter respondent often permits those licensees competing with other retailers, who issue stamps of a rival company that permits multiple stamping, to meet such competition (Tr. 4986). Although there is a good deal of multiple stamping done by S&H licensees, it is and has been the policy of S&H to enforce its contract against multiple stamping (Tr. 2020, 4016-17, 5629-31, 6133-39; RPF 85-89).

e. As a business matter and to the extent that trading stamps are a discount for cash, a limitation on the number of stamps issued limits that cash discount (Tr. 5009).

f. As is the case in deciding what respondent sells, there was, and there continued to be up to final argument, a sharp difference of opinion on the facts established about the 1-10 provision on issuance of stamps.

Complaint counsel affirms that, in terms, the 1-10 limitation is an express restraint creating a price-fixing device that is per se illegal and is wholly without factual justification (complaint counsel's reply brief pp. 8-23).

Respondent, on the other hand, claims that the agreements are not complained about (see respondent's reply brief pp. 1-6) and in any event that the 1-10 limitation is merely a definition of the service which respondent offers (respondent's reply brief p. 19; A pp. 5, 9, 16).

On the question of pleading, the examiner has determined that the language of the complaint (C 7 and 8) and respondent's statement of the issues are sufficient to show that respondent was apprised of complaint counsel's contention that certain provisions of the licensing agreements used by the entire industry were illegal. This is so despite the 1957 action of the Commission and its resolution authorizing the investigation here, which showed a disposition not to question the basic agreements used by the trading stamp industry. Accordingly, the following facts are found:

² There was also evidence offered of statements made by respondent's senior officials that it was respondent's policy to discourage multiple stamping (Tr. 4984, 5628-30; CX 413k, 1, n, o, p, 13, 14, 18, 19, 23, 24, 37, 143b).

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(i) The licensee in the license form expressly agrees with respondent to issue one stamp for each ten cents represented in cash payments as defined and not to dispose of the stamps in any other manner (finding E5(e) *supra*).

(ii) This agreement necessarily prevents the licensee from using his judgment in offering multiple stamps as a spur to competition, and to that extent, the agreement may have some effect on the prices which competitors might offer to offset offers of multiple stamps if such competitor were to choose a price cut as a method of reaction to multiple stamping (Tr. 2996, 3101-3102, 6544-6546, 7270, 7279-80; CX 196-98).

(iii) On the other hand, in this unique promotional business respondent could not sell its service of attempting to draw customers into its licensees' stores unless it defined of what that service should consist. The 1-10 limitation is part of that definition (Tr. 7136). As one of its selling points, respondent tells the prospective licensee that the licensee's cost of issuing stamps will be offset by the added number of customers attracted by such stamps. This seems to work out in practice (Tr. 5495). The cost to the retailer of the promotional system could not be defined unless the ratio of stamps to be issued to sales was specified. This specification is important because the retailer has a choice of promotions and must determine which one to use (see Tr. 6072-77, 6125-29, 7149-50). There could be no system of franchising a family of noncompetitive merchants which is one of the hallmarks of respondent's promotional system, unless each merchant is initially given the same basis of operation (see Tr. 4871, 6063-64, 7138). Where multiple stamps are prevalent as in the food stores, there is a noticeable effect on the reduction of franchises sought by other types of stores that might be expected to become licensees (Tr. 6122-24, 6658; CX 194). The licensee's customer likewise would not know what advertising the issuance of S&H stamps meant, unless the number was specified (see Tr. 4960, 6061-2, 7137). Respondent's S&H Green Stamps trademark has had seventy years of meaning 1-10 unless some other number was specified (Tr. 4960, 6061-2, 7137).

(iv) It is the opinion of the respondent's officials who testified, two of whom possess particular expertise in the field of theoretical economic analysis of trading stamp operation, that the 1-10 limitation is essential to the continuation of the trading stamp business because without it, escalation of multiple stamping will take place that would cause withdrawal of licensee's customers (Tr. 6071-2, 7137). Reliance on these opinions appears entirely reasonable despite the small number of actual cases of escalation (see CX 148a-b); the fact that

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a number of retailers who were called have not dropped stamps in the face of multiple stamping but simply stopped double stamping (Tr. 7018, 7050-51); and the proof of at least one double stamping situation that remained controlled and did not escalate (see Tr. 3097-98; CX 413W).

(v) The examiner accordingly determines that the provisions in the licensing agreements, relating to the number of stamps issued, are an essential definition of the service offered, are not an unreasonable restraint of trade in the unique circumstances of this industry, and do not constitute price fixing.

(2) *Enforcement of the 1-10 Policy Against One Retailer at the Behest of Another Competing Retailer*

a. Documentary proof written from 1957 to 1964, and taken largely from respondent's files, has established that in a substantial number of instances, involving several sections of the United States, retail licensees of respondent have requested respondent to urge other retail licensees, in competition with them, to cease issuing multiple stamps; and respondent has urged the competitors to stop (see Appendix A for references). Respondent admitted in its answer that it attempted to secure adherence to its policy sometimes after complaints were made by other licensees (A par. 8).

b. The vigor of respondent's action varied from case to case. In some instances a threat to cancel was made (CXs 18 a-b, 19, 20, 21, 128-129). In other instances a mild request was deemed sufficient (*e.g.* CXs 63, 90-92, 100-104). In many instances the action was initiated by a responsible official of respondent and almost all action came to the attention of a supervisory official (CPF 16-29).

c. The character and extent of the competing retailers' response also varied. In some instances a complainant in one case became an alleged violator in another (CXs 18-21, 130-146, 152 a-b, 190 a-b). In one instance the retailer complained about became a vigorous proponent of the 1-10 program (*id.*). Sometimes the compliance was short-lived (CXs 96-98, 100-104, 106-107, 130-135, 152 a-b). Sometimes there was no proof of subsequent compliance or noncompliance. In most instances, the noncomplying retailer agreed to comply (see Appendix A), even though he later lapsed into noncompliance.

d. The amount and nature of the competition between the complaining retailer and the retailer complained of varied from case to case. The hearing examiner infers from the fact that a complaint was made that the complaining retailer felt the effect on his business.

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Moreover, testimony (referred to in Appendix A) indicated in each instance that there was adequate proximity and sufficient product similarity between the two stores to infer active competition existed.

(3) *Agreement with Competitors on 1-10 Policy*³

a. The following trading stamp companies in their contracts with licensees provided that one stamp was to be issued for each 10 cents of purchase price:

Trading stamp company	Stamp issued	Commission exhibit
National Enterprises, Inc.-----	Top Value-----	43.
Top Value Enterprises, Inc.-----	Top Value-----	44, 52a-c.
E. F. MacDonald Stamp Co.-----	Plaid-----	53a-b, 54a-c.
Merchants Green Trading Stamp Co.---	Merchants Green--	55a-b.
King Korn Stamp Co.-----	King Korn-----	56.
Gold Bond Stamp Cos. (Subdivision of Premium Service Corp., which used to be known as Gold Bond Stamp Co. (Tr. 3576)).	Gold Bond-----	57-58, 630- 633 G.
Blue Chip Co. (for a limited period 1957-1960).	Blue Chip-----	2z27, 28.
Respondent.-----	S&H Green-----	11, 567b.

In some cases there were express provisions for special exemptions.

b. It was not established that the action of the stamp companies listed in finding G(3)a to adopt the 1-10 system was agreed to by them. Agreement was specifically denied (Tr. 3684-3688, 3694-5, 3713, 4963-6, 4974-8, 5614-15, 6033-41). It is inferred that the other companies imitated respondent because respondent had used that system successfully. It was general knowledge that stamp company contracts contained such a clause (see Tr. 6059).

c. During the year 1953 a number of supermarkets that served Denver, Colorado, began issuing multiple stamps. The number of multiple stamps escalated until at one time four stamps were issued for each 10-cent purchase. A meeting was held on October 1, 1953, by representatives of the stamp companies whose licensees in Denver had been issuing multiple stamps there. These included representatives

³ The hearing examiner has made no finding concerning the situation at Park Rapids, Minnesota, because the documentary proof is from the files of Gold Bond (CX 163a) and thus not generally binding on respondent and the testimony of Bixby and Barkley was inconclusive (CPF pp. 70-75; RPF p. 96h). Similarly, no finding is made with respect to the Grand Union situation in Connecticut, in this connection, as this is regarded as a retailer rather than a competitive stamp company situation (see CPF pp. 75-77).

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of respondent, Gunn Brothers, Pioneer Trading Stamps, Inc., National Gift Seal Co., and The True Blue Stamp Company. They agreed to issue a joint advertisement that beginning October 5, 1953, all firms would require adherence to the policy of giving only one stamp with every 10-cent purchase (RPF. 128, CPF 34). An advertisement was published to this effect on October 5, 1953 (CX 147, 148a-b; Stip. 30; Adm. 15-22). When the Better Business Bureau of Denver and others took steps to stop the issuance of multiple stamps, respondent participated in the discussions (CX 148b). Thereafter, for many years there was little double stamping in the Denver area (CX 189b, d, 191b, 192, 193d, 195; RX 548).

d. The General Counsel for Premium Service Company, which issues Gold Bond stamps, testified that it was the policy of that company in April 1961 to encourage their licensees to issue multiple stamps and that policy continued (Tr. 3626, 3665-6). He denied that there had been any agreement with S&H or any other trading stamp company to require issuance of stamps on a 1-10 basis (Tr. 3683-3688). Respondent's officials also denied that there had been any agreement or understanding with other stamp companies (Tr. 4963-6, 4974-8, 5614-15, 6033-41).

e. Respondent's records indicate that in May 1961, a Gold Bond representative telephoned the local Arizona representative of respondent, John Howarth, and advised him that Safeway Stores had complained about Pete's Country Store issuing double stamps with coupon books and that this could be interpreted as a policy of issuing double stamps every day by that store. Records further indicate that Safeway threatened to retaliate by offering double or quadruple stamps. Respondent's representative went to see Pete; and Pete advised the representative that he would clear the matter up as soon as possible (CX 149a-b). Records further indicate that three months later the Gold Bond representative telephoned the local S&H representative again and said he had purchased a coupon book from Pete's and had received double stamps. The local S&H representative then called John Beinert, an assistant vice president of respondent (CX 150), who telegraphed the proprietor of Pete's Country Store that issuing double stamps was in violation of his contract and must be stopped (CX 15) see also Adm. 45-51).

f. At the hearing, Howard Glenn Tremain, also known as "Pete," general manager of Pete's Country Store (Tr. 5863-4), testified about his conferences with John Howarth. In substance Howarth said that it was—"the general practice of S&H to single-stamp, and he had had some pressure put onto him by some other stamp company, and he

would appreciate it very much if we would consider just giving one, single stamp except on Wednesday" (Tr. 5872). Tremain testified that he told Howarth "we would not have much of an incentive to sell coupon books if it was sold on a single stamp practice. So he [Howarth] agreed with me, and we talked this thing over. So, we continued to go ahead and give double stamps on the books, and then later Safeway started giving us a little trouble on it" (Tr. 5872). The little trouble consisted of the Safeway supervisor's buying a coupon book, receiving double stamps, and then threatening that Safeway would go to triple stamps (Tr. 5873). Tremain then got in touch with Howarth and told him "we had decided to go to double stamps only on Wednesday and we would only sell coupons with double stamps on Wednesday" (Tr. 5874). Howarth said that he thought this would be all right, so Tremain has continued this practice ever since (Tr. 5874). It was brought out that Tremain's competition also issued double stamps on Wednesdays, as well as bonus stamps (Tr. 5878).

On cross-examination, Tremain said the contracts with Howarth, the telegram from Beinert, and the talk with the Safeway man were all factors in his decision to limit double stamping (Tr. 5883). Tremain also stated that he borrowed about \$120,000 from respondent of which \$72,000 is still outstanding (Tr. 5886). After his memory was refreshed, Tremain indicated that Safeway's representative had said he would contact S&H if Tremain did not stop double stamping (Tr. 5892-5895; see also CPF 35; RPF 132f).

g. In early 1961, in Mississippi, there was a case of cooperation in preventing double stamping between respondent and Gold Bond. Respondent admits that one of its officials recalled that about March 1961 a licensee of respondent, Lewis Grocery Co., owners of Sunflower Stores in Greenville, Mississippi, issued double stamps on the opening of a new Safeway Store (CX 155a, 157a) and that respondent's district manager at Montgomery, Alabama, Robert A. Sawhill, received a telephone call from a representative of Gold Bond about the practice. The Gold Bond representative suggested to Sawhill that he should speak to Sunflower because Safeway had complained about Sunflower's double stamping. Sawhill did speak to someone in Lewis Grocery Company (Sunflower) (Tr. 5529) and told him that "* * * Safeway was going to lean on him" (Tr. 5530) *i.e.* Safeway would be likely to respond by issuing multiple stamps (CX 155a-b). Lewis, the president of the company, did not recall any such conversation (Tr. 5422).

Records from the files of Premium Service Corporation (Gold Bond) corroborated respondent's admission and identified the officials of Premium Service who had made the calls. The records further

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related that Sawhill told the Gold Bond representative that the double stamping activity would not be repeated by Sunflower. This intelligence had been reported to Safeway. These records also indicate that double stamping had broken out strongly in June 1961 in Greenville; but no action was reported to have been taken, although the local Gold Bond representative requested further instructions (CX 157-160). Testimonial and documentary evidence has indicated that respondent's action was ineffectual (Tr. 5422-26, 5428, 5429, 5460, 5528-31, 5544, 5555; RX 651-773; RPF 132(e), CPF 36).

h. There were two instances of cooperation between Gold Bond and respondent to cope with multiple stamping in the State of Iowa in late 1961 and early 1962. The first involved Van's Food Market and Pella Super-Valu in Pella, Iowa (CPF 38; RPF 132(i)). Van's Food Market, an S&H licensee, was giving double stamps from September to December 1961 (Tr. 3183), because Pella Super-Valu was giving free Gold Bond stamps with a \$5 order and two other S&H licensees in neighboring towns were giving double stamps (Tr. 3184-85).

Sometime in November 1961, Bishop, respondent's local man, told Henry Vandervoort, the owner of Van's Food Store, that he had had word "from above" that Van's should stop double stamping (Tr. 3188). When Vandervoort refused, H. M. Bixby, respondent's regional manager, telephoned Vandervoort and told him emphatically to quit double stamping. During the conversation Vandervoort said he would stop and Bixby said, "You know who is here awaiting your answer." Vandervoort said, "Either Gold Bond or Super-Valu." Bixby then said, "Yes." Vandervoort said he had agreed to stop double stamping, because Bixby was high enough in the S&H company and because Vandervoort generally obeyed orders (Tr. 3190). Records of Premium Service Corporation (Gold Bond) indicate that the request to Bixby to stop Van's from double stamping had come from Gold Bond (CX 164, 165, 166). Although called as a witness by respondent, Harry M. Bixby denied any agreements but was not asked specifically concerning this incident (Tr. 6033-6041).

The second Iowa incident involved Eagle Stores, respondent's licensee, and Super-Valu Stores, a Gold Bond licensee (CPF 37; RPF 132(g)). There was cooperation between Gold Bond and respondent to prevent double stamping by one of respondent's licensees.

James F. Purk, the owner of three Super-Valu grocery stores in the Waterloo and Cedar Falls, Iowa, area, was dispensing Gold Bond stamps in 1962 (Tr. 3137-38). Two other retailers operated in the area; Eagle Stores and National Tea Company. Eagle issued S&H stamps, and National Tea, King Korn stamps (Tr. 3139). Eagle Stores

double stamped in its five stores at times during 1961 and 1962. When this would happen, Purk would call Irving Messerschmidt, manager of the Iowa division of Gold Bond, and would tell Messerschmidt that his [Purk's] competition was giving double stamps and that if they did not stop it, he would immediately start (Tr. 3140-41). Messerschmidt would tell Purk to relax; he would call S&H and would do what he could to get the matter stopped (Tr. 3141). Purk about this time also telephoned Kirk Carlson, president of Gold Bond, in the Minneapolis office, about double stamping (Tr. 3141). After each complaint within a normal length of time, the matter would be stopped and stamping would go back to normal (Tr. 3141). Purk could not recall how many times this happened (Tr. 3142). Premium Service Company's records corroborate Purk's testimony and indicate that after a call from Purk, J. J. Hunt, the Gold Bond vice president, made contact with Bixby and with Mills, general counsel of S&H in an effort to get the double stamping stopped (CX 162, 163 a-b). While Mills had no recollection of the contact, respondent admitted that Bixby recalled he had had a conversation with J. J. Hunt, but he could not recall the details (CX 161 a-b). Bixby was called as a witness by respondent but was not questioned specifically concerning this incident, though he made general statements that there were no agreements with other stamp companies (Tr. 6033-6041). The two officers of Eagle who testified could only deny that contact was made with them (Tr. 7011, 7090).

i. In March 1963 the manager of Gold Strike stamps at Salt Lake City, Utah, complained to a local S&H representative that Prinster's City Markets in Moab, Utah, was giving double stamps (CPF 41; RPF 132d). Although the recipient of the complaint, the S&H district manager, could not find a record of Prinster's, the district manager suggested to the zone manager that he follow through, advise the account of "our policy," and let the Gold Strike representative know "that we have taken care of it" (CX 154). Frank J. Prinster, the principal stockholder of City Markets, a chain of supermarkets, one of which was located in Moab, Utah, was called as a witness by respondent. Prinster testified that according to his recollection no one made contact with him and told him to stop giving double stamps (Tr. 6239-6243). Prinster did not know either the zone manager or the district manager of respondent who were the subjects of the correspondence that had been offered by the Commission (CX 154; Tr. 6243); and he never discussed with Jack White or Ed McBride who were the S&H representatives whom he knew, the use of stamps in excess of 1-10 (Tr. 6243). It was Prinster's recollection that he

was not giving double stamps in March 1963 at Moab, Utah (Tr. 6243). He stated that he had given extra stamps on specific products and on total purchases of \$5, and he had advertised such offers in the newspapers (Tr. 6244).

On cross-examination, Prinster stated that his firm was presently indebted to S&H for over \$200,000 and that the first loan was made in November 1965 (Tr. 6251-6252). On December 5, 1965, shortly after the loan, Prinster replied to a request made by complaint counsel for information: "I cannot recollect at any time did any official of the S&H Stamp Company request us not to give double stamps—either verbally or by correspondence" (CX 660). He also said that he had no correspondence on the subject.

It thus appears that no action was taken by the S&H zone manager to contact Prinster as suggested. This is quite likely, because Prinster, having his office in Grand Junction, Colorado, dealt with representatives of S&H from Denver, Colorado, and would not be contacted normally from Arizona (Tr. 6243).

(4) *Discouraging Exchanges*

Respondent admits that it endeavored by itself to stop trading stamp exchanges dealing in its stamps (C, A). In fact, it requested the hearing examiner to take official notice of numerous decisions of state and federal courts upholding its right to enjoin trading stamp exchanges and others who sought to purchase or exchange its stamps contrary to respondent's interest in retaining title thereto (see RX 120a-186 inclusive). It admitted in formal admissions that it had filed 16 complaints since January 1, 1957, seeking injunctions (Adm. 25); and it had issued 140 warning letters to firms exchanging S&H stamps and 175 warnings to persons engaged in redeeming S&H stamps (Adm. 24). Details covering instances of this character are described in Appendix B.

At the outset, consideration must again be given to complaint counsel's persistent claim that the restriction on the transfer of stamps in the license agreement is, in itself, an unreasonable restraint of trade. As pointed out in finding G(4)f (*supra*), with respect to the 1-10 provision, this limitation on transfer, while it appears to be an express restraint on alienation, is, by a parity of reasoning, nothing more than a necessary description of the service that respondent offers its licensees. Moreover, as a matter of common knowledge, it must be recognized that since the promotional service sold by respondent is one designed to bring customers into a licensee's store by the issuance of a popular S&H stamp, this design cannot be realized in the long run if a customer can get the popular S&H stamp at an exchange by

surrendering a different stamp secured at some other store (see Tr. 2414, 4983-84, 5439, 7159-61). Testimony of the trading stamp operators and a few of their customers about noticing or making no change in buying habits cannot change this long run necessary consequence (see CPF 117). In other words, this restriction is inherently essential to carrying out the purpose of the promotional scheme and is not an unreasonable restraint of trade.

a. *Testimony of Respondent's Executive Vice President*

(i) Frederick A. Collins, Jr., who had also been an associate and later member of the firm of outside general counsel to respondent (trial counsel in this case), testified that it was the policy of respondent, where there was either an unauthorized use of S&H trading stamps or a trading stamp exchange operating, to inform outside general counsel who would in turn write or telephone the person engaged in the unauthorized activity and, then, if they did not stop, outside counsel would be forced to bring action against them (Tr. 5578). There were three categories of persons engaged in unauthorized activity: 1) retailers who wanted to buy stamps and reissue them; 2) retailers who offered to exchange S&H stamps for those they were issuing to lure customers who collected S&H stamps into their stores; and 3) the trading stamp exchanges that ran brokerage operations (Tr. 5579). Generally, unauthorized users stopped at counsel's request but there was a substantial amount of litigation in all of which respondent was successful (Tr. 5579-80). In early history of respondent one case in New Jersey was lost, because there was insufficient notice of reservation of title (Tr. 5581) but, except for that case, no court has refused to honor the nontransferability of stamps or to hold the reservation of title illegal (Tr. 5581). In no case has respondent moved with respect to stamps other than its own, because it would not have sufficient interest (Tr. 5587).

(ii) Collins also testified that he did not communicate with executives of other trading stamp companies except with their counsel, where there was a trading stamp exchange involved (Tr. 5587). The nature of S&H's communications with counsel for other stamp companies is exemplified by a case where a trading stamp company was offering to exchange its stamps for S&H's stamps and Collins told their counsel to stop or S&H would be forced to bring action against them. The only other case he could recall was one where general counsel of Triple S Trading Stamp Company asked him for copies of the complaints and briefs his firm had used in litigation against the unauthorized use of trading stamps (Tr. 5587-88).

(iii) Collins further testified that he knew of no agreement between respondent and any other trading stamp company or of facts that would indicate there was such an agreement, and that the policy of S&H was dead set against communications between S&H representatives and representatives of other trading stamp companies relating to any phase of competition between them (Tr. 5589, 5613-14).

(iv) On cross-examination Collins testified, however, that if another trading stamp company gave S&H information regarding an exchange of S&H stamps, it would acknowledge the information and follow its usual procedure against the exchange (Tr. 5616). The same would be true of double stamping (Tr. 5617). The company might be willing to engage jointly in lawsuits with other stamp companies against trading stamp exchanges though Collins was not aware of any case in which they had done so (Tr. 5621, 5639). They may have advised other trading stamp companies that particular trading stamp exchanges were handling such other companies' stamps (Tr. 5621).

(v) Whenever another trading stamp company draws to the attention of respondent the fact that some person is indiscriminately redeeming or buying or selling trading stamps, respondent refers the matter to outside counsel and counsel tells the person to stop such activity or respondent will be forced to bring action (Tr. 5635). But respondent did not keep other firms informed of what it was doing; nor did other firms keep it informed, even though they had the same law firm (Tr. 5636).

(vi) Collins recalled that three trading stamp companies simultaneously sued a company called Two Guys From Harrison in New Jersey in 1963 or 1964. There was no consultation between the trading stamp companies, but counsel for one borrowed respondent's complaint and brief (Tr. 5638); moreover, there may have been further consultation between New Jersey counsel (Tr. 5638-39).

(vii) Collins specifically denied that there was any common planned course of action to furnish assistance to other stamp companies in suits brought to prevent the operation of trading stamp exchanges (Tr. 5656-57) or to exchange information regarding such suits (Tr. 5672) but he admitted that there were some instances where counsel had taken action beyond what he considered proper policy (Tr. 5673-5675, 5688).

b. *Other Proof of Cooperation With Other Trading Stamp Companies in discouraging Exchanges*

(i) Complaint counsel offered extensive documentary proof about discouraging trading stamp exchanges, some of which concerned al-

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leged cooperation between respondent and other trading stamp companies (CX 208-386).

(ii) It was established that a number of trading stamp companies reserved title to their trading stamps in a notice on collectors' books similiar to the restrictions contained in the S&H collectors' books (CX 208). These included the collectors' books for the following stamps:

Top Value.....	CX 209.....	Adm. 84.....	Stip. 43.
King Korn.....	CX 210.....	Adm. 85.....	Stip. 44.
Gold Bond.....	CX 211.....	Adm. 86.....	Stip. 45.
Plaid.....	CX 212-216....	Adm. 82.....	Stip. 46.
Merchants Green.....	CX 217.....	Adm. 116....	Stip. 47.
Triple S.....	CX 218.....	Adm. 83.....	Stip. 48.

(iii) There was no evidence offered that these notices were a matter of agreement among the companies. Agreements with competitors were specifically denied (Tr. 3694-5, 3713, 3974-3978, 5614-15a). Accordingly, it must be inferred that these notices were adopted as a result of imitation of S&H because respondent had used its system satisfactorily.

(iv) In a number of instances it appears that respondent cooperated with or received cooperation from other trading stamp companies in suppressing the operation of trading stamp exchanges. Some of these instances follow:

(aa) In May of 1962, Robert W. Sweet of counsel to respondent, authorized its local counsel to join Texas Gold Stamp Company in an action to enjoin an unauthorized use in Raymondville, Texas (CX 312; Stip. 49; CPF 82; RPF 165).

(bb) In December of 1961, Peter A. Cooper, attorney for respondent, wrote United Trading Stamp Company requesting that company to have their licensee, Sponangles Mobile Service, discontinue redeeming S&H stamps (see CPF 89). Shortly thereafter United Trading Stamp Company responded that they were investigating, and that they would take the necessary steps if they found evidence of improper redemption. They also assured respondent of their continued cooperation in matters of this type (CX 313-316; Stip. 50). The gasoline station ceased redeeming S&H stamps (CX 317; RCPF CPF 89).

(cc) The attorney for Quality Stamp Company in June 1961 notified respondent's general counsel of an advertisement in an East Memphis, Tennessee, paper by Warren Wooley offering to exchange stamps. Quality's counsel requested assistance in the form of explain-

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ing the theory of respondent's actions against such exchanges (CPF 81). Respondent's counsel shortly thereafter warned Wooley to cease his activity and suggested to Quality Stamp Company's counsel that they coordinate their activity with S&H to avoid a multiplicity of suits, if action were required. Some time later, local counsel for respondent in Tennessee talked with Quality's counsel and with counsel for Top Value. Top Value's counsel said that he would have no objection to respondent's joining his action, but that Quality Stamps would not do so because of other matters making it preferable for them not to litigate. Top Value also requested assistance in securing evidence against Wooley. Wooley later gave up its trading stamp exchange business just as Top Value counsel was about to start a proceeding for an injunction (CX 318-325; Stip. 51).

(dd) In April 1959, respondent's counsel instructed a local official to speak to Karbe's Supermarkets in Joplin, Missouri, because Top Value's general counsel had advised him that Karbe's was exchanging Top Value for S&H stamps. Respondent's counsel said he had agreed to do all possible to stop the practice. The local official reported that Karbe's agreed to discontinue the practice in accordance with the request of Top Value's counsel (CX 326-327; Stip. 54; CPF 80; CCPF RPF 168).

(ee) In September 1959, the general attorney for Top Value Enterprises, Inc., wrote respondent's assistant general counsel that Kirk's Gift Shops in Dayton, Ohio, had ceased redeeming Top Value stamps but were still accepting S&H and King Korn and that he thought respondent would be interested in stopping the practice (CX 328; Stip. 52). Respondent's assistant general counsel replied with thanks stating "we will follow up on this and stop the practice to which you refer" (CX 329). This matter was then referred to outside general counsel to handle (CX 330; Stip. 52; CPF 86).

(ff) In June of 1959, the Gold Bond manager in Denver, Colorado, informed the Grand Junction office of respondent that Kirby Vacuum Cleaner Company in Denver was accepting S&H stamps in lieu of money and that Gold Bond had notified their counsel. The local branch manager of respondent notified respondent's vice president. Then respondent's assistant general counsel sent the matter to outside counsel to handle "in their usual competent way" (CX 331, 332; Stip. 53; CPF 87). Outside counsel wrote Kirby's and received assurances of discontinuance. The local manager of respondent then rechecked Kirby's and found it in compliance (CX 331-339).

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(gg) In February of 1959, counsel for respondent were informed by Triple S's attorney that Food Land, Inc., in Worcester, Massachusetts, was redeeming S&H and other brands of trading stamps. Respondent's counsel then wired Food Land to cease and, after receiving assurance of discontinuance, told the local manager to check to see that Food Land had, in fact, ceased (CX 340-344; Stip. 55; Adm. 87; CPF 88).

(hh) In March of 1957, respondent was informed that Mayfair Market in Red Bank, New Jersey, was accepting S&H stamps for Yellow Stamps. In addition to notifying Mayfair Market to cease, respondent notified Philadelphia Yellow Stamp Company that its licensee, Mayfair, was improperly dealing in its stamps. Philadelphia Yellow Trading Stamp Co. agreed that its licensee should discontinue and so notified Mayfair Market. Mayfair needed further urging and so respondent again requested Philadelphia Yellow Trading Stamp Company to take action. Respondent subsequently received a letter from the attorney for Yellow Stamps stating that they had again written Mayfair Markets and agreed that trading stamp companies should redeem only their own stamps. The attorney for Yellow Stamp thanked respondent's counsel for advising of the instance and assured respondent's counsel of continued cooperation (CX 345-352; Adm. 88; Stip. 59). Following this exchange respondent instructed its Asbury Park employee to recheck and report (CX 353; Stip. 59; CPF 83).

(ii) In May of 1956, Mr. Collins, then a member of the firm of Casey, Lane and Mittendorf as outside general counsel for respondent, arranged with counsel for United Trading Stamp Company and counsel for Top Value to have respondent's counsel in Oklahoma represent all three companies in connection with unauthorized redemption of their stamps by Open Front Food Market in Duncan, Oklahoma, (Stip. 60; Adm. 89; CX 354; CPF 84). Respondent checked and found that this practice had been discontinued. In 1957 it started again. Counsel for S&H requested counsel for United, whose licensee Open Front Food Market had then become, to take steps to stop Open Front's practice of exchanging S&H stamps (CX 355-358). United's counsel took the action requested (CX 359).

(jj) In October 1956, counsel for Community Stamp Company asked respondent whether or not it would be interested in sharing legal fees if Community decided "to go to bat" to prevent Baries of Saxonburg, Pennsylvania, from redeeming S&H and Community stamps. Respondent turned the matter over to outside general counsel, who wrote Baries to stop, thanked Community's counsel for the information, but reserved decision on whether or not to proceed jointly with

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Community. Community's counsel later wrote that Baries had discontinued (CX 360-363; Stip. 61). Apparently Baries started again, because in March 1957, respondent's outside counsel wrote to counsel for Prudential Premium Company, whose licensee Baries was, to have Baries cease their unlawful activity, because S&H was "under considerable pressure from licensees in the Saxonburg area to do something about Baries * * *." Prudential's counsel informed respondent's counsel that he had instructed Prudential to notify Baries to stop (CX 364-366; Stip. 61; CPF 89).

(kk) In January of 1960, an S&H zone manager notified the home office that R. Donosky, a pawnshop operator in Roswell, New Mexico, was advertising that he would buy S&H and other stamps for \$1.25 per book. The matter was referred through channels to outside general counsel. General counsel wrote Donosky to cease and desist and also wrote three other trading stamp companies Frontier, Gold Bond and Scottie sending them a copy of his letter to Donosky. In sending the letter to the other trading stamp companies, Mr. Joyce of outside general counsel wrote: "We trust that you, too, will wish to take immediate steps to eliminate Mr. Donosky's unlawful interference with your trading stamp business." (CX 372). The letter to Donosky and a second registered letter were returned unclaimed. Gold Bond wrote that it would look into the matter, and Frontier wrote Donosky to cease. An attempt was then made to make contact with Donosky locally. This resulted in securing information that the trafficking in S&H stamps had ceased (CX 367a-386; Stip. 62; CPF 85; RCPF CPF 85).

c. Respondent's Publicity

Records from respondent demonstrate that in the two instances, in evidence, publicity releases were widely distributed upon the successful termination of injunction proceedings. The local publicity representative reported with respect to an earlier release that he had kept it plain and strictly to the facts but encouraged the city desk to do a little embroidering. The embroidering which resulted was that a temporary injunction was described as permanent (CX 390). An attorney for respondent with respect to a 1960 suit wrote outside general counsel that the story of the recent success had gone out over the Associated Press wire and that a clipping service was picking up the story from papers all over the country. The letter concluded:

This is what we were after and I am enclosing herewith a list of the newspapers in which the article has appeared. I will retain the articles themselves. If you need one for local negotiations, I will resurrect it for you.

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H. Effects

(1) *Effects Charged in the Complaint*

a. According to the complaint the activity charged in each count had specified effects.

b. In both counts one and two dealing respectively with the retailer and the competitor phases of the alleged illegal activity, there were common charges of effects produced. These included (a) tampering with price structures, (b) restraining competition among retail merchants, (c) creating a combination to limit competition, (d) depriving the public of additional stamps which might otherwise be dispensed, and (e) depriving retail merchants of the right to conduct their businesses and dispose of stamps as they saw fit. In addition, count two alleged that competition among trading stamp companies had been restrained.

c. In count three, which deals with the trading stamp exchanges, effects charged were: suppression of trading stamp exchanges to their detriment and that of the public; denial to public of opportunity to redeem stamps through persons other than respondent; and interference with the right of the public to alienate their personal property.

d. Should we accept what appears to have been the original theory of complaint counsel that respondent is merely engaged in the sale of stamps, it follows as a matter of logic alone that the price of the stamps is fixed so the stamp price structure is tampered with; competition among retail merchants in stamps is restrained; the public is deprived of getting additional stamps; and retailers are deprived of dispensing additional stamps. However, as heretofore pointed out, there is not involved here a sale of stamps. To the contrary, a promotional scheme having many interdependent facets is involved. Hence, we cannot merely draw a conclusion that certain results have occurred, but must consider rather the economic and other proof adduced.

e. Similarly, with respect to count three, complaint counsel assumes that there can be no valid retention of title to the stamps in respondent. If this be the case, it again logically follows that trading stamp exchanges are unreasonably suppressed and the public is deprived of rights to alienate and to redeem stamps as they see fit. As we have seen, however, there is really no question of title passage at all. What *is* sold is a duty to perform under the conditions specified in respondent's contract with its licensees. Since, however, evidence was adduced, on the effects charged, we shall describe what was established.

(2) *Effects Established*

a. *Price Structure Effects*

(i) Evidence established a number of facts relating to the price structure. Stamps are described as a cash discount by respondent. The number of stamps by contract is restricted to one for each 10 cents of purchase price. Thus there results a business restriction on this cash discount (see Tr. 5009).

(ii) In the cash only states redemption must be made in cash (CX 414), and in the 16 cash option states it may be demanded in cash.

(iii) On the other hand, there is no direct restriction on any other type of discount or on the price that the respondent's licensee may charge for the merchandise sold and with which the stamps are issued. From an accounting or economic point of view, it may be said that the stamps are not part of the cost of sales of the merchandise but rather part of the overhead of the business. From the point of view of the consumer, however, the stamps are part of the package of rights that he is entitled to receive for his purchase price. Any restriction on the number he receives *pro tanto* has an effect in the nature of a partial price restriction (see CPF 47 and references there cited, RCPFCPF 47, 48; RPF 78-86, 88-89, 92-98). The impact of respondent's practices is significant particularly in the food retailing field (see RCPF CPF 48 and references there cited). There, in addition, price and quality competition had declined (Tr. 4053, 6431).

(iv) Evidence on the behavior of stamp competition, moreover, established that price cutting was one of the competitive responses to the original issuance of stamps. This again points in the direction that a restriction on the giving of stamps may affect the price of the competitor of the stamp issuing retailer and thus the price offers in the market (Tr. 2996-97, 3101-03; CX 196-8). One may accordingly conclude that the restrictions on the number of stamps to be issued may affect in some measure price behavior.

Turning now to the retail competitors.

b. *Effects on Retailer Competition*

(i) Perhaps the best evidence of the effect of the limitations by respondent on the number of stamps to be issued by licensees comes from the situations in which one retailer complained about another retailer's practice of issuing more than the required number of stamps. The significant number of such complaints compels the conclusion that the

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issuance of more than the prescribed number has a real impact on competitors. Hence, requiring competitors to cease has a clearly restrictive effect (see Appendix A).

(ii) This same evidence demonstrates that respondent's network of some 70,000 licensees constitutes a combination to prevent violation of its agreements on the use of stamps. All licensees are bound by the same restrictions, and complaints of one retailer are received by respondent against another retailer with varying results (see Appendix A). Of necessity this activity of retail licensees has its impact on the customers of the retailers complained against.

(iii) In addition, retailers may use extra stamping as a competitive device (see CPF 53-4).

c. Effect on the Public

If a retailer is prevented from issuing double or multiple stamps by respondent, it follows that his customers likewise are deprived *pro tanto*, of the number he might otherwise have issued to them. No proof was required to establish this self-evident fact (see, however, CPF 52).

d. Effect on Freedom of Retailers

Similarly it follows that retailers who agree with respondent not to issue more than one stamp for each ten cents of purchase price are not *free* to issue more. Their right of decision as to whether or not to issue multiple stamps as a promotional device is thus curtailed even though some retailers feel they are in a better position to determine how to use stamps to compete than is respondent (see Tr. 3198; CPF 56-58). Passing now to the competing trading stamp companies the effect is not as clear.

e. Effect on Competitor Trading Stamp Companies

In October 1953 in Denver, Colorado, there was a trading stamp war and, after the Better Business Bureau and others became disturbed, the trading stamp companies issuing stamps there (including respondent) agreed that only one stamp would be issued with each ten cents of purchase price (CX 147, 148a-b; Stip. 30, Adm. 15-22). This clearly placed a restraint on each of the participants to the agreement to prevent their permitting issuance of more than one stamp for each ten cents of purchase price and thus restrained competition among them to that extent. It also affected their licensees and the licensees' customers. This Denver situation had a substantial impact on retailers and on trading stamp companies. The possibility of escalated stamping was thereafter used as a horrible example to seek to secure cooperation

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to prevent similar stamp wars (see CX 149; Adm. 45-48). It was, however, not effective to restrain all competition among stamp companies and, in fact, at least one company representative testified to a policy of encouraging multiple stamping. The agreement in Denver had an immediate effect, however, in that area on trading stamp company competition and had a restraining influence against permitting unlimited stamp wars in other areas. To this extent, competition among trading stamp companies was restrained. We pass now to effects charged in the third count relating to trading stamp exchanges.

f. Suppression of Trading Stamp Exchanges

(i) Admittedly respondent took all possible steps to prevent its trading stamps from being handled by trading stamp exchanges. Since respondent is the largest trading stamp company this, of necessity, substantially reduced the volume of the trading stamp exchange (see Tr. 1886).

(ii) When respondent joined forces with another stamp company, as the evidence indicated it did in a few cases, we may infer that the reduction in volume of the exchange was even more substantial. In one instance, respondent's counsel sought cooperation of other stamp companies to prevent their stamps from being used. That effort was abortive, because the exchange went out of business before other stamp companies came into the action.

(iii) In any event, in the numerous cases where respondent did succeed in preventing a trading stamp exchange from trafficking in its stamps we may infer that the exchange lost volume and that its customers could no longer use its services to buy, sell or exchange S&H stamps. Of necessity, consumers having S&H stamps would then, and to that extent, be limited in the use to which they could put such stamps. If they could not sell or exchange S&H stamps, they could only use them to secure the merchandise made available by respondent. This clearly presented less of a choice to the stamp collector than she would have had if she could have used the stamps as currency anywhere she chose (Tr. 2476-2638).

(iv) Today there is a large migratory population collecting stamps in one area that cannot be used in another area. There is also prevalent a number of different stamps that are collected by consumers because of the convenience of the shops dispensing them. Hence consumers are placed at a disadvantage if they cannot exchange such incidentally collected stamps for others (see CPF 90-93).

We consider now the reasons for our decision.

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Reasons for Decision

At the outset we must consider two distinct problems. The first problem is the inherent reasonableness of the trading stamp system. If it is an inherently reasonable contract provision to require that stamps be issued on a one for 10 cents of purchase price basis and be redeemed only by the original customer who surrenders them to the trading stamp company, then respondent's actions in enforcing its requirement, even by cancelling the license of a retailer who fails to comply and by suing a trading stamp exchange that interferes with its contract, would also seem inherently reasonable. The second problem involves utilizing the assistance of competing retail licensees and of competing stamp companies to enforce its contracts. When respondent goes beyond its right itself to enforce its contract and utilizes either its competitors or competing retailers to assist it in enforcing such contracts, a different legal consequence obtains. Even though respondent has a legal right to take action by itself, its activity in combining with others to enforce its contracts, with the result that competition in the retail line between its licensees is adversely affected, tends to create an illegal combination.⁴

1. The Legality of the Contract Provisions

Dealing with the first problem, the inherent reasonableness of the trading stamp business, we find there is no charge that the operation of the business is illegal. Complaint counsel's fire is concentrated on two incidents of the business: the one stamp for 10 cents of purchase price requirement and the restriction on the use of stamps after the licensee issues them to his customer.

Clearly there is ample precedent for prohibiting resale price fixing of commodities after their sale.⁵

Restraining the subsequent use of a commodity has likewise long been held unreasonable.⁶

Complaint counsel would have this restrictive resale doctrine applied to the sale of respondent's services, among other reasons: because the services are paid for in advance in accordance with the number of stamps issued to the licensee for distribution to his customers and because no taxes are paid by respondent on stamps in the hands of licensees and stolen stamps are not replaced.

⁴ *United States v. General Motors Corp.*, 384 U.S. 127 (1966).

⁵ *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911); *Dayco Corp. v. FTC*, 362 F. 2d 180 (6 Cir. 1966); *Dayco Corp.*, Docket No. 7604, order dated October 27, 1966.

⁶ *Straus v. Victor Talking Machine Co.*, 243 U.S. 490 (1917).

Application of the restrictive resale doctrine despite the flexible concept of Section 5 of the Federal Trade Commission Act approved by the United States Supreme Court,⁷ constitutes an oversimplification. Respondent, in fact, sells a promotional service to its licensees. This service is more than the issuance of stamps that can be redeemed for merchandise. It consists of the organization in each trading area of a family of merchants who are franchised to issue S&H trading stamps and who collectively and in most cases noncompetitively supply a customer with an easily accumulated amount of trading stamps. The number given with each purchase is calculated to induce the customer to return to the stamp issuing licensee and, considering other members of the family of merchants available, to permit the customer to accumulate enough stamps to make redemption within a sufficiently short time to maintain the customer's interest. The service also includes promotional national advertising by S&H and local advertising of the family of merchants. This system, to be wholly effective for the licensee, requires both a restriction on the number of stamps to be issued by each licensee to a customer and a restriction against the trading of S&H stamps by the customer. If the number of stamps given by a particular licensee is too great, two consequences would appear likely to occur. First, the licensee's costs might become too high and he might discontinue the service; and second, the customer might expect more stamps from other stores and might become disenchanted if she does not get them. If stamps can be traded, the attraction of the customer to a licensee's store caused by the issuance of S&H stamps is destroyed. The customer can trade anywhere and exchange other stamps for S&H. Thus the licensee does not get what he pays for.

Respondent's promotional scheme is set up to take advantage of the family-of-merchants concept. Its contract to supply merchandise to the licensee's customer has been held properly restricted to the original customer under the laws of the states in which it operates. Moreover, such restrictions are, in the opinion of respondent's experts, essential to the continuation of its business.⁸

In the issuance of its complaint, the Commission took pains not to attack the trading stamp business as such. In fact, in 1957 it specifically declined, after investigation, to issue complaints against the trading stamp industry.⁹ Hence, to the extent that the limitations on the num-

⁷ *FTC v. Brown Shoe*, 384 U.S. 316 (1966); *Atlantic Refining Co. v. FTC*, 381 U.S. 357 (1965).

⁸ See *Sperry & Hutchinson Co. v. Rance*, 410 P. 2d 859 (Okla. Sup. Ct. 1965), cert. denied 382 U.S. 945 (1965).

⁹ F.T.C. Release Oct. 3, 1957, 2 CCH ¶ 715.

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ber of stamps to be issued by its licensees and on the use to which the stamps may be put are essential to carry out the underlying concept of the trading stamp business, the Commission has decided as a policy matter not to attack such limitations.

On the other hand, respondent's protestations concerning the necessity for the 1-10 limitation are not reflected in the vigor of its enforcement. Some 20 percent of its stamps are used in multiple stamping. In addition, respondent provides lower costs to the larger users of its stamp service and thus tempts them to issue multiple stamps because the cost to them is less than that to their smaller rivals. However, the complaint nowhere charges the differing treatment of its licensees as an unfair trade practice. Hence we disregard such proof of discrimination.

Similarly, respondent makes no attempt to prevent noncommercial exchanges of stamps among housewives but limits its legal actions to prevent commercial trading stamp exchanges from dealing in its stamps. Respondent argues that this nonenforcement is due to the impracticality of policing over-the-back-fence swaps. At the same time, it does not number its stamps, as the initial prerequisite for keeping track of them, or place on their face a statement that they are not transferable.

It would thus appear that respondent does not enforce fully either the 1-10 limitation or the nontransferability of the stamps.

Respondent takes the position that it must retain the right to enforce these provisions even though in practice it limits enforcement of the 1-10 provisions of its contract principally to cases where effective competition of other stamp companies is not present. It applies the nontransferability provision only to those cases where someone seeks to gain a commercial advantage from buying, selling or exchanging its stamps.

Despite these infirmities in respondent's theory of necessity, and because of the respect in which we hold the very recent decision of the Supreme Court of Oklahoma that specifically passed on the problem of the legality of S&H contract and on their reasonableness under the antitrust laws,¹⁰ we are inclined to follow that court and the decisions of other courts cited by it.

Quite apart from the decisions of State courts upholding respondent's position, it is very clear that what complaint counsel desires here is that respondent be required to do more than it agreed to do. Respondent agrees with its licensees, in addition to supplying advertising and

¹⁰ *Sperry & Hutchinson v. Rance*, 410 P. 2d 559 (Okla. Sup. Ct. 1965), cert. denied 382 U.S. 945 (1965).

other promotional services, to make redemption of its stamps under specified circumstances. The specified circumstances in its agreement are that the stamps be issued 1 to each 10 cents of purchase price and that the person to whom the stamps are issued by the licensee make the redemption. These stipulations are descriptive of the service offered. S&H sells this service as a means of bringing customers into the licensee's store. To require respondent to permit a licensee to issue stamps at will and to redeem stamps from a person other than the licensee's customer clearly calls upon respondent to reform its contract and removes the very incentive for the customer to go to the licensee's store. This the respondent should not be required to do. Clearly this would be detrimental to respondent's legitimate business interest in preserving its promotional scheme. Section 5 of the Federal Trade Commission Act does not empower the Commission to exercise its powers solely for convenience of consumers—only to prevent unfair acts and practices.

Accordingly, we conclude that the limitations on the number of stamps to be issued and the restrictions on their subsequent use are reasonable provisions delimiting the obligations that respondent undertakes by its contracts. Consequently, such limitations are not unreasonable restraints under the Sherman Act nor unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act.¹¹

2. *The Illegality of the Combinations*

Dealing with the second problem, the effect of combination, we find that respondent utilized its network of retailers under contract to it as a means of enforcing its restrictions. In a significant number of cases it took action to prevent one retailer from issuing more than the required number of stamps at the instance and request of a competing retailer with the result that such action might substantially lessen competition between the two. Whatever are respondent's rights to act alone to enforce its contracts, when it acts with others to enforce such rights competition between such retailers is restrained. Such action tends to become a combination in unreasonable restraint of trade and thus violates Section 5 of the Federal Trade Commission Act.¹²

The evidence establishes an express agreement to enforce the 1-10 rule, in Denver, Colorado, in 1953, between respondent and a number of other trading stamp companies. While it has not been established

¹¹ *Matter of Carvel*, Docket No. 8574; *White Motors Co. v. United States*, 372 U.S. 253, 270 (1963); *Bank of Utah v. Commercial Security Bank*, 369 F. 2d 19 (10 Cir. 1966).

¹² *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 43-44 (1960); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 453 (1922).

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that this 1-10 system or the similarity in contracts among the major stamp companies was otherwise a matter of agreement, there have been a few instances in which Gold Bond, and perhaps Gold Strike, acted to assist respondent in the enforcement of the 1-10 program. Moreover, it was common knowledge that similar provisions existed in the stamp company contracts. Respondent's activity in accepting assistance from competitors and in reporting back the results, even though in all cases such results did not persist, was a knowing restraint of the competition between the licensees of a competing trading stamp company and those of respondent. This, too, clearly may become an unreasonable restraint of trade in violation of Section 5 of the Federal Trade Commission Act.¹³

Even in the opinion of respondent's vice president some of respondent's activity about trading stamp exchanges was improper (Tr. 5673-75, 5688). There were a substantial number of instances (see finding G(4)b iv (aa)-(jj)) of active collaboration, between respondent and one or more other trading stamp companies, to prevent trading stamp exchanges from trading in S&H stamps and presumably in the stamps of the other trading stamp companies concerned. These acts constituted at least *ad hoc* restrictive agreements among competitors and constituted unfair acts and practices within the meaning of Section 5 of the Federal Trade Commission Act. Since respondent expects to act on some such communications in the future, an order, to which we now turn, seems necessary.

3. The Order

We conclude that there should be no order issued precluding respondent from continuing to issue and to enforce its contract provisions that form the structure of its business. These provisions are reasonably necessary for the success of the promotional scheme of the trading stamp industry. That scheme has not been attacked by the Commission. However, the evidence¹⁴ shows that respondent collabo-

¹³ *FTC v. Cement Institute*, 333 U.S. 683 (1946).

¹⁴ In considering the evidence adduced, the hearing examiner gave little weight to the general denials of agreements made by respondent's officials in the light of the specific instances of collaboration indicated by the contemporary records, particularly since, at least in the case of Bixby, respondent made no attempt to secure an explanation of specifics. On the other hand, the hearing examiner was impressed with the candor of respondent's officials and with their experience in the trading stamp business. Thus, he credited their opinion of the effects which would flow from a change in requirements, despite the testimony of individual consumers or trading stamp operators that might be regarded, at first glance, as conflicting.

rated with competing stamp companies to some extent and collaborated to a greater extent with its licensees. These activities transcend respondent's right to enforce its contracts and may constitute a substantive illegal restraint of trade if not prevented because of the structure of the trading stamp industry. Hence a cease and desist order against such practices seems appropriate.

CONCLUSIONS

1. Respondent is subject to the jurisdiction of the Federal Trade Commission. The acts and practices cited in the foregoing findings have taken place in commerce, as "commerce" is defined in the Federal Trade Commission Act.

2. Respondent is engaged in selling an integrated promotional service to its licensees.

3. Placing restrictions on the number of stamps to be issued for each unit of purchase price and preventing transfer of such stamps are restraints reasonably ancillary to the sale of such promotional service; they are, in fact, merely descriptive of the limits of such service.

4. Respondent's action, insofar as it took place without collusion with others in enforcing its rights under such contracts and in preventing trafficking in its stamps by persons to whom such stamps were not issued, is not in unreasonable restraint of trade or an unfair trade practice.

5. Respondent's action in seeking or utilizing the assistance of its retail licensees or other stamp companies to prevent the issuance of more than the prescribed number of stamps, constitutes a combination that may result in a substantial restraint on competition. It is thus an unfair trade practice.

6. Respondent's action in agreeing with other stamp companies in Denver, Colorado, in 1953, not to permit its licensees to issue more than one stamp for each 10 cents of purchase price prevented competition among retailers licensed by it and by the other trading stamp companies that were parties to such agreement. It was thus an agreement in unreasonable restraint of trade and an unfair trade practice.

7. Respondent's actions in seeking or utilizing the assistance of other trading stamp companies to prevent the trafficking by persons to whom its stamps were not issued, in accordance with its contracts with its licensees, constituted combinations in unreasonable restraint of trade and unfair trade practices.

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8. It has not been demonstrated that respondent's actions have been surely discontinued and will not be repeated unless a cease and desist order is issued.

9. An order in the form set forth below should issue.

ORDER

It is ordered, That respondent, The Sperry and Hutchinson Company, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the distribution and/or redemption of trading stamps in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Combining, conspiring, or otherwise knowingly acting in concert with any other person to cause any retailer not to dispense stamps in excess of any specified ratio of the number of stamps to total retail price of goods and/or services purchased in connection with which such stamps are dispensed.

2. Communicating in any way with any other trading stamp company, or acting in any way in response to any communication from any trading stamp company with respect to the ratio of the number of stamps to total retail price of goods and/or services purchased which ratio is used by any retailer in connection with the dispensing of stamps.

3. Combining or conspiring with, or soliciting concerted action from, any other trading stamp company to prevent redemption of trading stamps or the operation of a trading stamp exchange.

4. Communicating in any way with any other trading stamp company or acting in any way in response to any communication from any trading stamp company with respect to preventing the operation of any trading stamp exchange or the free and open redemption of trading stamps by any person.

It is further ordered, That the respondent, The Sperry and Hutchinson Company, within sixty (60) days after the effective date of this order, shall notify in writing all of its sales employees, sales representatives, and licensees of the provisions of this cease and desist order.

¹⁵ See Tr. 5688.

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Appendix A

APPENDIX A. S&H ACTION ON COMPLAINTS BY ONE RETAILER AGAINST ANOTHER

Place	Date	Complaining retailer	Stamps used	Nature of complaint	Other retailer	Stamps used	Action by S&H
Colorado	11/61	Competitors unidentified	S&H Others	Multiple Stamping	Red Owl	S&H	Threat to cancel.
Colorado Springs, Col.	3/64	Kaufman, Inc.	S&H	Double Stamping	Babus	S&H	Received complaint and asked to stop.
Norwich, New York	9/63	Victory Market	S&H	Extra Institutional Stamps	O&W Supermarket	S&H	Visited—Asked to stop.
Denver, Colorado	5/66/63	Red Owl	S&H	Double Stamping	King Sooper	S&H	Visited.
Roanoke, Va.	2/28/62	Thomas G. Brown, Esq.	S&H	Double Stamping	Schneider Oil Co., Sun Dealer	S&H	Visited—Secured agreement to stop adv.
Danville, Va.	11/10/61 to 4/62	W. T. Grant (E. W. Mayer)	S&H	Double Stamping	Johnson's Dept. Store	S&H	Visited—Urged to discontinue.
Lawrence, Mass.	10/30/61	W. T. Grant (E. W. Mayer)	S&H	Double Stamping	Sutherland Dept. Store	S&H	Visited.
Statesboro, Ga.	4-61	Piggley Wiggly	S&H	Extra	Winn Dixie	S&H	Urged to discontinue.
Tampa and St. Petersburg, Fla.	4-62 to 10-60	Piggley Wiggly	S&H	Extra Stamps	Winn Dixie	S&H	Visited.
	3-61	Lifebuoy Drug Co., Inc.	S&H	Institutional	Publix Mkts.	S&H	Rec'd agreement to stop. Field Rep. visited.
Buffalo, N.Y.	7-60	Acme Stores	S&H	Extra Institutional Double Stamps	Loblaws Florofare	S&H	V.P. of S&H had meeting w/Loblaws—tried to stop.
Albiontown, Pa. and vicinity.	4-60	Milsons Northampton, Nazareth.	S&H	Double Stamps on Founder's Day	Zallinger Harned	S&H	V.P. wrote Z-H.
Jasper, Texas	7-10-59	Alnimax	S&H	Double Stamps	Piggley Wiggly	S&H	Reg. rep called on P-W.
Salisbury and Cambridge, Md.	8-57	Acme	S&H	Free stamps w/ coupon	Colonial	S&H	Rec'd promise to stop. S&H wrote asking discontinuance.
Hazleton, Pa.	9-57	Acme	S&H	Double Stamp Day	Genaldi	S&H	S&H took "drastic steps" to stop.
Bristol, Conn.	2-58	Mott's Supermarket	S&H	Double Stamping	Washington Superette Grand Union	S&H	S&H phoned asked to stop at once.
		Pettit Market	S&H	Double and Extra	Pettit's Market	S&H	
		Mott's Market	S&H	Daily Double Stamps	Kelley Food & Freezer Co.	S&H	
Carlisle, Mechanicsburg and Lewistown, Pa.	'63-'64	Javitch Giant Food	S&H	Daily Double Stamps	Wise & Acme	S&H	Whitnack tried to stop Wise and Acme.

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APPENDIX A.—S&H ACTION ON COMPLAINTS BY ONE RETAILER AGAINST ANOTHER Continued

Place	Exhibit numbers	Witness	Stip.	Adm.	Effect	Remarks
Colorado	CX 18 a-b, 19, 20, 21		12		Ceased	Red Owl later given help in advertising. It then resumed, RPF 83; CFF 21. S
Colorado Springs, Colo.	CX 63, 450, 474, 523; RX 513, 525	Folsom, Tr. 3904-8	18	26	Bain ceased	At time Victory was also issuing product stamps, RPF 81; CFF 23.
Norwich, New York	CX 64-67, 69-77, 190 a-b, 451	Teranto, Tr. 3537	19		Ceased adv	King Sooper one of Denver retailers causing Denver agreement. RPF 86; CFF 25.
Denver, Colorado	CX 100 a-b, 61a, 77, 78, 147, 148, 453; RX 548-67, 618-50, 80-83, 190 a-b, 454; RX 363, 365	Folsom, Tr. 3888, 3889		29	Ceased adv	Schneider canceled advertising, CFF 26, 27.
Roanoke, Va.	CX 80-83, 190 a-b, 454; RX 363, 365	Folsom	21	30	Ceased	Competition described Grant & Johnson, RPF 83-84; CFF 30-31.
Danville, Va.	CX 85-89, 190, 545-554, 455	McPherson, Tr. 3021-3072; Folsom, Tr. 3890-3901	22	31	Unknown	Competition described Grant & Johnson, RPF 83-84; CFF 30-31.
Lawrence, Mass.	CX 90-93, 190, 434-6, 555, 561, 563, 576; RX 12, 369, 383-386	Woodward, Tr. 2976-2998	23	32	Agreed to discontinue	Competition described Grant & Johnson, RPF 83-84; CFF 30-31.
Statesboro, Ga.	CX 96, 98, 457; RX 305, 362	Folsom, Mills, Tr. 7049-68		33	Agreed to discontinue	Started up again in the following year. RPF 86; CFF 33-36.
Tampa and St. Petersburg, Fla.	CX 100, 104, 106-107, 458; RX 525, 47	Folsom, Tr. 806-8	24	2	Agreed to discontinue	Started after 8 mos. claiming oversight. CFF 37-38; RPF 81.
Buffalo, N.Y.	CX 108-110, 459, 432, 580; RX 774-88, 963	Folsom, Tr. 3819-55	25	35, 3, 4	Not shown	Claimed meeting competition. RPF 81; CFF 39-41.
Allentown, Pa. and vicinity.	CX 116-117; RX 106-297	Freeman, Tr. 2735-2807		37	Temporarily stopped	Not shown. Grant Nelson Freeman complained. CFF 48-49; RPF 82.
Jasper, Texas	CX 118-124; RX 809-923	Folsom, Tr. 3817	27	4-7, 5-13	Discontinued for a time in part.	CFF 41-43; RPF 82.
Salisbury and Cambridge, Md.	CX 124, 127; RX 267-269	Folsom, Tr. 3886-7	28	30	Not shown	RPF 82; CFF 52.
Hazleton, Pa.	CX 128-129; RX 598-617	Folsom, Tr. 3887-8		40	Stopped as of 10/30/57	CFF 43, 44; RPF 84.
Bristol, Conn.	CX 130, 146; RX 402-434	Folsom, Tr. 3890-92	14, 29	41, 55	Apparently not permanent, stopped temp.	Mod. evaluated after double stamps conf'd and Pettis complained then. Kelley started. Mod. complained '62. Mod. continued. CFF 44-47; RPF 83.
Carlisle, Mechanicsburg & Lewisburg, Pa.	CX 413; RX 568-594	Javitch, Tr. 3003; Folsom, Tr. 3672-8			None	CFF 28, 29; RPF 81.

Appendix B

APPENDIX B.—S&H ACTION TO PREVENT TRANSFER OF STAMPS ISSUED BY LICENSEES TO CUSTOMERS

Name and place	Date	Complaint by	Stamp used	Nature of complaint	Action by S&H	Action by others
Jakes Dept. Store, Thibodaux, La.	9/28/64	Adv.	S&H	S&H Books Exchanged for Adv.	Letter	
Puckett's Food Store, Altus, Oklahoma	6/25/64	S&H Employee	S&H	Redeeming Stamps	Shopped and found S&H stamps redeemed. Sent to Counsel.	Lawyers sent letter.
Good Deal Supermarkets, Newark, N.J. and vicinity.	12/3/58	Adv. Newark News	S&H	Redeeming Stamps for Cash.	Ref'd to Cal. Attorney	Lawyers negotiated settlement.
Sam M. Kelber, Montclair, Cal. and vicinity	6/26/59	S&H Dist. Manager	S&H	Redeeming Stamps	Referred to Counsel	Lawyer called.
Dumas Miller, Chevrolet, San Antonio, Texas.	11/5/56	S&H Manager	S&H	Agreed to Redeem Stamps.		Counsel wrote.
Tifton Jewelers, Savin Jewelry Co. Bridgeport, Conn.	3/3/58	Adv. Bridgeport Post.	S&H Stop & Save.	Adv. Rec. Stamps as down payment on jewelry.	Ref'd to local attorney	Counsel wrote representing several stamp companies
Buchanan Stamp Exchange, Buchanan, N.Y.	8/27/64	Adv. Pennysaver	All	Trading Stamp Exchange	Ref'd to attorney	Attorney wrote C & D letter.
John & Al Exchange Service, Largo, Fla.	1/21/64	Adv. sent by local manager.	All	Trading Stamp Exchange	Ref'd to counsel.	Counsel wrote C & D letter.
Trading Post, Huntington Park, Cal.	6/16/62	Signs.	All	Redeeming Stamps	Referred to Attorney	
Kram's Trading Stamp Exchange, Russellville, Ark.	2/26/62	None		Request for authority to run exchange.	Permission refused	
Fors-Dowd, Jewelry and Camera Store, Memphis, Tenn.	11/30/61	Unknown	All	Incidental to stamp exch. by camera shop.	Ref'd to local counsel	
Rancho Centers, Bialto, Cal.	10/17/60	Unknown	All	Trading Stamp Exchange	Ref'd to local counsel	Shopped.
Trading Stamp Exchange, Los Angeles, Calif.	9/16/60	Lawyer L.A.	All	Trading Stamp Exchange	Ref'd to counsel	Shopped.
Captain's Dept. Store, Ellicott City, Md.	12/23/58	Unknown	S&H	Permission to redeem withdrawn.	Forbidden to continue	
Freeman's Dept. Store, Nazareth, Pa.	2/3/61	Unknown	S&H	Permission to redeem withdrawn.	Forbidden to continue	

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APPENDIX B.—S&H ACTION TO PREVENT TRANSFER OF STAMPS ISSUED BY LICENSEES TO CUSTOMERS

Name and place	Exhibit numbers	Witness	Admission	Stip.	Effect	Remarks
Jakes Dept. Store, Thibodaux, La.	CX 221-224			31	Agreed to stop	(Cpl. p. 75).
Puckett's Food Store, Altus, Oklahoma	CX 225-230			32	Agreed to stop	New Jersey lawyers recommended ac-
Good Deal Supermarkets, Newark, N.J.	CX 232-244			40	Agreed to stop	tion (Cpl. 76).
and vicinity.						
Sam M. Kelber, Montclair, Cal. and vicinity.	CX 245-253		76-80	39	Obfuscated S&H on signs.	
Dumas Milner, Chevreton, San Antonio,	CX 254-256			41	Found no violation on	
Texas.					recheck.	
Tifton Jewelers, Savin Jewelry Co., Bridge-	CX 257-270			56-58	Injunction secured.	S&H wrote C&D letter. Said rep.
port, Conn.						several stamp companies (CX 268).
						Partner of firm secured injunction
						for S&S stamps. Apparently also
						rep. Ist Div. Corp. through St. 10 in
						letter to Joyce had not made contact.
						Attorney warned would reshoot.
						Recheck ordered. Cpl. 73.
						Recheck ordered. Negative report.
Buchanan Stamp Exchange, Buchanan,	CX 272-274			33	Agreed not to adv. S&H	
N. Y.					Stamps.	
John & Al Exchange Service, Largo, Fla.	CX 274-285			34	Agreed to stop	
Trading Post, Huntington Park, Calif.	CX 286-290			35	Agreed to stop	
Kern's Trading Stamp Exchange, Russel-	CX 290-291					
ville, Ark.						
Pease-Brown Jewelry and Camera Store,	CX 292-295			36	Counsel reluctantly agreed	Local counsel's letter shows collabora-
Memphis, Tenn.					to stop.	tion w/T.N. counsel (CX 293).
Rancho Chaucers, Rialto, Calif.	CX 296-302			37	Ceased activity	Note original petition of exchange.
						Cpl. 74.
Trading Stamp Exchange, Los Angeles,	CX 303-311			38	Agreed to stop	Note special form of Power of Attorney.
Calif.						Cpl. 77.
Caplan's Dept. Store, Elkton City, Md.	CX 616					Cpl. 77.
Freeman's Dept. Store, Nazareth, Pa.		Caplan (CX 3-288, 2963). Freeman (CX 28, 2755-56, 2812).				

APPENDIX C

SOME OF THE FINDINGS¹ URGED BY RESPONDENT TO BE ESSENTIAL TO A COMPREHENSION OF ITS OPERATION AND FOUND TO HAVE BEEN ESTABLISHED BY PROOF TO THE EXTENT STATED ALTHOUGH NOT NECESSARY TO THE HEARING EXAMINER'S INITIAL DECISION EXCEPT TO THE EXTENT HERETOFORE FOUND

A1. Unlike games, lotteries and other promotional devices, S&H trading stamps, issued in the manner provided for in the Franchise Agreement, involve no element of chance: the rate at which they are given is the same for each customer, and the merchandise for which they may be redeemed is made known to the stamp savers in advance through the S&H catalogue and they may make such selection as they please or, in the States where cash redemption is mandatory or optional, take cash at a predetermined rate per stamp (Collins R. 5617-5619; Phillips R. 7151-7152; Lee R. 4045-4046, CX 402, 403, 586; (CPFRPF9).

A2. Where it can, S&H licenses one of each type of merchant in a given shopping area, such as a grocer, a department store, a druggist, a hardware merchant, a laundry, a cleaning and pressing establishment, and several gasoline service stations so as to cover, as nearly as possible, the entire spectrum of merchandise necessary to meet the housewife's ordinary needs (Rossi R. 4871, 5015-16). The concept is one of a family of merchants able to serve the customer's buying needs. Customers of one thus have the opportunity to deal with other members of the S&H "family of merchants" in order to fill their books more quickly. Each S&H licensee aids each other S&H licensee in this way by stimulating his customers to become their customers. Recognition of this fact in overall marketing strategy has long been central to S&H's operations. The "family of merchants" concept has been, and is, a major objective of the S&H marketing program. Most other trading stamp companies have put less emphasis on the development of broad families of merchants and, in consequence, do not enjoy as wide a coverage as S&H (Rossi R. 4871; Beem R. 6068-6069; Lee R. 4177; RX 924b; RPF 10).

A3. Another important aspect of the S&H promotional system is the company's general practice, followed from the inception of its business, of licensing no more than one retailer in the same type of business within a given marketing area (Lee R. 4127; Rossi R. 4874,

¹ No findings are made on the question of monopoly or on the litigation of respondent, since these questions are clearly outside the scope of findings of fact under the pleadings.

4887). This practice enhances the value of the S&H service to the retailer for, if housewives want S&H stamps with, for example, the groceries that they buy, they can get them only from the S&H licensee and not from his competitor. If S&H stamps were also available through his competitor, the S&H licensee would lose, in large measure, the promotional value for which he pays. The S&H trading stamp gives him something unique with which to differentiate his establishment from his competitors' (Beem R. 6087-6088; RX 924b; Rossi R. 4876; 4880-4881; McDonald R. 6386; RPF 12). However, S&H licensees often compete (Appendix A).

A4. Historically, S&H trading stamps have had their most widespread use among small independent merchants, unable to afford other types of sales promotion, which are available to their larger competitors. Today, S&H services a number of large regional food chains, but small independent retailers still make up the majority in number of the company's licensees (RX 924b, p. 7); thirty-five percent of S&H's sales are to small accounts such as service stations, hardware stores, drugstores, dry cleaners and the like. In 1965 S&H served twice as many independent food establishments (6,000) as it did chain food outlets (3,000) (Rossi R. 5496; Beem R. 6493; RPF 14).

However, a substantial portion of the growth in the Company's service revenue during the post-war period has resulted from the adoption of its trading stamp service by supermarket chains, which have become an increasingly important factor in food distribution during this period. Each of the 12 licensees accounting for more than one percent of the Company's service revenue in 1965 was a supermarket chain. These 12 chains accounted for approximately one-third of the Company's 1965 service revenue, with no one of them representing more than 7.5% of service revenue. (RX 924b, p. 7.) (CCPF RPF 14.)

A5. S&H invests in a continuing advertising and publicity program designed to interest consumers in saving S&H stamps and, hence, in patronizing S&H licensees. (Beem R. 6090.) The program is both national and local in scope. It has also published a special Sunday supplement which reviewed the history and described the present scope of the company's business. Locally, the company engages in cooperative newspaper advertising with its licensees and in-store displays (Rossi R. 4956-4957; McDonald R. 6384; RPF 15).

A6. The S&H catalogue which is reissued each year also plays a major role in the S&H advertising program (CX 402, 403, 586). The S&H catalogue is believed to be the largest catalogue printing in the nation. It is anticipated that in 1966 through its licensees S&H will distribute to consumers throughout the United States some 33 million catalogues. The printing cost alone exceeds \$6 million (Rossi R. 4955; RPF 16).

A7. Through its present catalogue S&H offers to stamp savers a selection of 2001 items of redemption merchandise (CX 586, Thorp R. 5696, 5702). This compares with the 400 items of ten years ago.

A8. The retail value of the redemption merchandise given to the stamp saver is approximately \$3.00 per book of 1200 trading stamps. (RPF 35.)

A9. The average redemption by the S&H stamp saver is for $2\frac{1}{4}$ books (Rossi R. 5106; RX 924b, p. 8).

On the basis of the current catalogue (CX 586) which lists 2001 items, the number and percentage of all items which may be secured for varying numbers of S&H stamp books is as follows:

No. of books	No. of items	Percent of total No. of items
1-----	223	11. 14
$1\frac{1}{2}$ -----	526	26. 29
$1\frac{3}{4}$ -----	623	31. 14
2-----	800	39. 99
3-----	1095	54. 47
4-----	1312	65. 59
5-----	1441	72. 04

(RPF 38)

(The number of items is cumulative, *i.e.* a person with 1 book can secure 223 items, a person with $1\frac{1}{2}$ books can secure these plus 303 more or a total of 526 [see CCPF RPF 38].)

A10. Three States, Wisconsin, Wyoming and Washington, directly or indirectly outlaw redemption in merchandise (Collins R. 5567, 5570; Rossi R. 4897; CX 414). In each of those States, S&H pays $1\frac{1}{2}$ mills per stamp or \$2.00 per book. The redemption rate in those States is much lower than it is elsewhere in the country (Beem R. 6138). One reason for the lower rate of redemption is that respondent does not promote cash redemptions (Tr. 5082-3; CCPF RPF 52).

A11. The S&H licensee pays the company an amount based upon the number of stamps delivered to him (Rossi R. 4888; CX 11), (RPF 58.)

A12. Since S&H has been in business for 70 years and stands ready to redeem all of the trading stamps that it has ever issued, the company is unable to determine with absolute certainty the percentage which will ultimately be presented for redemption (RX 924b, p. 8), but on the basis of 70 years' experience, S&H estimates that 95% of all stamps issued by it will ultimately be redeemed (Rossi R. 4958;

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Beem R. 6136-6137; CX 399a, b; RX 924b, p. 8), and for more than 40 years the company has kept its financial records, filed its income tax returns and maintained a liability account on that basis (RX 924b, pp. 25, 27). The liability account covers not only the cost of purchasing but also the cost of delivering the redemption merchandise (RX 924b; Rossi R. 5204-5205; RPF 59; see, however, CX 444 for the actual experience CCPF RPF 59).

A13. Unredeemed stamps do not represent a "windfall" to S&H. Competition requires the company to pass on to its stamp savers and to its licensees the savings represented by the unredeemed stamps (Beem R. 6215; RPF 61).

The extent of competitive pressures on respondent must be weighed in the light of its prominent (39-40%) share in the business, the fact that it is much larger (3 times) than its nearest competitor and the fact that six companies have 87% of the total national business (see CX 4 *in camera*; Tr. 4337-41).

A14. Years ago S&H engaged in an additional method of redeeming merchandise, described as the C&M Plan, meaning "cash and merchandise" (Rossi R. 4966-4967). Under this system the stamp saver was offered the alternative of redeeming through S&H or of taking complete books of S&H stamps to an S&H merchant-licensee and redeeming the stamps for an article out of that merchant's stock of goods (Rossi R. 4967) or for \$2.00 in cash from the merchant (Rossi R. 4968). The stamp books could also be used as a down payment on merchandise purchased from the merchant (Rossi R. 4968). The merchant-licensee engaging in the C&M Plan was then reimbursed by S&H. The rate of reimbursement ranged from \$2.00 (Caplan R. 2834, 2914; Freeman R. 2755) to \$2.25 to \$2.50 (Rossi R. 4968-4969). S&H gave up the C&M Plan (Rossi R. 4970) because S&H could give the stamp saver better values in merchandise (Rossi R. 4971). This resulted from the ability of S&H to eliminate middlemen's profits and to buy merchandise at lower prices; the elimination of the profit that the merchant-licensee made on the redemption merchandise that he provided in his store; and the economies effected by S&H in the operation of its redemption system (Rossi R. 4970). In addition, the retail merchant did not have the same concern as S&H for the future of the trading stamp business; his interest was in making a profit on the merchandise he offered for redemption (Rossi R. 4972). Since the company began phasing out the C&M Plan it has invested millions in expanding its merchandise distribution system to serve stamp savers, building hundreds of new Redemption Centers and expanding its merchandise line (Rossi R. 4911-4917, 4919-4920, 4922-

4923, 4948, 4950; Thorp R. 5696; RX 924b, pp. 11, 25; RPF 63, 64; see CCPF RPF 63, 64).

A15. It is the policy of S&H that its trading stamps be issued by its licensees at the rate of one for each 10 cents paid in cash or within a normal discount period (Rossi R. 4960; Collins R. 5628; RX 6c; CX 11). This policy is evidenced by a provision in the agreement entered into between the licensee and S&H, and the licensee is accordingly presumably aware of it at the time when he takes on the S&H service (CX 11; Phillips R. 7160-7161).

A16. While the S&H licensee in a particular community is more aware of and better able to appraise his immediate, local competitive situation, S&H is better able to determine the continuing manner in which its trading stamp system should be used. Over time, the strength of the S&H system for any account, including the supermarket which desires to issue multiple stamps on a particular occasion, rests on the overall strength of the system, the "family of merchants" concept, and the strength of the stamp (Beem R. 6078-6079).

When multiple stamps are given by certain accounts, S&H must consider the effect that this will have in accustoming stamp savers to expect multiple stamps from other members of its families of merchants (Lee R. 4178).

To the extent that multiple stamping by one merchant injures associate S&H accounts, cheapens the stamp and reduces the value of the "family of merchants," the S&H system itself is damaged, and its value is lost to all licensees, including the one who desires to issue multiple stamps (Beem R. 6078-6079; RX 6c, 6g; RX 8, 12b).

For 70 years S&H has used substantially the same trading stamp system (Rossi R. 5495). Over this period of time S&H has found that the most effective manner in which its stamps may be issued in the interest of all participants in the system is at the rate of one on each 10 cent sale (Rossi R. 5495). S&H is not interested in merely issuing a lot of stamps for a year or two and getting out of the business. The company wants to continue in business for another 70 years and the issuance of double and multiple stamps is inconsistent with that hope (RX 6g; RX 8). (RPF 74-77; see, however, CCPF RPF 74-77.)

A17. S&H takes no part in setting the prices at which its licensees sell their goods and services (Collins R. 5614; Rossi R. 5005; RPF 78).

A18. S&H takes no part in setting the discounts which its licensees grant on the sale of their goods and services (Collins R. 5614; Rossi R. 5006; RPF 79).

A19. Considering trading stamps as a means of affording a discount, the S&H licensee is free to issue any additional discount that

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he desires, including the issuance of competing trading stamps (Rossi R. 5006; Collins R. 5614; CX 11; CX 13; RPF 80).

A20. Trading stamps are not considered by respondent's economists as a part of the price of the goods or services offered by the licensee (Beem R. 6060; Phillips R. 7134). Stamps are a part of the variety of nonprice attractions that the consumer gets along with the product that she buys (Beem R. 6060). Trading stamps are a nonprice promotion (Lee R. 4041; RX 24i-j; RX24L-m). (RPF 81; see, however, CCPF RPF 81.)

A21. The trading stamp industry is highly competitive (RX 924b; Rossi R. 5289-5290; Heim R. 3700; Thorp R. 5713, 5759; Beem R. 6157). S&H operates nationwide and is the largest trading stamp company in the United States but in every area in which it does business it competes with other trading stamp companies, and in some its competitors do a larger volume of business (Stipulation of Counsel Supporting the Complaint and Respondent R. 3377-3378; RPF 91). See, however, last sentence of A13. Respondent by volume is generally either first or second company in almost every area of the country (Tr. 5256-5271; CCPF RPF 91).

A22. Respondent's object and reason for its existence is to sell a service or competitive device which will be effective in promoting the sale of goods and services by its licensees (Lee R. 4126; Rossi R. 4983; Phillips R. 7143; RPF 145; CCPF RPF 145).

A23. In order to make its service effective, respondent endeavors to set a goal for its stamp saver so that she will continue to collect its stamps until she has attained her goal (Rossi R. 4893-4894; RPF 146).

A24. Accordingly, respondent provides high quality redemption merchandise, made by well-known, reliable manufacturers, which it brings to the consumer's attention through the S&H catalogue and redemption centers (RPF Nos. 17-33; RPF 147). The choice is necessarily limited (CCPF 94).

A25. For the same reason, respondent refrains, from redeeming less than a full book of stamps so that, once started on S&H stamps, the stamp saver will have to collect a minimum of 1,200, representing, on a one-for-ten-cents basis, a minimum of \$120 in purchases from S&H licensees (Rossi R. 4893-4894; RPF 148). It must be noted, however, that respondent expressly states that it will always grant permission for one stamp saver to give her S&H stamps to another (CPF 123) and that respondent itself has recently inaugurated a group savings plan.

A26. For the same reason, respondent expressly forbids the assignment and transfer of its stamps by one stamp saver to another without its express consent (see Rossi R. 4894-4895). Notice to this effect has been printed on the inside cover of the collector's books for 70 years (CX 2i, par. 42; CX 208; RPF No. 7; RPF 149).

A27. For the same reason, respondent expressly prohibits the use of its stamps by its licensees for any purpose except to issue them to their customers upon payment for goods or services (CX 11). This limitation on the use of respondent's stamps has been contained in its license agreements from earliest times (RX 1, 2, 3; RPF 150).

A28. In order further to make its service effective, respondent endeavors to select redemption merchandise which, when secured by the stamp saver, will constantly remind her of S&H and stimulate her interest in saving S&H stamps (Rossi R. 4933, 5497-5498, 5512; Beem R. 6104; Phillips R. 7144; RPF 151).

A29. Accordingly, except as respondent feels obliged to meet the competition of other trading stamp companies who offer such expendable items as golf balls and foundation garments, respondent endeavors to provide redemption merchandise of the so-called "discretionary" type, something special which the housewife might feel that she could not afford except through savings represented by trading stamps, and which, once obtained, she will long remember (Rossi R. 5498; Beem R. 6103; RPF 152).

A30. Attraction and continuity of patronage are regarded by the respondent as the keys to respondent's success (Rossi R. 4983; Phillips R. 7143).

A31. Respondent takes the position that, if its business is to succeed and prosper, it must offer top-quality merchandise for redemption, well styled and in good taste, that will appeal to and satisfy the average housewife; that merchandise items shall be those in greatest demand by consumers; that the redemption merchandise must have genuine value; that it must have "remembrance value" as well as functional utility, so that an item will be a silent salesman, reminding the saver of the value of S&H stamps. Respondent goes to great expense to keep its redemption merchandise updated to meet current consumer demands. It attempts to fill requests for merchandise not carried in regular stock. Its purpose is to offer top-quality merchandise covering a broad enough range to assure that the great bulk of savers will find something in every S&H catalogue toward which they would like to start saving. (RPF 18-34; Resp. R. Brief A3-4.)

A32. Respondent takes the position that it makes every effort to encourage and facilitate redemptions of its stamps by making it as

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convenient as possible for a stamp saver to do so after such stamp saver has filled a complete book of stamps because it believes that a high rate of redemption is important to continued participation of retail merchants and their customers in respondent's trading stamp service. To that end, S&H is constantly increasing the numbers of redemption centers, and has doubled the number in the past ten years. It now has 768 redemption centers, 93 mail order centers, 5 mobile redemption units, and 9 distribution centers or warehouses. It has improved the size, appearance and accessibility of its redemption centers and these centers are attractively designed, well lighted, and the merchandise is well displayed in order to serve the convenience of the stamp saver. Stamp savers living at a distance from redemption centers may redeem their stamps at one of S&H's distribution centers or through a mail order redemption center or a mobile redemption unit. If beyond a 25-mile range, they may also redeem by mail but are encouraged to visit the redemption center. (RPF 40-49: 56-57.)

A33. The laws of 16 States require that the stamp saver be given the option of taking cash instead of merchandise when stamps are tendered for redemption. S&H pays 1 mill per stamp or \$1.20 per book in certain of these States and $1\frac{2}{3}$ mills or \$2.00 per book in the others. Savers of S&H stamps seems to prefer to redeem their stamps for merchandise rather than for cash. In those States in which State laws required that stamps savers be given the option of redeeming stamps for cash or merchandise, cash redemptions on an average amounted to less than one percent of merchandise redemptions in 1964, and cash redemptions of less than full books of stamps amounted to only $\frac{38}{100}$ of one percent of total cash redemptions. On the other hand, respondent does not promote cash redemptions (Tr. 5082-3) and sales at trading stamp exchanges demonstrate that some savers do want cash.

A34. The "one for 10 cents" provision in S&H license agreements which has been included since 1896 is an integral and essential part of the definition of the service that S&H sells to its licensees. The reasons stated for the policy of S&H to endeavor to limit the issuance of its stamps to one-for-ten are:

(a) To keep the cost of its service to its licensees as low as possible; to deter escalation in the rate of issuance of S&H stamps to such a point that the costs of the service become greater than the value of the benefits to the licensees. It is to S&H's interest that the cost of its service to merchants shall not increase their gross margins to the extent that merchants will drop the S&H service for other less expensive promotions. S&H wishes to provide some assurance to poten-

tial new customers that the cost of the service will not exceed its probable benefits and such assurance cannot be given if escalation occurs in the issuance of multiple stamps. S&H has been unable to sign up some nonstamp food stores in areas in which S&H does not have food store accounts because the owners are fearful of the cost of keeping up with multiple stamps. Larger retailers, with greater finances, are better able to bear the cost of multiple stamps than are smaller, independent merchants. Trading stamps are simply one of an array of promotions which can be used to promote business, and when the cost of one promotion becomes too great, the merchant will shift to another.

(b) To prevent consumers from becoming so accustomed to multiple S&H stamps that the offer of one stamp for 10¢ of purchase will no longer provide an incentive for consumers to patronize S&H licensees who cannot afford to issue multiple stamps; and to preserve the cooperative concept of the "family of S&H licensees," composed of a key account, such as a supermarket, surrounded by associate accounts whose businesses would not be benefited by their offer of multiple stamps. In the period since 1955, during which there has been a substantial increase in issuance of multiple stamps by supermarkets, there has been a drop in the ratio of S&H stamps issued by associate accounts to those issued by key accounts. This relative decrease in associate account business is a matter of concern to S&H since it depends more on the "family of merchants" concept than do its principal competitors who are owned by or dependent upon chain food stores.

(c) To preserve the traditional rate of issuance of S&H stamps which has been recognized by the consuming public for seventy years as the standard rate at which S&H stamps will be issued by every merchant displaying the S&H sign, without necessity for advertising that rate of issuance on the part of each merchant licensee. This communication with the consumer is particularly valuable to the small merchant who is less able to advertise than are his larger competitors.

(d) Trading stamps are not a primary consumer attraction, and are secondary in appeal to such considerations as price, quality of merchandise, convenience and service. Undue emphasis on trading stamps, with resultant increase in costs without commensurate increase in sales, will cause merchants to look to other means of attracting customers. S&H stamps are not essential to successful and profitable operation of retail stores, but continued patronage by retail stores is essential to successful operation of respondent's business. If one licensee in a "family of S&H merchants" cheapens the value of S&H stamps in the minds of the consumers in that trade area to a point

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where stamps issued at a one-for-ten rate no longer have a strong appeal, the value of the S&H service to the other accounts is lessened, to the detriment of those other accounts and of respondent.

(e) If S&H is deprived of the right to limit the rate at which its licensees issue its stamps, the long-term effect may be to eliminate S&H's service as an effective competitive tool, to the serious injury of S&H and to licensees. (RPF 66-73; Resp. R. Brief A5-8.)

APPENDIX D

KEY TO COMPARING PROPOSALS OF COUNSEL WITH THIS INITIAL DECISION

First counsel filed careful and complete proposals for findings and then responses and counterproposals.

These can be compared with this initial decision in the following manner:

Complaint counsel has filed an elaborate table of contents to their proposed findings filed December 13, 1966 (pp. iii to xvii). This table can readily be compared with the table of contents herein. Respondent in its counterproposals, filed January 4, 1967 (Appendix A), shows by a table how respondent's proposed findings (filed December 14, 1966), relate to complaint counsel's proposed findings.

In addition, each counsel in their counterproposed findings made comment on their adversary's original proposed findings by using their adversary's numbers to identify the findings criticized. Moreover, certain counterproposed findings were filed that specified by number the proposed findings for which they could be substituted.

Respondent's counsel in their reply brief in Appendix A, pp. 3-11, proposed findings that were adopted specifically, with minor modifications, as Appendix C to this initial decision. It was the examiner's decision that such findings, as modified, were factually supported but were immaterial except to the extent already found in the body of this initial decision.

OPINION OF THE COMMISSION

JUNE 26, 1968

By MACINTYRE, *Commissioner*:

The complaint herein charges The Sperry and Hutchinson Company (S&H) with violations of Section 5(a) (1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1), in connection with its trading stamp business. The charges are in three counts. The first has to do with S&H's policy of requiring retail dealers which it licenses to deal in

its stamps (licensees) by agreement and otherwise to dispense no more than one trading stamp for each ten cents worth of goods or services sold. The second is a conspiracy charge and it alleges that respondent, in combination with others, engaged in practices directed to preventing the dispensing by retailers of more than one stamp for each ten-cent purchase. The third and final count charges that respondent, alone or in combination with others, engaged in a practice or policy to prevent or suppress the operation of trading stamp exchanges and other free and open redemption of trading stamps.

A hearing was held in this matter before an examiner. He filed his initial decision on February 10, 1967, and therein he found and concluded that the charges were in part sustained by the evidence and in part unsupported. In general, the examiner held that the charges having to do with combinations or conspiracies between respondent and other trading stamp companies and actions taken at the behest of retailers to enforce the restrictive policies alleged were sustained, but those as to other actions concerning respondent's relationships with its dealers on the same policies were not. He issued an order to cease and desist as to those charges which he found supported by the evidence.

Both parties have appealed. Complaint counsel appeal from the initial decision to the extent the examiner did not find the complaint charges sustained and respondent appeals to the extent the examiner found violations and prohibited such by a cease and desist order. The grounds for the respective appeals of the parties will be covered in detail below.

Respondent and the Trading Stamp Business.—Respondent is a corporation, organized and existing under the laws of the State of New Jersey. It has its principal office and place of business at 330 Madison Avenue, New York, New York, and it is, and has been since 1896 (incorporated in 1900), engaged in the trading stamp business. Respondent is both the oldest and the largest company in this field in the United States.

In the conduct of its trading stamp business respondent issues, for a valuable consideration, pads of trading stamps to retailers pursuant to license agreements. These agreements are generally entered into for a period of one year, although some are for longer periods. The licensee pays the respondent an amount based upon the number of stamps distributed by the licensee. The average price in 1966 was \$2.23 for 1000 stamps, which works out to \$2.68 per book of 1200 (which is the size of the books issued by S&H). The rates charged for licensing decrease as the volume of usage increases. For retailers in certain categories who reach a particular annual volume of stamp distribution, respondent

ent guarantees that the cost will not exceed 2 percent of the retailers' sales.

The licensee, under the agreement with S&H, promises to advertise the use of S&H green stamps and to furnish his customers with stamp-saver books and catalogs displaying redemption merchandise supplied by the respondent. He also agrees to offer stamps on each purchase at the rate of one stamp for each ten cents paid. The license agreement contains a provision which states that the title to the stamps is to remain in the respondent.

For its part, respondent agrees to maintain, and it does maintain, redemption stores where the consuming public may exchange or redeem their stamps for merchandise. Respondent also engages in other activities intended to encourage the use of S&H trading stamps and to promote the interests of its licensees, such as national advertising.

Respondent emphasizes in its business the creation of a "family" of merchants. Thus, in a particular market like a shopping center, it licenses a so-called "key account," which account will usually be a retail food chain outlet. Respondent will also license in such market other independent and usually smaller retailers such as a drug store, a cleaning establishment, a gasoline station and similar outlets. These are referred to as "associate" accounts. Generally respondent will not license in the same market retailers competing in the same product or service, although there are exceptions.

Respondent is a firm of substantial size. It is also the foremost trading stamp company in the United States and the only one operating on a nationwide basis.¹ Respondent's annual gross receipts are over \$300 million. It issues between 37 percent and 40 percent of all trading stamps in the United States. The number of retailers licensed by respondent to use its trading stamps approximates 55,000, encompassing some 70,000 outlets. Respondent maintains over 850 redemption centers and in 1965 it distributed approximately 32 million copies of its catalogs. More than 35 million American households save S&H stamps.

It is clear that respondent is widely engaged in interstate commerce and that its acts and practices challenged in the complaint are engaged in "in commerce."

On redemption, respondent's policy is to accept all the trading stamps it has issued regardless of the length of time that they have been outstanding and, so, there is no way to determine with certainty the percentage of its stamps issued which will ultimately be returned. Based on its past records, respondent estimates that 95 percent of all

¹ While respondent is a significant factor in the trading stamp business over much of the United States, it does not dominate every marketing area. In California, for instance, the Blue Chip Company apparently has a large part of the stamp business.

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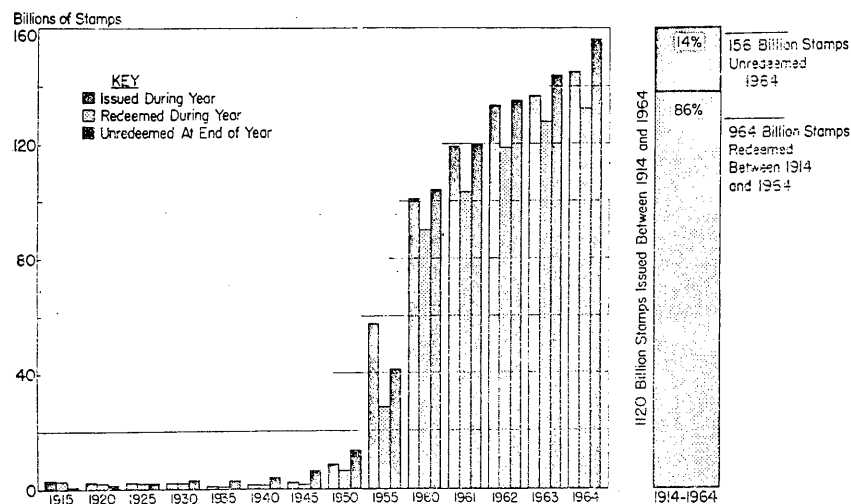
stamps issued by it will be redeemed and, accordingly, for more than 40 years it has kept its financial records, filed its income tax returns with Internal Revenue Service, and maintained a liability account on that basis. This percentage figure is disputed by complaint counsel, who, referring to CX 444, point out that from the period 1914 through 1964, 156 billion S&H stamps had not been redeemed, which is about 14 percent of the 1120 billion stamps issued in this period. In view of the state of the record on this subject, our finding is that the percentage of unredeemed stamps cannot be determined with certainty and that it is probable the redemptions will fall somewhere between 86 and 95 percent of the total stamps issued.

CX 444 (the same as CX 440) is reproduced herewith. It shows not only the S&H stamps issued, redeemed and unredeemed from 1914-1964, but graphically the growth of respondent's business in these years, particularly its rapid growth in the years since 1955.

Other leading trading stamp companies in the business include Top Value Enterprises, Inc., Gold Bond Stamp Company, E. F. MacDonald Stamp Company, King Korn Stamp Company and the Blue Chip Company. The six largest companies in 1964 represented between 83 percent and 88 percent of the industry.

A great boom in the use of trading stamps began in the food retailing field about 1950. (See Chart—CX 444—reproduced below.) From

S & H STAMPS ISSUED, REDEEMED, AND UNREDEEMED: 1914 - 1964



Source: CX 399.

CX 444

that year to 1962 the share of retail grocery store sales made by stores using trading stamps increased from 1 percent to 47 percent (although it later declined to 43 percent) and most of the increase involved the use of trading stamps by supermarket chains. Some of these food chains established their own trading stamp companies, *e.g.*, Kroger Co. is associated with Top Value. In certain metropolitan markets the stores which are dispensing trading stamps account for the major proportion of the retail food business. Respondent, from 1950 to the time of the hearings, increased its sales a thousand percent and derived the majority of its revenue in the period from food stores—mainly supermarkets.

The One-for-Ten Policy.—While the individual charges in the complaint will be separately considered below, the nature of the proceeding as a whole should be kept in mind. The practices, to be sure, break down into separate acts which in themselves may be found to be violations of the law as charged. However, to treat these solely as separate and nonrelated actions would give a far too fragmented view of the case. The acts and practices charged concern two distinct restrictive or restraining policies of the respondent, and it is as to these that we are here essentially concerned, whether carried out alone or in combination with others. These are (a) the policy of restricting licensees in the dispensing of trading stamps to one stamp for each 10-cent purchase (dealt with in Counts I and II), and (b) the policy of curtailing the activities of trading stamp exchanges and otherwise restricting the free transfer of trading stamps by collectors (covered by Count III of the complaint and treated separately below).²

First, our consideration will be given to the charges on the one-for-ten policy under Counts I and II. Count I specifically alleges that respondent has, by agreements and by its actions alone and sometimes at the "behest" of other licensees, required its licensees not to dispense more than one trading stamp for each ten cents worth of goods or services purchased. The effect of such policy, it is charged, is to tamper with the price structure levels or mechanisms, or otherwise to interfere with the free play of market forces: to restrain competition between retail merchants; to induce and put together a combination among retail merchants to limit competition among them; to deprive consumers of additional trading stamps, and to unfairly deprive retailers of the opportunity to make their own busi-

² The hearing examiner seemed to sum up complaint counsel's case in the following sentence:

"Complaint counsel's fire is concentrated on two incidents of the business: the one stamp for 10 cents of purchase price requirement and the restriction on the use of stamps after the licensee issues them to his customer." (Initial decision, p. 1144.)

ness decisions. Count II alleges that respondent and other named trading stamp companies have conspired to restrain and eliminate competition and that in furtherance thereof they have engaged in certain acts and practices to fix the rate of the dispensing of stamps by retailers. These alleged acts and practices include the adoption of restrictive provisions in contracts, the enforcement or attempts to enforce such provisions, and attempts to induce and the inducing of licensees not to dispense more than one stamp for each ten cents of purchases. The effects on competition charged are the same as the effects set forth in Count I, except for the additional allegation of a restraint on competition among trading stamp companies.

Thus, Counts I and II deal generally with alleged restraints on retailers in connection with the dispensing of extra or multiple stamps. There are a number of variations in the ways in which extra stamps are given. For instance, there is "double stamping," which is the dispensing of two trading stamps for each ten cents worth of goods or services; "bonus stamping," which is the dispensing of extra stamps in connection with the sale of a specified item; "institutional stamping," which is the issuing of extra stamps in connection with total purchases exceeding a specified amount; and other forms of the giving of extra stamps. The term "multiple stamping" will be used herein to describe all forms of the dispensing of extra trading stamps, *i.e.*, all dispensing other than the giving of one stamp for each ten-cent purchase.

Multiple stamping is clearly contrary to respondent's policy: on this there is no dispute.³ Each licensee expressly agrees in the licensing document to issue only one stamp for each ten-cent purchase and not to dispose of the S&H stamps in any other manner. The record shows vigorous enforcement of this policy by respondent, although neither enforcement nor compliance have been completely even and uniform. The examiner expressed the situation as follows:

³ In its answer respondent responds to charges as to its policy on restricting multiple stamping in pertinent part as follows:

"Denies each and every allegation contained in paragraph 7 of the complaint except admits that for many years past the practice or policy of respondent has been to enter into, place into effect, and carry out license agreements with various retailers which provide that one of respondent's stamps will be issued to the retailer's customer for each full 10 cents worth of goods or services paid for by the customer, but for the full and complete terms of said licensing agreements respondent begs leave to refer to current and past examples of licensing agreements upon the trial of this proceeding. Respondent further alleges that, notwithstanding the terms of said licensing agreements, some of its licensees have from time to time and do today issue "free stamps," "double stamps," and "bonus stamps" without special authorization or permission from respondent. Respondent further admits that it has from time to time sought to persuade licensees to refrain from such practices." (Answer, par. 7.)

Respondent's urging has been effective in some cases but not in others. * * * As a practical matter respondent often permits those licensees competing with other retailers, who issue stamps of a rival company that permits multiple stamping, to meet such competition. * * * Although there is a great deal of multiple stamping done by S & H licensees, it is and has been the policy of S & H to enforce its contract against multiple stamping. [Citations omitted.] (Initial decision, p. 1125.)

Elsewhere, the examiner found that some 20 percent of respondent's stamps are used in multiple stamping (initial decision, p. 1146).

The Hearing Examiner's Holding on the One-for-Ten Policy.—Under Counts I and II the examiner found violations (a) in the enforcement of the one-for-ten policy at the "behest" of competing retailers, and (b) in the joint actions involving respondent and competing stamp companies to seek a common adherence to the one-for-ten policy. He did not find a violation under Count I concerning respondent's actions, other than the behest situations, involving its agreements and relationships with its dealers. Both parties have appealed from his decision on these counts to the extent that it is adverse to their respective positions.

The examiner, in his findings on the anticompetitive effects of the one-for-ten policy, did not, in all connections, clearly distinguish between respondent's actions as charged under Count I and those taken in combination with other trading stamp companies. Further, he did not expressly eliminate respondent's Count I actions from his findings on such effects. He found the one-for-ten policy anticompetitive in its effects on: (a) the price structure, (b) retailer competition, (c) the purchasing public, (d) the freedom of the retailer, and (e) trading stamp companies (initial decision, pp. 1141-42). Specifically, he held that stamps are a cash discount and, thus, that a restriction on the issuance of stamps results in a "business restriction" on the cash discount: that from the point of view of the consumer the stamps are part of the package of rights he is entitled to receive for his purchase price, and any restriction on the number he receives, *pro tanto*, has an effect in the nature of a partial price restriction; and that the impact of respondent's practices is significant, particularly in the food retailing field where price and quality competition has declined. He also found, from evidence which he stated establishes that price competition is one of the competitive responses to the original issuance of stamps, that the restrictions on the number of stamps to be issued may affect in some measure price behavior. Having found such anticompetitive effects from respondent's engaging in the one-for-ten policy, he nevertheless dismissed the complaint as to most of respondent's Count I actions and found violations only in the conspiratorial situa-

tions involving other trading stamp companies and the so-called "behest" instances.

The hearing examiner's dismissal as to the aforesaid allegations was based on his reasoning that respondent's one-for-ten policy was necessary to define the service offered. He held that without such a restrictive policy respondent could not state the cost of the "promotional system" to the retailer; there could be no system of franchising a family of noncompetitive merchants; and licensees' customers would not know what the advertising of S & H stamps means (initial decision, p. 1126). Elsewhere, the hearing examiner observed that respondent sells its service as a means of bringing customers into the licensee's store and that to permit a licensee to issue stamps at will and to redeem stamps from a person other than the licensee's customers would call upon respondent to reform its contract and remove the very incentive for the customer to go to the licensee's store. This, according to the examiner, would be "detrimental to respondent's legitimate business interest in preserving its promotional scheme" (initial decision, p. 1147).⁴ He concluded that the limitations on the number of stamps to be issued and restrictions on their subsequent use are reasonable provisions delimiting the obligations that respondent undertakes by its contracts and consequently are not unreasonable restraints under the Sherman Act nor unfair acts and practices under the Federal Trade Commission Act (initial decision, p. 1147).⁵ We construe the examiner's holding on this issue as, in effect, a conclusion that whether or not the one-for-ten policy constitutes an undue restriction or restraint on trade, it was saved from antitrust strictures because respondent had a sound business reason or motive for its actions.⁶ In this he erred. Such is not the rule under the Sherman Act, and so, clearly, it is not under the Federal Trade Commission Act, which is broader in its sweep. As stated in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967),

Our inquiry is whether, assuming nonpredatory motives and business purposes and the incentive of profit and volume considerations the effect upon competition in the marketplace is substantially adverse. The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct. It is only if the conduct is not unlawful in its impact in the market-

⁴ The examiner, on page 1127 of his initial decision, further found that the provisions in the licensing agreements relating to the number of stamps issued "are an essential definition of the service offered, are not an unreasonable restraint of trade in the unique circumstances of this industry, and do not constitute price fixing."

⁵ The question of respondent's restrictions on the subsequent use of trading stamps, such as by trading stamp exchanges, will be separately considered below.

⁶ Although the examiner, on page 1127 of his initial decision, found that the stamp dispensing restriction was not an unreasonable restraint, he seemed to ground this finding on his holding of a good business purpose.

place or if the self-interest coincides with the statutory concern with the preservation and promotion of competition that protection is achieved. * * * (*Id.* at 375.)

Clearly the hearing examiner should have looked at more than the business purpose. He should have weighed respondent's individual conduct in the light of the facts, if any, bearing on the impairment of competition. Moreover, we believe that the examiner erred in failing to recognize that the anticompetitive effects which he found resulted from respondent's various agreements and acts as charged in Count I as well as its actions jointly with other trading stamp firms.

Contentions of the Parties on the Legality of the One-for-Ten Policy.—On their appeal to the Commission complaint counsel do not rely on the *per se* approach. At pages 40–41 of their appeal brief they state that they put aside the argument that the practice is illegal *per se*—to be condemned simply on the basis of the contract itself—and assert that they rely on the record showing of the effects of the restraint on competition. Their contentions on injury in general are that multiple stamping is an important competitive tool and that respondent's restriction can result in harm to local retailers who may lose business to competitors because of it; that in the marketplace the effect of the restriction on the dispensing of stamps is similar to that resulting from resale price maintenance; and that the prevention of multiple stamping eliminates a spur to price competition, particularly in the food retailing field, which, they assert, is characterized by sluggish and oligopolistic competition.

Respondent's position on the legality of its one-for-ten policy (aside from its arguments as to the sufficiency of the evidence relating to the conspiracy allegations) is that the practice must be tested under the rule of reason. As respondent phrases it, the question is: "Was the provision adopted 'with the legitimate purpose of reasonably forwarding personal interest and developing trade,' or was it entered into 'with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce?' . . . Or, regardless of its purpose, does the one for ten have the effect of unreasonably restraining trade?" (Respondent's answering brief, p. 13.) Respondent, to support its position, cites *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1910); and *Times Picayune Publishing Company v. United States*, 345 U.S. 594 (1953); and asserts that under the criteria in these cases its one-for-ten restriction is not unlawful. These contentions will be disposed of in subsequent paragraphs.

On the merits respondent first claims the record reveals the reasons and the circumstances surrounding the use of the one-for-ten provision and demonstrates it was adopted for the legitimate business purpose of providing an effective trading stamp system. It makes the following points in this connection: (1) that respondent had to select a rate of issuance which would both attract customers and yet be low enough to make the patronage profitable to a licensee, (2) that respondent had to communicate to licensees the basis upon which its stamps were issued so that the licensee could budget its costs, (3) that respondent needed a uniform rate of issuance so that the public would know what to expect at a retail store exhibiting an S&H sign, and (4) that respondent sought to avoid asserted injury to members of groups of licensees where the attractiveness of the stamps would supposedly be reduced if one of a group dispensed more than one for ten. In its argument on the one-for-ten restriction respondent does not contend (as it does with regard to its policy of suppressing the redemption of its trading stamps) that such a restriction is an element essential to the success of the S&H system; rather, respondent argues only—as we understand its position—that it had a good, sound business purpose for doing so. Respondent, in other words, takes its stand here on the goodness of its motives—not business necessity.⁷ As we have just indicated, however, assuming nonpredatory motives and valid business purposes, our inquiry cannot stop there; we need to look further at competitive effects.

Respondent also argues as to the one-for-ten restriction that complaint counsel have proved no actual anticompetitive effects, nor that the restriction must necessarily result in such effects. On this, respondent avers it is not enough that the restriction might or could have anticompetitive effects; it asserts the rule is the showing must be that the restraint must necessarily result in such effects. For this proposition respondent relies on *Maple Flooring Manufacturers Assn. v. United States*, 268 U.S. 563 (1925).

The Federal Trade Commission Act and Its Application to the Practices Alleged. The trading stamp business concerns a tripartite arrangement involving (a) the stamp company issuing the stamps, (b) the dispensing retailer, and (c) the collector of the stamps. Cases in the courts have frequently raised issues as to the contract and property rights of participants in the scheme and in resolving these issues some of the courts have ruled as to the nature of trading stamps.

⁷ Respondent's position on the one-for-ten restriction contrasts with, and apparently differs from, the examiner's holding, which is to the effect that the policy is "an essential definition of the service offered." (Initial decision, p. 1127.)

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In *Sperry and Hutchinson Co. v. Hertzberg*, 60 Atl. 368 (C.Ch. N.J. 1905), for instance, the court stated: "The thing of value which the collector pays for and acquires and has a right to transfer is not the piece of paper and the ink thereon which constitute physically the trading stamp, but the absolute property right which the stamp represents and evidences, which counsel for the complainant accurately refers to as a chose action." *Id.* at 370. The court further observed that "The trading stamp scheme is complex, and is based upon a large number of legal and equitable principles relating to the law of personal property, the law of contracts, the law of estoppel. The scheme has been adjusted with care, so as to gain the full advantage of the binding force of these principles of jurisprudence . . ." (*Id.* at 373.)^s

Here, in considering the application of the Federal Trade Commission Act, the Commission's purpose, whatever the rights and obligations of the participants to the scheme and others may be, is simply to determine, in light of the public interest, whether or not the practices as alleged are unfair within the meaning of Section 5 of such Act, which states in part: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." It can be stated at the outset that the "unfair" methods, acts and practices referred to are not limited to violations of the Sherman Act, as respondent's argument appears to suggest. See *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 694 (1948). The United States Supreme Court has expressed its views on the scope of Section 5 of the Federal Trade Commission Act a number of times in recent cases, and there is no doubt whatsoever as to the broad reach of this law. In *Atlantic Refining Co. v. Federal Trade Commission*, 381 U.S. 357, 367 (1965), the Court stated:

In a broad delegation of power it [Section 5, Federal Trade Commission Act] empowers the Commission, in the first instance, to determine whether a method of competition or the act or practice complained of is unfair. The Congress intentionally left development of the term "unfair" to the Commission rather than attempting to define "the many and variable unfair practices which prevail in commerce."

Later, in the *Brown Shoe* case, the Supreme Court reaffirmed this position and held that the Commission has broad powers to declare trade practices unfair and that "[t]his broad power of the Commission

^sIn the *Hertzberg* case the court also stated that "Men who devise novel schemes of transacting business in order to make money cannot have the courts create novel rules of law for the protection of such schemes." (60 Atl. 373.) See, in addition, *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 135 Fed. 833 (C.C.D. R.I. 1904); *Sperry & Hutchinson Co. v. Hertzberg*, 60 Atl. 368 (C.Ch. N.J. 1905); and *Rance v. Sperry & Hutchinson Company*, Okla. 410 P. 2d 859 (1965).

is particularly well established with regard to trade practices which conflict with the basic policies of the Sherman and Clayton Acts even though such practices *may not actually violate these laws.*" (Emphasis supplied.) *Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966). In both the *Atlantic* and the *Brown* cases the Court clearly indicated that the Commission, in applying Section 5, was not bound to the criteria of the antitrust laws. For instance, in *Atlantic Refining* it stated in part:

As our cases hold, all that is necessary in § 5 proceedings to find a violation is to discover conduct that "runs counter to the public policy declared in the" Act. . . . But this is of necessity, and was intended to be, a standard to which the Commission would give substance. In doing so, its use as a guideline of recognized violations of the antitrust laws was, we believe, entirely appropriate. It has been long recognized that there are many unfair methods of competition that do not *assume the proportions of antitrust violations.* (Emphasis supplied.) (381 U.S. 369.)

The position of the Court on this question is perhaps even more explicitly set out in *Brown*, where it states that the Commission, in declaring the franchise program to be unfair, did not have to prove that its effect "may be to substantially lessen competition or tend to create a monopoly," as would be required under Section 3 of the Clayton Act. The reason, the Court said, is that the Commission has the power, under Section 5, to arrest trade restraints in their incipency without proof that they amount to an outright violation of Section 3 of the Clayton Act or other provisions of the antitrust laws. See also the recent decision in *Luria Brothers and Company, Inc. v. Federal Trade Commission*, 389 F.2d 847 (3d Cir. 1968).

Thus, it is clear that the Commission, in determining here whether or not the practices challenged in the complaint are unfair, may find a violation of the Act without a showing of such anticompetitive effects as would be required under the antitrust laws. However, we will by no means apply a mechanical application of the law to the facts. As in the *Atlantic Refining* case, *supra*, we believe it is desirable to look at all the facts of record to determine if competitive activity has been or may be impaired. In this connection, we reject respondent's contention that we must use the criteria of the Sherman Act set forth in the cases they have cited and above referred to in order to find a practice to be unfair. Respondent's reliance on *Maple Flooring, supra*, and other cases adverted to, is misplaced. These all involve rulings under the Sherman Act which are not controlling in a Federal Trade Commission Act proceeding. We will look to comparable statutes, if any, for guidance, but not as to establishing essential criteria for a finding of a violation of the practices here challenged.

Competitive Effects of the One-for-Ten Practice.—Respondent is widely engaged in interstate commerce and the commerce involved is substantial. The broad scope of the use of trading stamps has already been mentioned. Thirty-five million American households save trading stamps. Respondent alone licenses approximately 55,000 retail businesses, which distribute S&H stamps to over 70,000 retail outlets throughout the United States. Respondent's gross annual receipts alone are over \$300 million. Respondent's restrictive policies challenged in this complaint affect a large part of such commerce.

The impact of the use of trading stamps is particularly marked in the retail food business, where from 1950 to 1962 the share of retail grocery sales made by stores using trading stamps increased from 1 to 47 percent. In many metropolitan areas stamp-dispensing supermarkets account for a major portion of the retail food business in such areas. Furthermore, the stamp-dispensing retailers include all the top-most supermarket chains in the United States (though they all do not use stamps in every market in which they do business), namely, Atlantic & Pacific Tea Co., Safeway, Kroger Co., National Tea, Loblaw, Colonial, Jewel, Winn Dixie, Acme, Allied, Grand Union, and First National. Food stores using trading stamps embraced 46 percent of all food retailing in the United States in 1964.

The use of trading stamps provides a form or means of competitive rivalry at the retail level.⁹ The scope of their use and influence in retail marketing is clear from the facts stated in the paragraphs above. Other factors affecting retail competition include price, attractiveness of store, convenience of location, parking lots, selections and variety of stock and like considerations. Additionally, in promoting goods, continuity plans are widely used, *e.g.*, encyclopedias—a volume at a time; games, such as a variation on Bingo and the like. Trading stamps, of all of these, are in a special class because of their versatility and price-like nature and, at least under certain conditions, may rank next to price in importance.

Trading stamps affect price behavior. The examiner found, as heretofore mentioned, that price-cutting was one of the competitive responses to the original issuance of stamps; that a restriction on the giving of stamps may affect the prices of the competitor of the stamp-issuing retailer and thus the price offers in the market; and that, ac-

⁹ Respondent's witness Dr. Beem testified to the effect that not all customers are similarly attracted by the dispensing of trading stamps. We see no particular relevance, however, in the fact that trading stamps may not exert an equal pull on all customers. It is sufficient, we believe, that a large majority of American households, as indicated above, save trading stamps and to some extent mold their shopping decisions on the basis of the availability of such stamps.

cordingly, the restrictions on the number of stamps to be issued may affect, in some measure, price behavior (initial decision, p. 1141). Dr. Phillips, respondent's witness, testified that at least at one time during the period of the adoption of trading stamps by their competitors, Safeway and Atlantic & Pacific Tea Company reacted by reducing prices. Other evidence in the record, including the testimony of retailers, clearly brings out the fact that an effective response to the issuing of trading stamps is the lowering of prices. As an example, the manager of W. T. Grant Company store in Chelmsford, Massachusetts, testified that he ran sales and cut prices to meet the competition of double stamps. Other instances are documented in the record. Consequently, we find that trading stamps have an effect upon price behavior and that in view of the universality and widespread use of trading stamps this effect was and is substantial.

In the retail food industry there is evidence that historically, as price competition intensifies, the use of promotions and other forms of nonprice competition decreases, and vice versa. RXs 24 (a)-(o), which include certain testimony of Willard F. Mueller, Director of the Bureau of Economics, Federal Trade Commission, before the National Commission on Food Marketing (May 5, 1965), convey this idea. We quote in pertinent part from such testimony:

* * * Writing in TNEC Monograph 35, A.C. Hoffman, now a vice president of Kraft Foods, concluded:

During their period of rapid expansion, the chains almost without exception had an aggressive price policy calculated to bring new customers into their stores and expand their business. But close observers were able to note late in the decade of the 1920's that the chains were placing less emphasis on the price appeal and were giving less attention than formerly to methods for reducing retail costs. Competition had begun to take the form of institutional advertising and more elegant store buildings and equipment.

The introduction of the supermarket by independent retailers in the early 1930's reversed for nearly two decades the trend observed by Hoffman. Price competition was intensified * * *.

* * * By the early 1950's the 4 or 8 largest retailers in most cities accounted for well over half of all grocery-store sales. This oligopolistic market setting encouraged large retailers to deemphasize price competition, which had proved so effective with smaller stores. They turned increasingly to nonprice rivalry. Many turned to trading stamps. Some placed increasing emphasis on advertising and other promotion techniques. And nearly all turned to more modern, fancier supermarkets, in-store facilities and parking lots as a way of attracting customers. * * * (RX 24 (l)-(m).)

Dr. Stewart Lee, testifying for complaint counsel, referred to the shift from price to stamp competition as follows:

Another important aspect, and this is one of the areas that disturbs me very much both as an economist and particularly as one whose area of special inter-

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est is consumer economics and consumer welfare, and that is in the last decade we have tended to see somewhat of a diminution of price competition, particularly in food sales.

Now, if you have a diminution in price competition in food sales, then the competition needs other competitive devices to bring in and there is no question they have brought in trading stamps. So the type of competition has been shifting from price competition to trading stamp competition. (Tr. 4053.)

Thus, it can be seen that price competition and stamp competition are importantly related in the marketplace. Moreover, it is clear that there is an intermingling in the two forms of competition and that stamp competition may, in some circumstances, substitute for price competition at the retail level.

The versatility and importance of trading stamps as a competitive factor is demonstrated by the number of ways in which they can be used as a sales incentive. Dr. Lee, on this subject, testified in part:

Price competition has a great degree of flexibility in its use. You can move in quickly. You can adjust prices, you can adjust prices in different ways as was testified to. Trading stamps could be used and have been used very closely with the degree of flexibility, with multiple stamping of various types on certain items, and this is one of the very important aspects of it. (Tr. 4052-53.)

Dr. Beem testified that it is easier to establish a specific value for the trading stamp than it is for many other kinds of nonprice competition and "that in that sense the trading stamp is, you might say, price-like" (Tr. 6057).¹⁰ Multiple stamps (including double, bonus or institutional) have been used in various ways as a competitive device. They have been used to sell specific products, to increase store traffic, to promote store openings, to meet the store openings of competitors, to shift patronage from regular "shopping days" to another day, and to overcome impediments like poor location and special merchandising problems.

This record also shows that in addition to lowering prices a retailer's response to a competitor's introduction of stamps may be the use of trading stamps, including the issuance of multiple stamps. The situa-

¹⁰ Dr. Beem also agreed with the following question, which was taken from his writings: "By Mr. Stern:

"Q. A way in which trading stamps has has [sic] helped to make competition more effective is by offering another dimension in which competition can be expressed. There are many instances, for example, in which market structures make effective price competition unlikely. To make a price concession feasible, a seller must secure enough additional sales to offset the lower profit per unit of sales. When there are only a few sellers in a market, and where costs among competing sellers is comparable, price reductions are subject to rapid neutralization through imitation. In these frequently occurring situations trading stamps offer a feasible way to make a price-like concession because they cannot easily or immediately be offset by imitation.

Now, I ask you if you agree with that statement?

"A. I not only agree with it, but I wrote it." (Tr. 6435.)

tion which developed in Denver in 1953, covered in more detail in the conspiracy discussion to follow, is a classic example of the use of multiple stamps to meet stamp competition. In that instance the use of trading stamps had been met by competitors by the dispensing of double, and, in turn, triple stamps, and even quadruple stamps. This competition in the dispensing of multiple stamps finally reached the point where the various stamp companies operating in the market entered into an agreement that they would adhere to a policy of dispensing only one for ten.

The importance of stamp competition possibly is in no way better shown than by the evidence of complaints from licensees against other competing licensees on the use of double stamps. Such evidence demonstrates not only the existence of trading stamp competition but that such a form of competition is effective. Appendix A of the initial decision, incorporated into the Commission's findings, contains a listing of various instances documented in the file of complaints from licensees as to such multiple stamp competition.

An example is a situation which developed in Bristol, Connecticut, in 1958. In that year three food stores—Mott's, Washington Superette, and Petit's—all dispensed S&H stamps in their Bristol, Connecticut outlets. Petit's and Washington Superette began offering double S&H stamps. Mott's demanded that respondent stop such practice. There followed a series of efforts by respondent to eliminate the double stamping. This included submitting to Washington Superette and Petit's an advertisement to be run jointly, stating that double S&H stamps would not be given by those stores, although it is not clear that such an advertisement was published. The efforts on the part of respondent to stop this multiple stamping were unsuccessful in the beginning, and apparently it was only after a period of time and a number of contacts by the respondent that the retailers discontinued the practice. As to this and other similar situations disclosed in the record, the showing of the tenacity with which such retailers stick to and continue double stamping suggests the effectiveness of this form of competition.

Respondent's own policy leaves no doubt as to the potency of stamp competition. In enforcing its one-for-ten restriction respondent does not require licensees competing with multiple stamping retailers licensed by other companies to discontinue the dispensing of multiple stamps. Respondent's vice president, Frank Rossi, testified in part as follows as to its policy:

... And when a rival trading stamp company permits its licensees to use multiple stamps, for us to deny our merchants the right to issue multiple stamps

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would put him at a considerable disadvantage. And so, whether we like it or not, we have got to go along with it because the competitive situation is such that we must do this to protect our interest and that of our licensees. (Tr. 4986-87.)

The retention of this power by the respondent—the power to decide which retailer will use a certain competitive tool and which will not—cogently reveals the inherent evil in the restraint imposed.

The testimony of retailers further shows the impact of trading stamps on competition at this level. David Javitch, president of Carlisle Food and Giant Foods, Inc., Carlisle, Pennsylvania, testified that the advertised prices of his stores in Mechanicsburg were lower than the prices of his stores in Carlisle to overcome the double-stamp situation occurring in the former area. Henry Vandervoort, operator of Van's Food Market in Pella, Iowa, testified that he used multiple stamps to combat competition in his area. He further testified that when Van's Food Market in Pella was required to give up double stamps, the store lost business. Samuel P. Alterman, executive vice president of Alterman Foods, Atlanta, Georgia, testified that one of his competitors started double stamping and that in his opinion this was partly in response to his own price cutting. He stated: "Well, we were fighting for existence. We were fighting with prices." (Tr. 6986-87.) Bernard Weindruch, who was connected with Eagle Stores of Rock Island, Illinois, asserted in his testimony that in December 1961 Park's Discount Department Store and Discount Food Store completely demoralized the entire marketing area with price cutting and that Eagle Markets had decided to try double stamps to see if they could generate enough volume, rather than resort to "drastic price cutting." (Tr. 7007.) These are examples, among others, of the testimony of retailers as to the competitive effects of multiple stamping in the retailing of food.

It is also apparent from grocery store advertisements included in the record that the use of trading stamps rivals price itself as an inducement to patronage. In many of the advertisements the assertions as to price and the offering as to trading stamps appear to be given about equal prominence (some examples are CXs 69-76, 106, 107, 126-27, and others). Many of these advertisements offer extra or bonus trading stamps on the purchase of specific items therein listed.

Respondent's own advertisement, which appeared in such publications as *Business Week*, *The New York Times*, and others, possibly summarizes the impact of trading stamps upon competition in food retailing as well as any other single item of evidence. It states in part: "When a leading research organization recently made a national sur-

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vey among the managers of 541 supermarkets that do not give stamps, they found that more than half of them (51.5%) had reduced prices to compete with stamps." The article concluded: "* * * it seems we need more and more competitive forces, like trading stamps, in the marketplace" (CX 196).

In holding here as we do, that trading stamps are in themselves a competitive force or factor, it is unnecessary to make a conclusive determination, as complaint counsel appear to urge, that trading stamps are, in effect, a discount from price. Nevertheless, we believe that some comment on this particular phase of the matter is justified because the competitive significance of trading stamps is traceable at least in part to its price-like behavior. Trading stamps, of course, are in one sense only an incident to the sale transaction and, in this respect, something like a cash discount. The price of the article on which the stamps are given can fluctuate independently of the stamps and to the extent stamps are a discount from price, it is a discount only from the otherwise established price of the article.

In this light, at least, the dispensing of trading stamps by the retailer can be considered a price reduction from the retailer's regular prices. That would seem to be the result particularly in the States which require redemption be made in cash, such as Wisconsin and Wyoming, as well as in the sixteen States in which the consumer has the option of redeeming trading stamps in cash.

Also, it is noted that in some States, in applying fair trade laws, the giving of trading stamps has been held to constitute a reduction in the price of the goods. See, for example, *Hogue v. Kroger Co.*, Tenn. Sup. Ct., 1963 CCH Trade Cas. ¶70962, where the court stated: "The stamps have the effect of reducing the price whether called advertising gimmicks, discounts for cash payment, etc., or not. * * *" (P. 78822.) See also *Colgate-Palmolive Co. v. Elm Farm Foods Co.*, 148 N.E. 2d 861 (1958). While other courts in fair trade law decisions have held to the effect that trading stamps constitute a discount for cash (and therefore supposedly not a reduction in price), even in this respect the stamps have a clear relationship to price.¹¹

Respondent's contention on the subject is that the dispensing of trading stamps by retailers is a promotional service similar to such other services as the furnishing of a parking lot and thus that it is not

¹¹ See, for example, *Safeway Stores v. Oklahoma Retail Grocers Association*, 322 P. 2d 179 (1958). *aff'd*, 360 U.S. 334 (1959). The court held in this case that trading stamps merely constituted a discount from cash.

a discount from price but a cost item to the retailer.¹² While the dispensing of trading stamps, in some circumstances at least, appears to be in effect a price reduction, as stated, we need not make a conclusive finding on this one way or the other. The scheme, one court has observed, is *sui generis*. *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.*, 135 Fed. 833 (C.C.D.R.I. 1904). In the circumstances, we are of the view that the application of any *per se* or mechanical rules of law would be inappropriate. Moreover, even a determination (which we do not make) that the dispensing of trading stamps is not a reduction in price but the giving of a service to a customer would not dispose of the proceeding. The Federal Trade Commission Act's proscription against unfair practices is broad enough to cover restrictions in the services which retailers may offer. *Cf. Fashion Originators Guild of America, Inc. v. Federal Trade Commission*, 312 U.S. 457 (1941), a case involving a restriction on competition in the nonprice area, *i.e.*, collective action to destroy competition in the sale of copied garments.

Our decision rests not on resolving the issue of whether or not the trading stamp is a discount from or a reduction in price in the guise of a stamp program, but on the determination that the trading stamp scheme is itself a viable means of competition at the retail level, particularly in the distribution of food. Trading stamps are not just a temporary phenomena, to disappear with changes in marketing approaches or purchasing habits, like so much frost under an October sun. Their use—going back some seventy years—has stood the rigorous test of time. Nor are they just another promotional scheme or gimmick, as respondent contends; they have become an integral and important part of retailing in America.

We note, moreover, that the trading stamp industry is highly concentrated (only a few of the companies have any significant share of the business), and it is dominated by the respondent, who wields great power over its licensees.¹³ It is in this environment that we view the competitive effects of respondent's restraints.

¹² The examiner found at one point as follows:

"From an accounting or economic point of view, it may be said that the stamps are not part of the cost of sales of the merchandise but rather part of the overhead of the business. From the point of view of the consumer, however, the stamps are part of the package of rights that he is entitled to receive for his purchase price." (Initial decision, p. 1141.)

¹³ While there are other trading stamp companies in the business to which a retailer could turn, in many markets in which respondent's S&H stamp is highly prized such an option, as a practical matter, is not available. On this Dr. Lee testified as follows:

"S&H is so dominant in the marketplace that a retailer wants to give a trading stamp that has a high degree of acceptability and with 39 percent of the consumers preferring S&H, a retailer wants to be very cautious, if he is going to introduce a trading stamp, he would like one they prefer. If he has the one they prefer, he wants to keep it. So that

On the desirability of the use of stamp competition in place of price competition we make no finding either way; we only recognize, looking at the record before us, that such competition does exist; that it is substantial; and that, in the circumstances, it is worth preserving against limitations and restraints.

There is no showing that respondent's conduct relative to its dealers as charged under Count I is in any way necessary for the preservation or promotion of competition; the evidence is just the reverse. It is clear, we believe, from the discussion in preceding paragraphs under the subject of "competitive effects," that respondent's one-for-ten policy, by limiting retailers' opportunities to compete, has substantially impaired or may substantially impair competition.

The scheme is closely analogous to the practices involved in cases dealing with resale price maintenance and the organizing of price maintenance combinations. See *Dr. Miles Medical Co. v. John D. Parke & Sons Co.*, 220 U.S. 373 (1911); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Federal Trade Commission v. Beach-Nut Packing Co.*, 257 U.S. 441 (1922). Here the respondent, to the extent that it entered into individual agreements on a vertical plane with various retailers and instituted, as part of its plan, the one-for-ten restriction, engaged in a practice restraining trade in much the same way as if it had entered into agreements with such dealers bearing specifically on the prices of the products they sold.

There is a further aspect to the matter concerning the so-called "behest" situations. The hearing examiner found that in a substantial number of instances involving several sections of the United States licensees of respondents requested it to urge other retail licensees in competition with them to cease issuing multiple stamps; and that respondent urged such competing licensees so to stop (initial decision, p. 1127). Respondent, in paragraph 8 of its answer, admits that from time to time it has attempted to secure adherence by its licensees—sometimes after complaints were made by other licensees of respondent—to abide by the one-for-ten policy.¹⁴ The examiner found that respondent's ac-

in the marketplace, the dominant size makes it a very valuable competitive device; either he wants to get to use it or he wants to continue to use it, if he has it." (Tr. 4055.)

It is also apparent, since most major trading stamp companies have similar restrictions on the dispensing of trading stamps, that a retailer wishing to compete by multiple stamping might have difficulty obtaining a desirable trading stamp license.

¹⁴ Paragraph 8 of respondent's answer reads in parts as follows:

"* * * except admits that from time to time it has attempted to secure adherence by its licensees, sometimes after complaints were made by other licensees of respondent, to the provision in respondent's license agreements that respondent's trading stamps shall be issued at the rate of one for each 10 cents worth of goods or services sold by the retailer, and that upon one occasion respondent actually cancelled a license agreement when the retailer refused to adhere to or comply with the aforesaid provision."

tions varied from case to case; that in some instances a threat to cancel was made and that in other instances a mild request was deemed sufficient. The examiner further found that in most instances the non-complying retailer agreed to comply, even though he later lapsed into noncompliance. The examiner concluded as to such "behest" situations that the action tends to become a combination and unreasonable restraint of trade and thus violates Section 5 of the Federal Trade Commission Act. The hearing examiner, to support his holding, relies on *United States v. General Motors Corp.*, 384 U.S. 127 (1966); *United States v. Parke, Davis & Co.*, *supra*; and *Federal Trade Commission v. Beech-Nut Packing Co.*, *supra*.

Respondent, as to these "behest" situations, argues that the cases relied upon by the examiner are inapposite because the *General Motors* matter involved a conspiracy and *Parke, Davis* and *Beech-Nut* went beyond the unilateral enforcement of the resale pricing policy involved. It claims that no combination of the 70,000 licensees existed and that respondent "simply acted, by itself, to enforce its contracts after receiving unsolicited information from isolated licensees having no relation with each other" (respondent's appeal brief, p. 20). Thus, respondent asserts, it is impossible to find a conspiracy.

We note on this that respondent entered into agreements on the one-for-ten restriction with its dealers, so that the *Beech-Nut* and *Parke, Davis* cases are relevant only to the extent they deal with organizing a combination with retailers. In *Parke, Davis*, the Court was primarily concerned with the lack of agreements between retailers and Parke, Davis. It resolved such issue by holding that in a vertical restraint matter no actual agreement is necessary.³⁵ The Court there stated that if a manufacturer was unwilling to rely on individual self-interest to bring about general voluntary acquiescence in the scheme and takes affirmative action to achieve uniform adherence by inducing each customer to adhere to it, the customer's acquiescence has not been a matter of individual free choice prompted alone by the desirability of the product. The manufacturer there was the organizer of a price maintenance combination or conspiracy in violation of the Sherman Act. This case is similar in that respondent was an organizer of a combination restricting the competition involved in the dispensing of multiple trading stamps, but it did this by agreements as well as by other acts and practices.

³⁵ "... an unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declaration to sell to a customer who will not observe his announced policy." (The emphasis is the Court's.) (362 U.S. 29, 43.)

In this matter, the behest situations are not necessary to prove the Count I combination, but they do serve to illustrate that the agreements were more than a mere formality. Also, they show that enforcement was such as to involve retailer against competing retailer in league with respondent, bringing this close to a horizontal combination among retailers. Respondent, if it did not expressly solicit complaints against double-stamping licensees, made clear by its actions that such were encouraged and acted upon. A few examples will be related.

In 1961, Mr. Meyer of W. T. Grant Company wrote to Mr. Clemens of the respondent's in New York City, referring to an ad promoting double stamps by Sutherland's Department Store in Lawrence, Massachusetts. Mr. Meyer stated that the ad disturbed his stores, since they were told repeatedly that double stamps could only be used with permission of respondent, and that "I would appreciate confirmation, from you, that there has been no change in your policy and that promotions such as the attached, without your approval, will not be repeated" (CX 90). Subsequently, the record shows some internal correspondence between Mr. Clemens and Mr. Gardner of Sperry and Hutchinson Company. In this correspondence it is clear that Sutherland's was contacted by a Sperry and Hutchinson representative and apparently was advised of the Grant store's objection.¹⁶ Finally, on November 10, 1961, Grant's was informed by Mr. Clemens of respondent that Sutherland's did not have permission to double stamp and that "he has promised me that he would not do it again unless permission was definitely granted" (CX 94). It appears that the double stamping by Sutherland's was discontinued, at least for a period of time.

Another example concerns an incident in Pennsylvania in 1960. The record contains a letter from Mr. Whitnack of Sperry and Hutchinson to the Zollinger-Harned Department Store in Allentown, Pennsylvania, reporting that he had seen the store's Founder's Day Sale, featuring double S&H stamps. Mr. Whitnack objected to this, stating, "We can handle the supermarket situation all right, but in your case stores such as Miller's Department Store in Northampton and Nelson-Freeman in Nazareth and a few other small stores in that area, have given us quite an argument about why we do not let them operate like you do" (CX 116). The responding letter from Zollinger-Harned included this statement: "The decision with respect to our continuing this double stamp event will remain entirely within your judgment. I am interested only in cooperating with Sperry and Hutchinson Co."

¹⁶ Respondent's letter of November 7, 1961, reports that Mr. Kurth of Sutherland's "would have no objection if Grant's were also to use them" (CX 93-(a)).

(CX 117.) Zollinger-Harned thereafter discontinued double stamping for a period of time.

Another example is the incident which occurred in Bristol, Connecticut, in 1958 (discussed above), in which two licensees gave up double stamping at the behest of a competing licensee.

These and similar situations disclosed by the record (see illustrations in Appendix A attached to initial decision and incorporated into the Commission's findings) have gone well beyond the bounds proscribed by the Supreme Court of a mere announcement of policy and a refusal to deal.¹⁷ In this case, respondent entered into agreements with retailers to confine the dispensing of trading stamps to one-for-ten and it actively enforced such policy. Respondent, upon the receipt of a complaint, went to the party complained against, received an assurance to cooperate, and frequently reported this back to the complaining dealer as a means to retain the latter's adherence to its policy. Respondent used various means at its disposal to obtain compliance, including threats to cancel. This restrictive policy, as above found, has impaired or may substantially impair competition.

We hold in the circumstances that respondent's agreements with retailers on the one-for-ten restriction and its policies and actions in connection with enforcing such restriction as charged in Count I of the complaint, including the "behest" situations, were such as to organize a combination in restraint of trade in connection with the dispensing of trading stamps; that these are unfair methods of competition and unfair acts and practices; and that they are in violation of Section 5 of the Federal Trade Commission Act.

The Illegality of the Combinations to Enforce the One-for-Ten Policy.—The complaint, in the conspiracy charge in Count II, alleges that respondent and other companies not named in the complaint (including Top Value Enterprises, Inc., Gold Bond Stamp Company, E. F. MacDonald Stamp Company, King Korn Stamp Company, Merchants Green Trading Stamp Company, and Stop & Save Trading Stamp Corporation) engaged in understandings or agreements, combinations or conspiracies, and pursued a common course of action and course of dealing to restrain and eliminate competition. Complaint counsel, in support of this charge, has adduced evidence concerning cooperative efforts or contacts with regard to enforcing a one-for-ten policy. The hearing examiner agreed and found that conspiracies had been entered into and included in his initial decision an order to cease and desist such practices. Respondent has appealed from this holding.

¹⁷ There is only one disclosed instance of a refusal to deal, which instance was admitted in respondent's answer (par. 8).

The appeal is largely a challenge of the significance of the evidence adduced. Respondent claims, for instance, that the joint activity in Denver in 1953, in which respondent and four other companies announced in a newspaper that they would thereafter require their licensees to issue stamps at a rate of one on each ten-cent sale, is the only evidence in the record relating to joint activity by trading stamp companies and that this is old and stale. It avers that documents showing the contacts as to the one-for-ten restriction between officials of respondent and Gold Bond relate to events prior to 1962 and thus do not show a "continuing" conspiracy alleged to exist on the date of the complaint, and that none of the incidents involving Gold Bond were initiated by respondent's officials. Respondent, in sum, attacks the sufficiency of the evidence. Nowhere does it take the position that it could have lawfully combined with other trading stamp companies to fix a ratio for the dispensing of stamps.

It is clear, we believe, that respondent did combine with other stamp companies to fix a policy of dispensing one stamp with ten. This is possibly best illustrated by the Denver incident of 1953, involving respondent and Gunn Stamps, Red Stamps, Pioneer Stamps and True Blue Stamps. In that instance a meeting was held October 1, 1953, at which the stamp companies agreed to issue a joint advertisement that all firms would require an adherence to a policy of one for ten, and this advertisement subsequently appeared October 5, 1953. The advertisement, signed by the mentioned stamp companies, states in part: "The Practice of Offering Multiple Stamps Is Contrary to the Policies of the Undersigned Stamp Companies. In the Interest of Both Merchant and Consumer, Beginning Today, Monday, October 5, We Will Require Adherence by All Firms, to the Policy of Giving ONE and Only ONE Stamp With Every 10¢ Purchase." (CX147.) Thereafter, for many years, there was little double stamping in the Denver area.

However, that is not the only incident of direct cooperative activity between respondent and another stamp company on this question. The examiner's findings (pp. 1128-1133) discuss various other incidents. For example, in May 1961, as a result of a contact by a Gold Bond representative with personnel of the respondent, Pete's Country Store was advised that issuing double stamps was in violation of his contract and must be stopped. In another instance, in 1961, respondent was contacted by a Gold Bond representative as to double stamping by Lewis Grocery Company in Mississippi. There is evidence respondent's representative advised that the double stamping by Lewis Grocery Company would not be repeated; however, it appears that respondent's action was ineffectual.

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Further, instances of combined activity between Gold Bond and respondent involved multiple stamping in the State of Iowa in 1961 and 1962 and later in 1963. In the first instance, respondent was asked by Gold Bond to stop Van's Food Market, Pella, Iowa, from double stamping. The second incident in Iowa involved Eagle Stores, respondent's licensee, and Super-Valu Stores, a Gold Bond licensee. The evidence indicates that contacts were made with respondent's representatives by Gold Bond representatives as to the double stamping by Eagle Stores, in efforts to have it stopped. Finally, there is an instance in March 1963 in which the manager of Gold Strike stamps, in Salt Lake City, Utah, complained to a representative of respondent that Prinster's City Market in Mohab, Utah, was giving double stamps. The evidence shows that Gold Strike was advised that respondent would take care of the matter.

These examples appear to be separate incidents; yet, they form a part of the larger pattern. Most of the leading stamp companies at the time of the complaint expressly provided in their contracts for the issuance of one stamp with each ten cents of purchase (though some made certain exceptions). These included National Enterprises, Inc. (Top Value), and Top Value Enterprises, Inc., E. F. MacDonald Stamp Company (Plaid), Merchants Green Trading Stamp Company, King Korn Stamp Company, Gold Bond Stamp Company, Blue Chip Company, and the respondent. These companies and others were all aware of each other's policies and, at times, as illustrated by the above situations, sought to enforce such policies by collective action. Clearly it is unnecessary that there be simultaneous action or a simultaneous agreement on the part of all the conspirators. Nor is it a defense that the scheme may not have been continuous and wholly effective. *Cf. Fashion Originators Guild v. Federal Trade Commission*, 312 U.S. 457, 466 (1941); *Interstate Circuit v. United States*, 306 U.S. 208, 227 (1939). The relationship here was informal and loosely connected. Nevertheless, there was an adherence to a common scheme and at certain times and places specific action taken by certain of the trading stamp companies to enforce such scheme. In the circumstances we believe there has been shown a conspiracy or conspiracies to restrain trade. We hold that these constituted unfair methods of competition and unfair acts and practices violating Section 5 of the Federal Trade Commission Act.

Charges under Count III of the Complaint.—Count III of the complaint charges that respondent, by itself or in combination with others, has entered into and placed into effect a practice or policy to prevent and suppress the operation of trading stamp exchanges or the free and

open redemption of trading stamps. It is alleged that the means used include agreements with retailers, a planned common course of action or course of dealings with other trading stamp companies to exchange information and to assist in legal actions against persons engaged in such activity, and other regulating and policing activity. The complaint finally charges that the effects of such practices or policies are to suppress independent trading stamp exchanges to the detriment of the people engaged in such business or activity, and of the members of the purchasing public who are thus deprived of the facility, and to interfere with the right of the public to enjoy the full use of their personal property.

On the issues raised under Count III, dealing with alleged restraints in the redemption of stamps, the facts are not generally in dispute—at least so far as they concern respondent's unilateral acts. In its answer to the complaint respondent admits that "by itself, respondent for many years past, has entered into, placed in effect and carried out a practice or policy to prevent trading stamp exchanges from trafficking in respondent's stamps and to prevent unauthorized redemption of respondent's stamps, by means of provisions in its license agreements, by notification of intent to institute litigation and by the actual institution and conduct of such litigation" (respondent's answer, par. 16). The evidence in the record relating to respondent's efforts alone or in conjunction with others to prevent or suppress trading stamp exchanges and the free redemption of trading stamps is detailed by the examiner in the initial decision on pp. 1133-39. These have been specifically incorporated into the Commission's findings, to accompany this opinion.

The examiner, as he did in the policy of limiting the dispensing of stamps to one for ten, found a violation in the combined activity of respondent with others, but no violation in respondent's individual actions. The examiner held that both restrictions challenged in the complaint were a part of the service offered. In the examiner's view, if the stamps can be freely traded, the attraction of the customer to a licensee's store, caused by the issuance of S&H stamps, is destroyed and the licensee loses what he has paid for.

Both parties have appealed from the hearing examiner's disposition of Count III of the Complaint—complaint counsel for his failure to find respondent's unilateral acts unlawful, and respondent from his finding that its acts in combination with others were illegal.

The policy of alleged suppression and prevention of stamp redemption activities covered in Count III of the complaint relates not only to trading stamp exchanges but also to what the complaint refers to as

"the free and open redemption of trading stamps by persons or firms desiring to enter or operate such business other than respondent." The hearing examiner found that there were three categories of persons engaged in the so-called "unauthorized" stamp redemption activity, as follows: (1) retailers who wanted to buy stamps and reissue them, (2) retailers who offered to exchange S&H stamps for those they were issuing to lure customers who collected S&H stamps into their stores, and (3) the trading stamp exchanges that ran brokerage operations (initial decision, p. 1134).

On point (1), above, a comment is necessary. Reissuance might be defined as the practice of a retailer of taking in trading stamps which have not yet been pasted into books and reissuing (or redispensing) them on new purchases. Such a practice goes beyond merely redeeming or exchanging, which was the practice shown in this record. Trading stamp operators, including the two Rances and Mrs. DeBolt, stated that they had a definite policy against selling stamps to retail merchants. The reissuance of stamps by a retailer not licensed by the respondent is a practice concerning which there is little, if any, evidence in this record. Complaint counsel concede, at page 30 of their reply brief, that the right of respondent to prevent such a use of issued stamps is in no way involved in this proceeding. Accordingly, the Commission's order will not extend to the respondent's individual policies so far as they concern the reissuance of S&H stamps by retailers.

We will now consider the characteristics of the "trading stamp exchange." The hearing examiner, at page 1111 of his initial decision, defined the trading stamp exchange as a person or business engaged in the exchange of trading stamps issued by one trading stamp company for those issued by another, or engaged in the sale or purchase of trading stamps to or from members of the consuming public. The trading stamp exchanges disclosed by the record appear to be relatively small businesses. The individuals involved simply went into business and offered to redeem or exchange trading stamps. Trading stamp businesses as to which testimony was taken include the "Trading Stamp Exchange" in Oklahoma City, Oklahoma, operated by William Rance; the "Trading Stamp Exchange" of Tulsa, Oklahoma, operated by Mrs. Regina Lou DeBolt; the "Trading Stamp Exchange" of Fort Worth, Texas, operated by Morris Sam Rance; and "Rosenwasser's," Corpus Christi, Texas, operated by Herbert Rosenwasser.

These trading stamp exchanges all seem to be similar in their mode of operation. William Rance described his operation as follows:

We buy, sell, or exchange trading stamps for, principally, our customers are housewives. If a person wants to sell trading stamps, we can buy them. If a per-

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son wants to buy a book of stamps, then we will sell him a book. Principally, most of our customers simply want to exchange one type of stamp for another, and for that we charge a commission fee, usually thirty to fifty cents a book, and that's about the extent of the services that we offer. (Tr. 1881.)

He added that about 90 percent of the income for the business was from commissions charged for the exchange of stamps (Tr. 1882).

The other kind of stamp redemption activity which respondent sought to suppress and did suppress involved principally retailers who offered to exchange S&H stamps for their own variety of stamps or simply to redeem S&H stamps. The redemption activity may in some instances be carried on by S&H licensees. Generally, the stores involved are not licensees of S&H. One example involves Jake's Department Store, Thibodaux, Louisiana. In this instance the retailer offered to give \$3 in merchandise for each green stamp book. Respondent warned the store about this practice and the retailer agreed to discontinue it. Another example concerns Good Deal Supermarkets, Irvington, New Jersey. In 1958 this store advertised that it would accept coupons and trading stamps to be used to buy food to give to needy families. Good Deal was threatened with litigation and informed that it had no right to exchange or redeem S&H stamps. It appears that eventually Good Deal discontinued its practice. A further example is that of the Savin Company, Inc., doing business as Tifon Jewelers in Orange, Connecticut. This firm, in 1958, offered to take in stamp books as a down payment on goods purchased but was forced to discontinue the practice by S&H.

Respondent has vigorously opposed trading stamp exchanges and all redemption of S&H stamps by persons and firms other than the respondent. This policy is set out in its answer, which was quoted in pertinent part above. First, we will give consideration to respondent's individual activities in restraining stamp redemption or exchange activity.

The stamp collector's book supplied by respondent contains a notice that the title in the stamps is reserved in the respondent and that "[t]he only right which you [the consumer] acquire in said stamps is to paste them in books like this and present them to us for redemption" (CX 401). The policy statement in the collector's book further explains that the consumer must not dispose of the stamps or make further use of them without respondent's consent in writing, that permission to transfer the stamps to any "bona fide" collector of S&H stamps will be granted and that if the books are transferred without respondent's consent the respondent reserves the right to restrain their use or take them from other parties. Also, respondent's

contract with its licensees provides that title to the stamps shall remain in the respondent and shall not pass to anyone else.

In enforcing its policy of suppressing trading stamp exchanges and other outside redemption activities, respondent, since January 1, 1957, filed at least 16 complaints seeking injunctions against trading stamp exchanges or other parties engaged in redeeming its stamps. Between January 1, 1957, and April 1, 1965, respondent sent approximately 140 warning letters to exchange operators dealing in S&H stamps, and approximately 175 warning letters to other kinds of firms redeeming S&H stamps. Respondent has been generally successful in suppressing the so-called unauthorized redemption of stamps. A recent court case sustaining respondent in its policy of suppressing trading stamp exchanges is *Rance v. Sperry and Hutchinson Company*, 410 P. 2d 859 (Okla. Sup. Ct. 1965), *cert. denied*, 382 U.S. 945 (1965).

Complaint counsel, on this issue, argue that respondent's actions violate Section 5 of the Federal Trade Commission Act because respondent is imposing an oppressive and unjustified restriction on the consuming public, because it tends to eliminate a class of small businessmen, and because it is against the public policy of encouraging the free transfer of property. More specifically, complaint counsel contend that respondent's suppression policy is a restraint on alienation contrary to public policy; it removes a service which could reduce the economic waste of unredeemed stamps, and it eliminates a needed and unique service.

Respondent's position, so far as its individual policy is concerned, is to the effect that unrestricted "trafficking" in respondent's stamps would destroy the franchise system by removing the incentive for stamp savers to return to S&H licensees. This would eliminate, it is claimed, the very consideration for which licensees are paying under the franchise. Respondent otherwise asserts that the essential elements to the success of the S&H system (*i.e.*, the exclusive license, full book requirement, the "remembrance value" of S&H merchandise, and exposure of the consumer to respondent's attractive redemption centers) are frustrated and impaired by the so-called unauthorized redemption activities.

Respondent does not seem to argue that its policy of suppression of trading stamp exchanges and other outside redemption of stamps rests on technical legal principles such as a reservation of title. Rather, it argues that redemption operations by others are an interference for commercial purposes with the normal operations of its business in a manner depriving it of the full benefit of its own expenditure of time, money and labor, and unjustly appropriates that benefit to another.

Thus, it asserts trading stamp exchanges and others dealing in its stamps interfere with and reduce the value of respondent's exclusive license agreements, while at the same time capitalizing for their own profit on respondent's efforts to create a valuable promotional system for its licensees. Respondent refers particularly to *Sperry & Hutchinson Co. v. Lewis Weber & Co.*, 161 Fed. 219 (N.D.Ill. 1908).

Respondent, to support its position that in suppressing outside redemption of its stamps it acted in good faith to protect its business interests, adduced testimony from its own officers and employees, who testified in broad generalities that harm would come to respondent's system by the indiscriminate redemption. They offered no hard facts, however, to support their assertions on the issue. On this question, we note that trading stamp exchanges and other redemption activities have been so regularly suppressed that there is little evidence to show what would be the effect if such operations were continued over a period of time. In the Oklahoma-Texas area where trading stamp exchanges did do business with some regularity before their operations were curtailed (principally through respondent's actions), the evidence seems to indicate, if anything, an increase in respondent's business.¹⁸

Furthermore, there is a great deal of exchanging of stamps between individuals. There is evidence, for instance, that in 1960 some 20 per cent of the stamps issued were exchanged by housewives on an informal basis. Such exchanges are permitted by the respondent when authorization is requested. There is no evidence that such exchanges have been damaging to respondent's business, that is, that they discourage consumers from shopping at S&H licensees. It is not clear why the effect should be any different where the exchange is made through a commercial exchange.

Additionally, it has been the policy of respondent to encourage the pooling of stamps for charitable reasons. An example of this is where a church organization decides to acquire a school bus with trading stamps. In such an instance some of the various elements which respondent claims are essential to the effective operation of its business, *i.e.*, remembrance value, attractive redemption stores, completed books, etc., would appear to be reduced or eliminated. This seems to illustrate that motivations other than those listed can act as incentives for the housewife to acquire S&H trading stamps and therefore to shop S&H licensee stores.

¹⁸ For example, respondent's Fort Worth warehouse facility serving such area was doubled in 1964, suggesting an increase of business.

It is clear, we believe, upon a more general basis, that respondent's business would not be seriously affected by the operation of trading stamp exchanges. In most areas the S&H trading stamp is the most popular and sought after. If the trading stamp exchange has a supply of the S&H stamps, this would necessarily mean that individuals in the market have patronized S&H licensees to obtain them and to in turn supply the exchange. Furthermore, even if exchanges existed on a broader scale, many people who now exchange books among themselves would probably continue to do so to avoid the fees charged and the inconvenience which might be involved. To summarize, we do not think that the examiner's finding to the effect that respondent's business would be harmed by free and open redemption of its trading stamps is justified by the evidence in this record. In short, there is no business justification shown for the restraint imposed.¹⁹ However, as we have heretofore indicated, even if respondent could have shown a good business reason for the suppression of stamp redemption activity, its actions would still have to be weighed in terms of their possible harm to competition. *United States v. Arnold, Schwinn & Co., supra*. We will therefore look at the competitive effects of the practice.

Before covering such effects, however, some mention should be made of complaint counsel's argument in substance that respondent's restrictions on the transfer of S&H stamps constitutes a restraint on alienation and that this is contrary to public policy. We do not understand that respondent is pressing an argument—at least on this appeal—that its actions are justified by the right of ownership. Quite to the contrary, respondent appears to argue that reasons other than “reservation of title or any other matter of form” constitute the basis for its claim, the other reasons being an asserted interference with its business for commercial purposes (respondents' answering brief, p. 39).²⁰

It seems to us that if this matter should be construed to involve a restraint on alienation, an important threshold issue would be whether the trading stamps themselves constitute personal property.²¹ The fact

¹⁹ The cases cited by respondent, in which the courts have enforced restrictions placed on the transfer of railroad and amusement tickets, involve public interest considerations such as rate regulation and abuses of ticket speculation. There are no such considerations in this case. See *Betterman v. Louisville & Nashville RR. Co.*, 207 U.S. 205 (1907); *Collister v. Hayman*, 76 N.E. 20 (1905).

²⁰ Also in its answering brief respondent states: “Respondent is *not engaged* in the business of selling goods, or putting goods in the stream of commerce *while purporting to reserve title*. The trading stamps themselves have no value. Respondent merely uses its stamps as tokens or symbols which represent its obligation to deliver merchandise to customers in accordance with its license agreements and its redemption catalogs.” (Emphasis supplied.) (Respondent's answering brief, p. 28.)

²¹ See *Sperry and Hutchinson v. Hertzberg*, *supra* note 8 and other cases cited therein.

that respondent contends that it is not selling stamps but offering a promotional service suggests that it is not relying on property rights. Complaint counsel appear to recognize this difficulty and, accordingly, at page 26 of their reply brief, assert in part as follows:

Although we have taken no exception to the Examiner's finding that respondent is in the business of selling a "promotional service" and that it does not sell stamps as such * * *, we also think it clear that trading stamps are a separate and identifiable component of the "service," which can be freely traded and exchanged * * *.

If respondent's trading stamps are considered in such terms, would respondent, by placing a restriction upon their transfer or disposition, be in violation of the "ancient rule against restraints on alienation"? *United States v. Arnold Schwinn & Co., supra*, at 380. Under that decision, once the manufacturer has parted with title and risk, he has parted with dominion over the product, and his effort thereafter to restrict territory or the persons to whom it may be transferred is a per se violation of Section 1 of the Sherman Act.

If such a test were to be applied in this case, the showing would not be sufficient to justify respondent's actions. Although respondent gives notice in the collector's book that it reserves title in the stamps and the books to itself and also has a provision in its contract with each licensee for reservation of title in the stamps (no such notification, however, being made on the stamps themselves), other indicia of ownership—especially, acceptance of risk—are absent or not shown in this record. For instance, vice president Rossi knew of no tax paid on stamps issued by the company in the hands of the licensees and he knew of no action to stop swapping by customers of licensees. Additionally, respondent does not replace stamps stolen from its licensees. It is clear the evidence is not sufficient to demonstrate that the respondent has exercised dominion over the stamps.

However, we do not believe it appropriate to decide the broad competitive questions presented in this record on the narrow and technical basis of a restraint on alienation. The circumstances here are much different from that where products are transferred to a dealer for resale. They are complicated by the nature of the trading stamp scheme. It is essential in this matter, we believe, and as we have heretofore indicated, to determine whether or not there has been or may be an impairment of competition. Thus, we intend to look at the substance of the allegedly illegal practice rather than to decide the case by application of a technical formula. *Cf. Simpson v. Union Oil Co. of California*, 377 U.S. 13 (1964). We now turn to the evidence which the record may contain as to the competitive effects of the restrictions which respondent

has placed on the transfer of its stamps and of respondent's suppression of trading stamp exchanges.

The examiner's findings as to the effects of respondent's suppressive activities are set forth on page 1143 of the initial decision. As heretofore noted, these include respondent's individual actions, although he did not find that respondent had violated the law acting alone. Furthermore, while the examiner appeared to limit his findings on injury from these practices to the suppression of trading stamp exchanges, some of the same effects which he noted would also have resulted from the suppression of other trading stamp redemption activity. The effects found by the examiner were that the suppression substantially reduced the trading volumes of the trading stamp exchanges and that it disadvantaged the stamp collecting consumers who did not have, after respondent's actions, the same freedom of choice in the disposition of trading stamps.

There is no question that respondent's suppression policy restrained trade and had severe anticompetitive effects in the marketplace. As above pointed out, in addition to the injunctive actions taken by respondent between 1957 and 1965, it sent out a total of 315 warning letters concerning the redemption of its stamps by others. Appendix B attached to the initial decision and specifically incorporated into the Commission's findings herein lists a number of concerns against which respondent took action for redeeming or exchanging S&H trading stamps. In practically all cases the firms (many of which were retailers) were forced to abandon their redemption or exchange practices.

Respondent suppressed or restricted the activities of trading stamp exchanges which were practically exclusively engaged in the business of redeeming or exchanging trading stamps. Some of these have been listed above. Such trading stamp exchanges suffered a serious loss of business when they were compelled to discontinue dealing in respondent's stamps. For instance, William Rance testified that his best estimate of the business lost after respondent obtained an injunction against him was a gross income decline of between 40 and 60 percent and that was because of the popularity of the S&H stamp in the market in which William Rance did business. Mrs. DeBolt testified that 60 percent of the transactions in her exchange involved S&H stamps. Certain of these concerns were forced out of business. For example, the record indicates that the Trading Stamp Exchange in Los Angeles had to give up exchanging stamps upon threat of an injunction by respondent. Warren Wooley, who advertised a stamp exchange, upon threat of a lawsuit "became frightened and quit the operation" (CX 325).

Respondent's dominance in the trading stamp field and the popularity of its S&H stamp greatly enhanced the effects of respondent's suppression practices. William Rance testified that in Oklahoma City there were approximately 15 different kinds of stamps but that the three most important were Top Value, Gunn Brothers, and S&H because these resulted in the most volume turnover. He stated that the effect of respondent's injunction against him involved not only S&H stamps but the swapping of other varieties of stamps as well, because if customers had S&H green stamps and could not exchange them as part of the whole deal he would lose the business. In short, it appears that respondent has monopoly power over the small trading stamp exchanges in the sense that they may be unable to effectively operate without S&H stamps and when respondent forces them to discontinue dealing in S&H stamps their businesses are severely curtailed, if not destroyed. Respondent's actions, therefore, against the trading stamp exchanges tended to eliminate the operations of a whole class of businessmen who provided, or had been providing, a useful and valuable function.

Respondent, in curtailing or eliminating the activity of retailers in collecting or exchanging S&H stamps (as distinguished from trading stamp exchanges), restrained trade at the retail level. It is important to note that so far as such exchange activity by retailers is shown on this record the stamps obtained were not reissued. The retailers involved were vying for the patronage of consumers who collected S&H and other trading stamps. As an example, the record contains testimony of Victor H. Savin, president of the V. Savin Company, Inc., doing business as Tifon Jewelers in New Haven, Connecticut. Tifon Jewelers sells products such as diamonds, watches, rings, appliances, luggage and many similar household and jewelry items. Mr. Savin considered himself in competition with other firms selling similar merchandise as well as the trading stamp redemption centers. In 1958 Tifon Jewelers offered to take in trading stamp books toward the purchase of the products it sold. Tifon was forced to stop this practice by threat of an injunction from respondent. In this instance, as well as other instances shown by the record, respondent's actions restrained the retailers from a practical and effective response to stamp competition in their markets. Mr. Savin testified that the promotion, before he was forced to discontinue it, was a good promotion and that it was effective.

The record shows a number of instances of other retailers who offered to redeem or exchange trading stamps and were stopped by respondent, *e.g.*, Jake's Department Store, Thibodaux, Louisiana, and Good Deal Supermarkets, Irvington, New Jersey, referred to above. From the nature of the offers and the circumstances in most cases, it appears that

the purpose of the retailer was not to be in the exchange business but to attract customers. In other words, trading stamp exchange activity was used as a spur to, or a method of meeting this form of, competition. Where the retailer is faced with stamp competition, his most effective response might be an offer to exchange or redeem the stamps. Respondent, by its suppression practices, prevents any such competitive reaction, and thereby it has restrained trade. We believe this is an unfair method of competition and an unfair act and practice in violation of Section 5 of the Federal Trade Commission Act and so hold.

Finally, we come to a consideration of respondent's actions, in collaboration with its competitors, against trading stamp exchanges and other redemption activities. The examiner, on page 1148 of the initial decision, found that there were a substantial number of instances (which he lists on page 1136 and which findings have been specifically incorporated into the Commission's findings) of combined activity between respondent and one or more other trading stamp companies to prevent exchanges from trading in their stamps. He found that these acts constituted at least *ad hoc* restrictive agreements among competitors and therefore violations of Section 5 of the Federal Trade Commission Act.

Respondent's policy of suppressing the redemption of S&H trading stamps by others than itself coincides with the policies of major trading stamp companies, including Top Value, King Korn, Gold Bond, Merchants Green, and Stop & Save. Respondent and certain of the other trading stamp companies have exchanged information on the question of dealing with exchange or redemption activity. There are a number of instances in the record, revealed by correspondence between respondent's attorneys and those of other trading stamp companies, in which joint efforts to combat this practice are suggested. These include an instance in Joplin, Missouri, in which a supermarket was exchanging TV stamps for S&H stamps; an instance involving Warren Wooley, who advertised in a Memphis, Tennessee newspaper that he would exchange stamps; an instance with a Raymondville, Texas merchant who offered to purchase, trade or redeem any stamp for \$2 per book; a situation involving the Mayfair Market, a supermarket in Redbank, New Jersey, an account of Philadelphia Yellow Stamp Company, which was exchanging S&H for Yellow stamps; and others.

In a particular instance, to show more detail, respondent's counsel, on March 8, 1957, wrote to Baries of Saxonburg, Pennsylvania, demanding the discontinuance of the redeeming of S&H stamps and stated in part:

We would also like to advise you at this time that the Prudential Premium Company, the trading stamp company of which you are an authorized licensee, has assured us that they are against having their licensees engage in practices of this type. In fact, their attorneys have cooperated with us in putting an end to it in various parts of the country. (CX 365.)

In each of the instances mentioned there were contacts between respondent's counsel and representatives of the other trading stamp companies involved concerning the action to be taken against the offending redemption organization. In some instances joint litigation was considered but generally no legal action was taken. Typically, the party engaged in the trading stamp activity was contacted by respondent or another trading stamp company involved with a threat of litigation, and the party ordinarily discontinued the practice without question or controversy.

Respondent's individual acts and its acts with others taken to suppress trading stamp exchanges and other stamp redemption activity are all part of a clearly defined restrictive policy pursued by the respondent. In the circumstances surrounding this particular practice it is difficult to wholly separate the individual acts from the collective acts for the purpose of making an analysis of the consequences under the antitrust laws.

Our approach to the matter is to look first at the activity involved (which in this instance is respondent's suppression not only of trading stamp exchanges but all other free and open redemption of trading stamps) and to determine whether such is anticompetitive. In light of the above discussion we believe it is clear that respondent's suppressive actions, whether taken alone or jointly with others, has adversely affected competition.

Respondent argues that cooperation looking toward joint legal action is not illegal. But respondent has gone beyond merely joining with another concern for the purpose of contemplating or bringing a common lawsuit. Here various leading trading stamp companies have a common policy against the redemption and exchanging of trading stamps except by the company which issues them. In the common interest, respondent and one or more of the trading stamp companies did contact each other from time to time concerning possible action against exchange and redemption activities and, for the most part, suppression of the activity was achieved without litigation. In respondent's case it was its policy to suppress such activity and it did so both by acting individually and in concert with others.²²

²² Respondent, in its brief, concedes that even warning letters sent out and lawsuits commenced in good faith may violate the antitrust laws if undertaken for the purpose of achieving or maintaining a monopoly, a boycott or some other unlawful restraint of trade.

In the circumstances we believe it is clearly shown, and we hold, that respondent, both alone and in combination with other trading stamp companies, engaged in limiting competition in the use of trading stamps and that its policies and actions in this regard are unfair and in violation of Section 5 of the Federal Trade Commission Act.

Finally, we come to the form of the order to be issued. We believe the order proposed by complaint counsel is appropriate, with several modifications. First, since the reissuance of trading stamps is in no way involved in this proceeding, the order to be issued with this case should make an appropriate exception for actions involving such a practice engaged in by respondent individually.

Secondly, respondent challenges the order proposed by complaint counsel to the extent it would apply to the setting of a minimum rate for the dispensing of stamps by retailers as well as the maximum. Respondent asserts that no allegation in the complaint and no evidence in the record supports such an order. It claims that the necessity for a minimum requirement is self-evident; that if respondent could not set the minimum rate it would have no assurance of revenue of significance for the franchise granted; and that consumer confidence in the S&H system would be destroyed.

We construe respondent's argument to extend only to the provisions applying to it individually since it did not raise this issue as to the form of the examiner's order covering jointly engaged in or conspiratorial acts. The record contains evidence, moreover, that respondent acted in cooperation with others to fix not only the maximum but the minimum rate for stamps as well, *e.g.*, the Denver, Colorado situation.

So far as respondent bases its argument on its individual acts the situation is this: No evidence was offered as to any retailer dispensing stamps on the basis of less than ten for one, and there is no particular evidence as to the competitive effect such a restraint might have. In the circumstances, we are of the view that the order should not proscribe respondent's individual acts or policies on fixing a minimum ratio of the dispensing of its stamps and our order to be issued herewith will so provide.

In accordance with the above, the appeal of complaint counsel and that of respondent are granted to the extent indicated and otherwise denied. It is directed that the initial decision be vacated to the extent that it is inconsistent with the views herein expressed and that the Commission's own findings of fact, conclusions and order be substituted therefor. An appropriate order will be entered.

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Concurring Statement

Commissioner Elman concurred and has filed a concurring statement.

Commissioner Jones dissented and has filed a dissenting statement.

Commissioner Nicholson did not participate for the reason that oral argument was heard prior to his appointment to the Commission.

CONCURRING STATEMENT

JUNE 28, 1968

By ELMAN, *Commissioner*:

I dissented from the issuance of the complaint in this matter because I believed that the many difficult questions raised by the pervasive use of trading stamps, as well as the restrictive arrangements by which they are distributed, deserve broader study and analysis than a case-by-case approach permits. The market structure and distribution methods revealed in this record confirm my earlier view that litigation is not the most satisfactory way to deal with the problems raised by trading stamps and similar forms of nonprice competition.

The Commission, without making any finding as to "the desirability of the use of [trading] stamp competition in place of price competition," determines that such stamp competition is "worth preserving against limitations and restraints."¹ Justified as that determination may be on the present record, it does not come to grips with such major questions as the impact of trading stamps on merchandising costs and prices, and their effect in "tying" customers to particular retailers who dispense stamps, nor does it cast any light on the general competitive problems associated with their use. For example, a staff report to the National Commission on Food Marketing² suggests that franchise arrangements and price discrimination in the sale of trading stamps have a major effect on competition in food retailing. Smaller retailers are either unable to obtain franchises from the large stamp companies, whose stamps are generally more desirable because of their wide consumer acceptance, or they pay more for stamps than do their larger competitors, a cost difference that may be an important competitive factor in the retail grocery industry. Case-by-case adjudication is not the best vehicle for consideration and resolution of these broad problems.

Similarly, while there are a few small firms, the trading stamp industry is highly concentrated, as the Commission finds,³ with the six

¹ Opinion pp. 1182-1183.

² *Organization and Competition in Food Retailing* Technical Study No. 7, National Commission on Food Marketing, June 1966, pp. 471-473.

³ Finding of fact 22.

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largest firms accounting for well over 80% of both the dollar volume received and stamps issued. Quite apart from the evidence of horizontal collusion present in this record, there are strong indications that many of the practices here found to be illegal, for example respondent's one-for-ten policy, its restrictions on multiple stamping, and its vigilant efforts to restrain the operation of stamp exchanges, reflect a general industrywide pattern. This is not to imply any prejudgment that these practices exist or that they are substantial, but the Commission would have done better to explore all these questions more fully in a context broader than a single adjudicative proceeding against one company. An industrywide study could focus not only on the issue of the extent to which respondent's restrictive practices reflect a broader industrywide pattern, and the competitive impact of those practices, but also on the larger questions of the desirability of trading stamps as a form of competition, their effect on food marketing and on other areas of retail trade, and their economic implications for consumers and the competitive process.

Had the Commission undertaken such a study, it would have been able to analyze this form of competition and assess its merits and disadvantages, its economic effects and ramifications, in a meaningful context. On the basis of its general findings, the Commission would have been in a position to take such action as the public interest might require, perhaps simply proceeding against individual law violators to eliminate particular restrictive practices, or, developing broad guidelines for the industry, or if necessary, preparing a report to Congress indicating gaps in existing law and suggesting areas appropriate for legislative action.⁴

Although I regret the limited case-by-case approach here taken, the record amply supports the findings that respondent has engaged in a number of unfair and anticompetitive practices. Accordingly, I concur in the Commission's decision and order.⁵

⁴ As is pointed out in the majority opinion, a number of states have passed laws regulating the activities of trading stamp companies, and even now there are bills dealing with this subject pending before Congress. See, *e.g.*, H.R. 2914, 90th Cong., 1st Sess. (1967).

⁵ The suggestion that the interests of competition and the consuming public might somehow be advanced if a provision were added to the order prohibiting respondent from setting a minimum ratio for dispensing its trading stamps seems rather farfetched. The argument, which is based on speculation rather than evidence, is that there are "undoubtedly" many small retailers who could afford to purchase respondent's stamps but do not do so because of the requirement that they be dispensed at a ratio of at least one stamp for every ten cents worth of sales; that these retailers (assuming there are any) might want to "compete" by offering stamps at a ratio less attractive to consumers, *e.g.*, one for every twenty cents worth of sales; and that respondent's one-for-ten policy "forecloses" such retailers from engaging in such "competition." It could be argued with equal plausibility that the mere suggestion by a manufacturer of a retail price for his product "forecloses" some retailers from "competing" by charging the public a higher price. It has not

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Dissenting Statement

DISSENTING STATEMENT

JUNE 28, 1968

By JONES, *Commissioner*:

I cannot agree with the Commission majority in this case that respondent be permitted to continue to fix the ratio at which its customers must dispense trading stamps. The majority's decision is wholly inconsistent with their finding that respondent had violated Section 5 of the Federal Trade Commission Act by compelling purchasers of its stamps not to dispense more than one trading stamp for each 10 cents worth of goods or services and by agreeing with its competitors to eliminate competition by preventing the dispensing of more than one trading stamp for each 10 cents worth of goods or services.

The notice order attached to the complaint as originally filed would have prohibited respondent from "fixing *any* specified ratio of number of trading stamps to the total retail price of goods and/or services purchased * * * " (emphasis added). Yet for reasons which are not disclosed in the majority's opinion, the Commission has retreated from the original order provision and omits any prohibition on respondent against fixing this ratio in the future as it has done in the past. Instead the Commission's order simply prohibits respondent from preventing its customers from offering stamps in any amount in *excess* of this fixed ratio. I cannot find any basis in this record for this major retreat by the majority from the original notice order and accordingly I am compelled to dissent from the decision.

The uncontested evidence in the record shows that respondent sells books of stamps to retailers at \$2.68 per book and entered into contracts with its customers which required them to dispense these stamps at a fixed ratio of one stamp for every 10 cents worth of sales. The evidence also shows that respondent enforced these fixed ratio contract provisions and in their policing activities against violating retailers specifically advised these customers of their obligation to dispense the stamps which they had purchased from respondent at the 1 for 10 ratio required in the contract.

The Commission recognizes that respondent's fixing of a designated ratio restrains the competition of its retailer customers. It admits in its opinion that trading stamps are an important competitive factor, that there is an interrelationship between *price* competition and *stamp* competition, that "trading stamps affect price behavior" and points

heretofore been considered that this common everyday practice of American manufacturers of consumer products, ranging from toothpaste to television sets, constitutes an unlawful restraint of trade prohibited by the antitrust laws.

to the examiner's finding that "a restriction on the giving of stamps may affect the prices of the competitor of the stamp-issuing retailer and thus the price offers in the market." Yet it determines that respondent can continue to fix this ratio provided it does not prevent its customers from dispensing *more* stamps than the designated ratio. The impact of the Commission decision is to permit a little bit of price fixing provided it is the fixing of a minimum price but not a maximum.

I can find no sanction in law or in reason or indeed in the competitive realities of the marketplace for this inexplicable and illogical conclusion.

What the Commission fails to recognize is that respondent's fixing even of a minimum dispensing ratio forecloses many competitors from being able to use trading stamps as a competitive tool. There are undoubtedly many small retailers who could afford to purchase respondent's stamps but cannot do so because of respondent's requirement that they must be dispensed at a specified ratio in relation to sales. The cost to the retailer of respondent's trading stamp is a combination of the amount he pays for the stamps plus the number of stamps which he uses. If he were free to determine for himself the number of stamps which he wishes to offer per dollar of sales, smaller retailers who could not afford to offer 1 stamp for every 10 cents worth of sales, might nevertheless be able to offer a lesser number of stamps. Because of the interest of consumers in collecting stamps, these retailers would be more able to compete for the business of these customers by offering *some* stamps than if they could not offer stamps at all. Thus respondent's specification of the one-for-ten ratio thus forecloses some competitors from using this competitive device and to this extent restrains the competition of potential users just as much as it restrains the competition of actual users.

The vice in respondent's activities here lies not simply in its requirement that its customers refrain from double or multiple stamping as the majority seems to believe. The vice lies in the fact that respondent fixes *any* ratio at which its customers must dispense stamps which they have purchased from respondent. Respondent's customers are the owners of these stamps as they are the owners of the produce which they purchase from their suppliers. They have complete ownership rights in these stamps just as they would any other premium they might purchase to give away as a promotion device. Respondent cannot change this fact no matter how much it seeks to by characterizing its sales of stamps as a licensing arrangement.

The Supreme Court just this term had occasion to review the long line of decisions relating to minimum and maximum price fixing in

Albrecht v. The Herald Company, 390 U.S. 145 (1968). In a forceful opinion, the Court again reiterated its view on the illegality of all forms of price fixing. As the Court said:

Maximum and minimum price fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgement of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition, even in a single product, is not cast in a single mold. Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant nonprice competition. Moreover, if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices. It is our view, therefore, that the combination formed by the respondent in this case to force petitioner to maintain specified prices for the resale of the newspapers which he had purchased from respondent constituted, without more, an illegal restraint of trade under § 1 of the Sherman Act.

Even if this case is viewed as involving some form of marketing restraint which though similar to price fixing should not be judged in terms of the reasonableness of the restraints rather than on the traditional concepts of *per se* illegality, the restraints which respondent has imposed are clearly unreasonable. Respondent sought to argue that it must be permitted to fix the actual minimum ratio in order to remain in business. This argument is wholly unpersuasive. Respondent does not need to fix the ratio at which its retailer-customers shall dispense S&H stamps in order to assure itself of revenue any more than any seller engaged in the sale of its products to wholesalers or retailers needs to fix the amount of the product which his reseller will resell in order to assure itself of revenue. As the hearing examiner found—and respondent does not challenge—respondent fixes a specific price to the retailer for its stamps. This is its assurance of revenue. Of course respondent's revenue will increase as its customers purchase more of its product but this does not give it a right to force its customers into purchasing any stated amount. The fact that respondent's customers traditionally dispense these stamps on the basis of the dollar volume of their customers' purchases is no reason why respondent should be permitted to designate the ratio at which its customers decide to dispense the stamp.

I find equally unimpressive respondent's other argument that it must fix the ratio at which its stamps will be dispensed in order to

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maintain consumer confidence in its product. Consumers are of course concerned to know the number of stamps which a given merchant is dispensing per dollar of sales. But a consumer does not lose confidence in the product because merchants vary the amount it sells any more than they lose confidence in a product which can be purchased at different prices in different retail establishments.

It is obvious from this record that competition among stores offering these stamps as well as with stores not able to offer stamps on respondent's terms may be severely restrained if respondent is permitted to fix the ratio at which its customers must dispense S&H stamps to the consumer.

The Commission's decision in this case grants to every trading stamp company which fixes the ratio at which its customers must dispense its stamps a license to violate the antitrust laws. I cannot be a party to such an amendment of the antitrust laws carved out for any single industry.

FINDINGS AS TO THE FACTS, CONCLUSIONS AND FINAL ORDER

The Federal Trade Commission issued its complaint in this matter, charging respondent with unfair methods of competition and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45(a)(1)). Hearings were held before a hearing examiner of the Commission, and testimony and other evidence in support of and in opposition to the allegations of the complaint were received into the record. In an initial decision filed February 10, 1967, the hearing examiner found and concluded that certain of the charges in the complaint were sustained by the evidence and other charges were not so sustained, and he entered an order to cease and desist as to those charges which he found to be sustained.

The Commission having considered the cross-appeals of counsel supporting the complaint and the respondent and the entire record, and having determined that the initial decision is inappropriate to the extent indicated in the accompanying opinion and should be vacated and set aside, now makes this (as supplemented by the accompanying opinion), its findings as to the facts, conclusions drawn therefrom, and order, the same to be in lieu of those contained in the initial decision.

FINDINGS AS TO THE FACTS

1. Respondent, The Sperry and Hutchinson Company, more commonly known as "S&H," is a corporation organized and existing un-

der the laws of the State of New Jersey and it has its principal office and place of business at 330 Madison Avenue, New York, New York (comp., ans.). Respondent, which was incorporated in 1900, is engaged primarily in the trading stamp business. It is the oldest and largest trading stamp company in the United States (CXs 3, 5 *in camera*, 198; RX 924 (prospectus)).¹

2. Respondent has licensed approximately 55,000 retailers to use its trading stamps, and these retailers distribute respondent's stamps (S&H green stamps) to over 70,000 retail outlets located throughout the United States. A trading stamp is a small piece of gummed paper about the size of a postage stamp. It is given by the retailer to customers upon the purchase of goods or services and it is redeemable, usually in merchandise, at centers operated by the trading stamp company. Respondent maintains more than 850 such redemption centers. In 1965 respondent distributed approximately 32 million copies of its catalog illustrating and describing the merchandise offered. With gross annual receipts of over \$300 million, respondent issues between 37 percent and 40 percent of all trading stamps in the United States. It employs approximately 9,000 people on a regular basis (comp.: ans.; RX 924; CXs 3, 5 *in camera*). From 1914 to 1964 respondent issued 1,120 billion stamps, of which 964 billion were redeemed (CXs 440, 441).

3. Respondent, in connection with the aforementioned trading stamp business, is widely engaged in interstate commerce and in "commerce" as that term is defined in the Federal Trade Commission Act. Respondent's trading stamp business is a nationwide operation. From its main office in New York City it controls the operation of its business through nine distribution centers, each located in a different State, and 850 redemption centers which are located in 44 of the 50 States of the United States (comp.; ans.; CX 586, p. 100; RX 924). Purchasing is centralized in New York (tr. 4929, 5698). Communications pass between the redemption and distribution centers and the New York office, substantially all of which are across State lines (CX 586: tr. 5701). The merchandise from distribution centers crosses State lines to redemption centers (tr. 4911-4915). Respondent's other activities are also widely in interstate commerce, including its system of the granting of its licenses, the delivery of its stamps and the negotiating of its contracts with 70,000 retailers who dispense its stamps (RXs 3, 413, 924).

¹ Explanatory note: The examiner, in referring to respondent's prospectus of April 27, 1966, identifies it as RX 924(b). The exhibit itself is identified only as RX 924 and it was received into the record as RX 924. It is therefore referred to here as RX 924.

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4. Respondent's business in interstate commerce is substantial (RX 924, CX 413, and other references referred to in findings 2 and 3, above). Respondent is in substantial competition in the distribution of trading stamps with other trading stamp companies (RX 924; tr. 4993, 6288-6293; CX 5 *in camera*).

5. Trading stamps have been used since about the turn of the century. Respondent in 1896 pioneered in the business (CX 198). It is only in more recent years when trading stamps have taken on a highly substantial role in retailing, particularly in the marketing of food. Their use increased rapidly after 1950, when supermarkets became interested in them (tr. 5010, 6304). From 1950 to 1962 the share of retail grocery store sales made by stores using trading stamps increased from 1 percent to 47 percent, although there has been a more recent decline to 43 percent (tr. 6430-6431, 6505; CX 681). Most of the companies which are now major competitors of the respondent have come into the business since 1950 (tr. 6288-6289). The major supermarket chains have given impetus to the increase in the trading stamp business. Some use different stamps in different areas (tr. 6511-6516); others have developed or bought their own trading stamp companies (tr. 6291-6292).

6. The trading stamp companies in the United States in 1964 collected about \$800 million for approximately 400 billion trading stamps issued to more than 200,000 retail establishments. Such retailers include food supermarkets, drugstores, gasoline stations and a large variety of other retail stores and service organizations. Trading stamps are issued in connection with annual sales to the consuming public of about \$40 billion in goods and services, about one-half of which are grocery sales (comp.; ans.; CXs 3-B, 411).

7. Leading trading stamp companies in addition to respondent include Top Value Enterprises, Inc. (Top Value); Gold Bond Stamp Company (Gold Bond); E. F. MacDonald Stamp Company (Plaid); King Korn Stamp Company (King Korn); and Blue Chip Company (Blue Chip). The six largest companies in 1964 represented between 83 percent and 88 percent of the industry (CXs 4, 5 *in camera*).

8. The trading stamp business is a tripartite arrangement in that the conduct of this scheme involves three persons or companies in interdependent relationships—the trading stamp company that issues the stamps and provides for the redemption, the retailer that dispenses the stamps as a sales promotional device, and the consumer who receives the stamps from the retailer and in turn takes them to the trading stamp company for redemption. In the conduct of its business, respondent, pursuant to contracts, issues to retailers pads of trading

stamps, for a valuable consideration. The retailers in turn dispense the trading stamps to the consuming public in connection with the sale of goods and the furnishing of services. Respondent, among other things, agrees to maintain redemption stores where the consuming public may redeem for merchandise stamps which have been pasted into books furnished for this purpose. Respondent's license agreements or contracts with retailers are generally entered into for a period of one year, although some are for longer periods and provide for annual renewal unless either party gives notice of termination upon thirty days notice. The retailer-licensee pays respondent for its stamps and services an amount based upon the number of stamps received. The average price in 1966 was \$2.23 for 1000 stamps, which works out to \$2.68 per book of 1200 (which is the size book issued by S&H). The license agreement with the retailer contains the statement that title to the stamps remains in respondent. In most areas the rates charged by respondent for its trading stamps decrease as the volume of usage increases, and for retailers in certain categories who reach a certain annual level of stamp distribution respondent guarantees that the cost will not exceed 2 percent of the retailer sales (comp.; ans.; CXs 1a, 11; RX 924; Tr. 5025-5026).

9. The retailer-licensee, for his part, agrees to advertise the use of S&H green stamps, to furnish his customers with stamp-saver books and catalogs of redemption merchandise (supplied to him by respondent) and to offer stamps on every purchase at the rate of one stamp for each ten cents paid (RX 924; CX 11).

10. Respondent has a policy of limiting its licenses to only one competing retailer in a given area, though it has deviated from this policy in some instances (RX 924; Tr. 5016-5017, 5200-5201). Respondent also endeavors to license a group or "family" of noncompeting retailers within a marketing area, generally including a store which attracts a large number of customers, such as a supermarket. The latter is referred to as the "key account." The other stores in such family of merchants may include a cleaning establishment, a gasoline station, a hardware store, and such other retailers which are referred to as "associate accounts" (RX 924).

11. Respondent licenses retailers engaged in almost every type of retail business conducted in the United States; however, its stamps are used most often in those fields of retail trade which are characterized by similarity in the products and services offered in high frequency of purchase, such as food stores and service stations. The percentage

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breakdown of total service revenue for respondent for the year 1965 between major categories of retail licensees is as follows:

	(Percent)
Supermarkets and other food stores.....	61.6
Service stations.....	21.2
Department, clothing, dry goods, furniture and general stores.....	4.5
Drugstores	4.3
Other retail licensees.....	5.6
Incentive programs.....	2.8
Total	100.0

(RX 924.)

12. A substantial portion of respondent's growth in service revenue during the post-World War II period has occurred in the supermarket field. Each of the 12 retailer licensees accounting for more than 1 percent of respondent's service revenue in 1965 was a supermarket chain. These 12 chains accounted for approximately one-third of the company's 1965 service revenue, with no one of them representing more than 7.5 percent of the revenue. These 12 chains are Grand Union, National Tea, Weiss, Acme, Thorofare Markets, First National, Consolidated Foods, Winn-Dixie, Publix, Mayfair, Shop Rite and Red Owl (RX 924; tr. 5011-5013, 5194).

13. The books which respondent supplies for stamp savers need 1200 stamps to be filled. Respondent will not redeem stamps until the stamp saver has one full book. A stamp saver may present stamps for the redemption of merchandise at respondent's redemption centers. Stamp savers who are not located near a redemption center may redeem stamps by mailing them directly to one of such centers. In certain States stamps may be redeemed in cash but in 1965 such cash redemptions made by the company were less than 1 percent (RX 924. CX 400).

14. Sixteen States (California, Connecticut, Florida, Indiana, Maine, Maryland, Massachusetts, Nebraska, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, South Dakota, Utah, and Vermont) require that the stamp saver be given an option to redeem stamps in cash. Wisconsin and Wyoming require redemption of trading stamps in cash only. The State of Washington imposes a heavy tax on merchants who use trading stamps redeemable in merchandise. With the exception of Wyoming, the above-listed States also require that the stamp saver be permitted to redeem less than a full book of stamps when redemption is made in cash if stamps having a minimum value specified by the statute are presented for redemption. The State of

Kansas prohibits the issuance of trading stamps on sales of merchandise (RX 924; tr. 516, 517).

15. Respondent offers its stamp savers the choice of over 2000 merchandise items, most of which are nationally advertised brands available at its redemption centers. These include various household items such as textiles, flatware, kitchen utensils, lamps and small appliances, as well as leather goods, apparel, photographic equipment, sporting goods, jewelry and various other types of merchandise, all of which are illustrated and described in a catalog published each year by the respondent. The number of filled stamp books required to redeem the items in the company's recent catalog range from 1 to 385. Respondent conducts its business on the basis that the average retail value per book of 1200 of respondent's stamps is \$3.00. So measured, the total value at retail of the merchandise distributed by respondent in 1965 would be approximately \$335 million (RX 924; CXs 402, 403).

16. Respondent does not know with certainty the percentage of its stamps which will ultimately be redeemed (since it has a declared policy to redeem all stamps ever issued), but respondent has for more than 40 years kept its financial records and filed its tax returns on the basis that 95 percent of all the stamps issued will ultimately be redeemed (RX 924). Nevertheless, between 1914 and 1964 respondent issued 1120 billion stamps and only 964 billion of these have been redeemed. This is an 86 percent redemption rate (CXs 399, 440). A much higher volume in the use of stamps occurred after 1960, and the possibility exists that there will ultimately be a greater redemption rate of stamps for these later years. It is found, therefore, on the basis of this record, that respondent's redemption rate cannot be exactly determined and that it probably is somewhere between 86 percent and 95 percent of the stamps issued.

17. The contracts between respondent and retail licensees contain the express provision that the stamps shall be issued one for each ten cents of cash payment and that they shall not be used except in the manner provided (CX 11).

18. Respondent purports to reserve title to the stamps by providing in the agreement with the retailer licensees that title to the stamps shall remain in the respondent and shall not pass to anyone else and by inserting a notice in the collectors books (CXs 11, 401). Respondent, in any cases where application is made, gives permission to a collector to turn over his stamps to another bona fide collector of S&H stamps (CX 401). Respondent restricts the use of its stamps to its licensees and their customers (CX 401). The notice in respondent's collectors books has been substantially the same since the year 1896 (stip. 942).

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Respondent requires that at least one book be filled before it will redeem the stamps (CX 401).

19. There is no notice on the stamps themselves as to respondent's policy on transferability (CX 1a). Consumer witnesses were doubtful or uninformed as to respondent's policy on transferability (tr. 2096, 2097, 2106, 2155-2157, 2173). Some of the consumer witnesses were not aware of respondent's policy for getting permission from respondent before swapping stamps (tr. 2173). Respondent's written notice permits swapping among "bona fide" collectors. In 1960, 20 percent of all stamp savers swapped with other collectors (CX 626a), mostly unauthorized (tr. 5063). Respondent has taken no action against collectors swapping among themselves except for the notice in the collector's book (tr. 5069-5070). No taxes are paid on stamps issued by the company and in the hands of retailer licensees (tr. 5076). Respondent does not replace stamps stolen from its retailer licensees (tr. 5076).

20. In recent years respondent has encouraged and promoted the idea of the pooling of S&H stamp savings by members of churches, charities, or fraternal groups for the purpose of benefitting their organization (tr. 4896, 5976-6030; RXs 1000a-1004b).

21. Some retailers engage in the practice of giving multiple stamps. One such method is "double stamping," that is, the dispensing of two trading stamps for each ten cents worth of goods or services. "Bonus stamping" is the dispensing of a number of extra stamps in connection with the sale of a specified item or in connection with the total purchases exceeding a specified amount (tr. 5231-5232, 7129). "Extra stamps" include those received from double or bonus stampings (tr. 7129-7130). "Institutional stamping" relates to the issuing of bonus stamps in connection with total purchases exceeding a specified amount (tr. 3531, 3719, 5231, 5232, 6872, 7129, 7130; CXs 33, 69).

22. The trading stamp industry is highly concentrated and respondent is a prominent factor in the industry. According to various estimates, the number of companies engaged in the trading stamp business is somewhere between 200 and 400, although many of these are very small (CX 10a-c; RX 924; tr. 6285, 6286). Respondent's estimated share of the industry in 1964 was 38 percent of the stamps issued and 40 percent of the dollar volume received. In the same year five other companies, *i.e.*, Top Value, Blue Chip, Gold Bond, Plaid and King Korn, collectively accounted for 50 percent of the stamps issued and 43 percent of the dollar volume received. Accordingly, the six largest companies represented between 83 percent and 88 percent of the industry (CX 5 *in camera*).

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23. In a number of metropolitan areas stamp dispensing by supermarkets accounts for a major proportion of the retail food business (RX 1012). Twelve supermarkets chains accounted for a third of respondent's revenue of 1965, all of which became customers since the 1950s (tr. 5240). The following are some of the markets in which stamp dispensing supermarkets account for over 70 percent of retail food volume: Dallas, Fort Worth, 97 percent; Miami, 79 percent; Albany, 78 percent; Jacksonville, 77 percent; Salt Lake City, 86 percent; Little Rock, 79 percent; El Paso, 72 percent (RX 1012).

24. From 1950 to 1962 the share of retail grocery sales made by stores using trading stamps increased from 1 to 47 percent (CX 681). The stamp-dispensing retailers include all the topmost supermarket chains in the United States (though they all do not use stamps in every market in which they do business), namely, Atlantic & Pacific Tea Co., Safeway, Kroger, National Tea, Loblaw, Colonial, Jewel, Winn Dixie, Acme, Allied, Grand Union and First National (tr. 6511-6516). Food stores using trading stamps embraced 46 percent of all food retailing in the United States in 1964 (tr. 6430).

25. The trading stamp business, particularly in the food industry, is substantial (references in findings 23 and 24, above).

The One-for-Ten Policy or Practices Charged Under Count I of Complaint

26. The "one-for-ten" provision has, for many years past, been a part of respondent's contracts with its retail merchants (comp., ans.).

27. Respondent, under the terms of the license contracts, requires that its licensees issue only one stamp for each ten cents worth of goods or services (comp., ans., tr. 4984, CX 11). Respondent does not take action in all cases in which retailer licensees issue multiple stamps, particularly in instances where the retailer licensees are issuing multiple stamps to meet competition (tr. 4986-4987). In general, however, respondent pursues a policy of discouraging in every possible way the use of multiple stamps (comp., ans., tr. 4984).

28. Respondent's policy of requiring retail licensees to issue one stamp with each ten cents of the purchase was enforced in a substantial number of instances at the request of retailer licensees competing with the multiple stamper (respondent's ans., par. 8 thereof).

29. Respondent's action upon such complaints from licensees varied from case to case; in some instances a threat to cancel was made (CXs 18-a -b, 19, 21, 128, 130). In other instances, a simple request to desist was made (CXs 63, 90-92, 100-104). In many instances respondent's

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field representative visited the offending retailer and requested the practice to be stopped (tr. 3537). The hearing examiner, in Appendix A attached to his initial decision, listed the various "behest" instances and the action taken by respondent. No exception has been taken to the appendix, including the references therein. Such appendix will be incorporated herein. It is attached hereto and identified as Appendix A [p. 1151 herein].

30. In most instances the noncomplying retailer agreed to comply, though often later lapsing into noncompliance (references in finding 29 and Appendix A).

31. The amount of commerce involved in the one-for-ten practice is substantial. One in every five trading stamps is given out on a multiple-stamp basis (tr. 6545; references in findings 22-24).

32. There are a number of factors which affect the competition for customers between rival retailers and foremost would be the matter of price. In addition, there are such items as the attractiveness of the store, convenience of location, parking lots, selections and variety of stock, and similar considerations. Also widely used are the so-called continuity plans. These include such as the following: the giving of different volumes of an encyclopedia over a period of time; promotional games such as where the customer spells out a word or plays "Bingo," and the like; cash-register type plans (that is, so-called trading stamp plans without the glue); the giving of chinaware and other similar promotional schemes. Of all of these, trading stamps hold a special place because of their versatility and price-like nature (tr. 3495, 3547, 6073-6077).

33. Trading stamps are used by retailers as a sales promotion device and as a competitive instrument (tr. 3100, 3183-3184, 3224, 6986-6987, 7007). Competitors lower prices to meet double stamps (tr. 3100); double stamps are used to respond to price cutting (tr. 3183-3184, 6986-6987, 7007).

34. Trading stamps are featured in grocery store advertising. In many advertisements claims as to low prices and trading stamp offers are given about equal prominence (CXs 69-76, 106, 107, 126, 127, and others). Grocery advertisements intermingle price competition with stamp competition (tr. 4044).

35. A national survey among the managers of 541 supermarkets that do not give stamps disclosed that more than half of them (51.5 percent) had reduced prices to compete with stamps (CXs 196-197, 198).

36. While there are other trading stamp companies in the business to which a retailer could turn, in many markets in which respondent's

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S&H stamp is dominant such an option, as a practical matter, is not available (tr. 4055). Thirty-nine percent of consumers prefer S&H stamps and 62 percent save them (tr. 4054). Loss of the S&H license for a retailer would be to lose his following built up over the years (tr. 5465-5466).

37. In addition to the lowering of prices, a retailer's response to a competitor's introduction of stamps may be the use of trading stamps (if not already so engaged), or the issuance of multiple stamps. In Denver, Colorado, in 1953, the retailers in that market engaged in stamp competition by, first, the dispensing of double stamps, triple stamps, and, finally, quadruple stamps (CXs 147, 148-a and b; references in finding 33).

38. The use of trading stamps is a form or a means of competitive rivalry at the retail level. Trading stamps are versatile as a competitive tool and price-like in nature (tr. 4053, 6057; references in finding 33).

39. Trading stamps affect price behavior (tr. 4053, 7270-7271; RX 24).

40. In the retail food industry, historically, as price competition has intensified, the use of promotion and other forms of nonprice competition decreased and vice versa (RX 24, tr. 4053).

41. Trading stamps have been used to increase traffic (tr. 3670), to sell specific products (tr. 3669, 3672), to meet store openings (tr. 3671-3672, 7007), to shift patronage from regular "shopping days" to another day (tr. 3531-3534, 3673, 6975-6976), and to overcome impediments of poor location and special merchandising problems (tr. 3475-3476, 3490, 3533).

42. Respondent's policy of requiring dealers to limit the dispensing of stamps has restrained competition. The agreement which respondent has with the retailer licensee and the enforcement of this agreement prevents and has prevented the retailer licensee from using his judgment in offering multiple stamps as a spur to competition. The restriction in this regard affects prices, since it eliminates or tends to eliminate price cuts by competitors as a method of responding to multiple stamping (tr. 2996, 3101-3102, 7270-7271, 7277-7280; CXs 196-198). A restriction on the giving of stamps may and does affect the prices of competitors of the stamp-dispensing retailer, thus affecting the market price (tr. 2996-2997, 3101-3103; CXs 196-198).

43. Respondent's restraint on the dispensing of multiple stamps has particularly affected competition in the food industry. In the retailing of food, price and quality competition have declined (tr. 4053, 6431). The structure of the industry in food retailing is such that with few sellers there is a hesitation to lower prices as a sales stimulant (tr.

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6435). The imposition of a one-for-ten policy in 1964 affected 46 percent of food retailing (CX 3-B). Trading stamps in 1964 were issued in connection with annual sales to the consuming public of about \$40 billion in goods and services (CX 3-B). Over 60 percent of S&H business is derived from supermarkets and other food stores and S&H is by far the largest organization in the stamp industry (RX 924, p. 7); supermarkets represent the single most significant block of business (tr. 5010-5011). Respondent's restrictive practices concern some of the largest supermarket chains, *i.e.*, Grand Union, National Tea, Acme, First National, Winn-Dixie, Consolidated, Red Owl, Shop-Rite, Mayfair and others (tr. 6511, 6516; references in finding 24). In some markets the one-for-ten provision could affect almost all food retailing (RX 1012).

44. In the trading stamp industry market shares are concentrated in a few hands. Respondent—the largest trading stamp company—has about 40 percent of the estimated \$800 million industry sales (CXs 3-A, -B, 5 *in camera*). Respondent is almost three times the size of its nearest rival (CX 5 *in camera*). Respondent, plus five other companies which all have a one-for-ten provision—Top Value, Blue Chip, Gold Bond, Plaid and King Korn—account for about five-sixth of the industry's business (CX 5 *in camera*). Since the 1960s the share of all retail sales by stamp-dispensing retailers has been about 16 percent (tr. 6303, 6304). Trading stamps are issued in connection with annual sales to the consuming public of about \$40 billion in goods and services (CX 3-B).

45. The following trading stamp companies use contracts providing for the dispensing of stamps on a one-for-ten basis (this listing is taken from the initial decision and is not factually in dispute):

Trading Stamp Company	Stamp Issued	Commission Exhibit
National Enterprises, Inc.....	Top Value.....	43.
Top Value Enterprises, Inc.....	Top Value.....	44, 52a-c.
E. F. MacDonald Stamp Company.....	Plaid.....	53a-b, 54a-c.
Merchants Green Trading Stamp Company.....	Merchants Green..	55a-b.
King Korn Stamp Company.....	King Korn.....	56.
Gold Bond Stamp Companies (Sub- division of Premium Service Corpora- tion which used to be known as Gold Bond Stamp Co. (Tr. 3576).)	Gold Bond.....	57-58, 630- 633 G.
Blue Chip Company (for a limited period 1957-1960).	Blue Chip.....	2z27, 28.
Respondent.....	S & H Green.....	11, 567b.

In some cases there were express provisions for special exemptions.

46. The effect of the foregoing acts and practices has been to :

(a) Tamper with prices and price behavior and to interfere with the free play of market forces at the retail level, particularly in connection with food retailing;

(b) Impair and unreasonably restrain competition among retail merchants;

(c) Induce, organize and to put together a combination among competing retail merchants to restrain and limit competition in the dispensing of trading stamps.

47. There are a substantial number of instances involving several sections of the United States where licensees of respondent requested it to urge or take action against other retail licensees in competition with them to cease issuing multiple stamps. Respondent, at the "behest" of the licensees, took action in various ways to bring the multiple stamping licensees into compliance with its policy. These actions varied from simple requests to threats of cancelling the license (comp. ans., references in finding 29 and Appendix A [p. 1151 herein]).

48. On one occasion respondent cancelled a license agreement when the retailer refused to adhere to its one-for-ten provision (ans., par. 8). In most of the behest instances the licensees engaged in multiple stamping agreed to discontinue the practice (references in Appendix A [p. 1151 herein]).

49. Respondent, by its actions, demonstrated that complaints against multiple stamping would be received and acted upon (CXs 90-94, 116-117, 130-146).

50. Respondent, in many cases, upon receipt of the complaint, went to the party complained against and received an assurance to cooperate by such party and sometimes reported this back to the complaining dealer as a means to obtain the latter's adherence to its policy (references in finding 49, above).

51. The effect of respondent's foregoing acts and practices, including the "behest" situations, has been to induce, organize and to put together a combination among competing retail merchants to restrain trade and limit competition in the dispensing of trading stamps.

52. Respondent's foregoing acts and practices constitute and are unfair acts and practices and unfair methods of competition within the meaning of these terms in Section 5 of the Federal Trade Commission Act.

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The One-for-Ten Policy or Practices Engaged In With Others as Charged Under Count II of the Complaint

53. All of the leading trading stamp companies in their contracts with retailer licensees impose restrictions on multiple stamping and generally require that one stamp only is to be issued for each ten cents of purchase price. These include, in addition to respondent, National Enterprises, Inc. and Top Value Enterprises, Inc., which issue Top Value stamps (CXs 43, 44, 52-A, -C); the E. F. McDonald Stamp Company, Plaid stamps (CXs 53-A, -B, 54-A, -C); Merchants Green Trading Stamp Company, Merchants Green stamps (CX 55-A, -B); King Korn Stamp Company, King Korn stamps (CX 56); Gold Bond Stamp Company, Gold Bond stamps (CXs 57-58, 630-633-G); and the Blue Chip Company, Blue Chip stamps (CXs 2227, 28; 2268, 69). The general basic promotion of all the major stamp companies is one on a dime (tr. 6190-6192).

54. In the carrying out of the one-for-ten policy, some of these and other firms at times acted in combination to enforce such restriction. On one occasion in 1953 in Denver, Colorado, supermarkets using stamps became engaged in competing in the giving of multiple stamps and at one time were issuing four stamps on a dime. A meeting was held October 1, 1953 by the stamp companies whose retailer licensees in Denver had been issuing stamps, namely, the respondent, Gunn Brothers, Pioneer Trading Stamps, Inc., National Gift Seal Co., and True Blue Stamp Company. They agreed to issue a joint advertisement announcing that thereafter firms would require adherence to a policy of one stamp for each ten-cent purchase. An advertisement to this effect was published October 5, 1953 (CXs 147, 148-A, -B; stip. 30; adm. 15-22). Respondent also participated in other discussions involving efforts to stop the issuance of multiple stamps in Denver (CX 148-B). Subsequently, for many years there was little double stamping in Denver (CXs 189-B and D, 191-B, 192, 193-D, 195; RX 548).

55. Other instances occurred in which representatives of competing trading stamp companies and respondent's representatives were in contact in connection with efforts to stop particular situations of double stamping. In May 1961, a Gold Bond representative contacted respondent's man John Holworth in Arizona, advising him of a complaint from Safeway Stores (using Gold Bond stamps) about Pete's Country Store issuing double S&H stamps. The respondent's representative contacted Mr. Termaine of Pete's Country Store about the matter (CX 149-A, -B). There were other contacts between Gold Bond and S&H

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(CX 150). Mr. Termaine later decided to limit his double stamping (tr. 5883).

56. In March 1961 a retailer licensee of respondent, Lewis Grocery Co., Greenville, Mississippi, issued double stamps on the opening of a new Safeway store (CXs 155-A, 157-A). Respondent's district manager, Robert A. Sawhill, received a telephone call from a representative of Gold Bond about the practice. Sawhill did speak to someone in Lewis Grocery Company (tr. 5529) and told him that "... Great Safeway was going to lean on him" (tr. 5530), meaning that Safeway would likely respond by issuing multiple (Gold Bond) stamps (CX 155-A, -B). Sawhill later told the Gold Bond representative that the double stamping activity would not be repeated (CXs 157, 160). Apparently respondent's action was not effectual (tr. 5422-5426). (See also admissions 45-52.)

57. Two instances occurred in Iowa in late 1961 and early 1962, involving Gold Bond and the respondent's cooperative efforts to prevent multiple stamping. In one instance Van's Food Market in Pella, Iowa, gave double stamps because Pella Super-Valu was giving free Gold Bond stamps with a \$5.00 order and two other S&H licensees in neighboring towns were giving double stamps. Henry Vandervoort, the owner of Van's Food Store, was told by Mr. Bishop, respondent's local representative, that Van's should have to stop double stamping (tr. 3188). When he refused, Mr. Bixby, respondent's regional manager, telephoned Vandervoort and told him emphatically to quit (tr. 3190). The evidence indicates that the request to Bixby to stop Van's from double stamping had come from Gold Bond (CXs 164, 165, 166). The second incident took place in the Waterloo-Cedar Falls, Iowa area. The evidence here, again, indicates that there were contacts between representatives of Gold Bond and respondent on the stopping of double stamping (tr. 3140-3141; CXs 161, 163-A, -B).

58. The effect of the foregoing acts and practices engaged in collectively with other trading stamp companies has been to:

- (a) Tamper with prices and price behavior and to interfere with the free play of market forces at the retail level, particularly in connection with food retailing;
- (b) Impair and unreasonably restrain competition among retail merchants;
- (c) Induce and to put together a combination among retailers to limit trading stamp competition;
- (d) Limit and unreasonably restrain competition among trading stamp companies in the distribution and sale of trading stamps.

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59. Respondent's foregoing acts and practices, engaged in collectively with other trading stamp companies, constitute unfair acts and practices and unfair methods of competition within the meaning of these terms in Section 5 of the Federal Trade Commission Act.

Suppression of Trading Stamp Exchanges and Other Redemption Actively Under Count III of the Complaint

60. A trading stamp exchange is a person or business engaged in the exchange of trading stamps issued by one trading stamp company for those issued by another or engaged in the sale or purchase of trading stamps to or from members of the consuming public. These exchanges are small businesses, usually operated by a single individual. Those disclosed by the record include the trading stamp exchange operated in Oklahoma City by William Rance; that in Tulsa, Oklahoma, operated by Mrs. Regina Lou DeBolt; that operated in Fort Worth, Texas, by Morris Sam Rance; and the exchange in Corpus Christi, Texas, operated by Herbert Rosenwasser (tr. 1875-1876, 2201-2202; 2327-2328; and Rosenwasser deposition, tr. 2-3).

61. The trading stamp exchanges disclosed by the record are similar in their mode of operation. They buy, sell or exchange trading stamps principally for housewives and charge a commission fee (tr. 1881). William Rance testified that 90 percent of the income of the business was for commissions charged for the exchange of stamps (tr. 1882).

62. The other kind of activity involving the redemption of trading stamps by other than the issuing company pertains generally to retailers who offer to exchange S&H stamps for their own variety of stamps to lure customers into their stores. One example involves Jake's Department Store, Thibodaux, Louisiana. In this instance the retailer offered to give \$3.00 in merchandise for each green stamp book. Respondent warned Jake's Department Store about this practice, and the retailer agreed to discontinue it (CXs 221, 223, 228-B).

63. Another example of trading stamp redemption by others than the issuing company involves the Good Deal Supermarkets in Irvington, New Jersey. In 1958 this store advertised that it would accept coupons and trading stamps to be used to buy food to give to needy families. Good Deal was threatened with litigation by respondent and informed that it had no right to exchange or redeem S&H stamps. It appears that Good Deal eventually discontinued this practice (CXs 232-244).

64. The amount of commerce involved in trading stamp exchanges and redemption activity is substantial or potentially substantial. Respondent itself operates 850 redemption centers (references in finding numbered 3). Trading stamp exchanges may do business in the amount of \$12,000 (CX 526). Collectors informally swap 20 percent of the trading stamps issued (CX 626a).

65. Trading stamp exchange operators M. S. Rance, William Rance and Regina Lou DeBolt all testified that they had a policy against selling stamps to retail merchants (tr. 1922, 2246-2247, 2346-2347). There is no substantial evidence in this record that the practice of re-issuing or dispensing stamps previously issued to another retailer is widespread or a significant factor in the trading stamp business.

66. Respondent's policy is to oppose and suppress the operation of trading stamp exchanges and all redemption of S&H trading stamps by persons and firms other than the respondent (respondent's ans., par. 16). The facts supporting such finding are also contained in Appendix B of the initial decision and have not been disputed by the parties. The examiner's Appendix B will be incorporated herein verbatim and designated as Appendix B [p. 1153 herein] of the findings of the Commission. Respondent enjoined and suppressed the trading stamp exchanges listed in finding 60 (Rosenwasser dep., p. 14; tr. 1988, 2234-2340, 2344-2345; CXs 602-A, -B, 603, 604, 605A, -607, 608, 609).

67. It is, and for many years has been, the practice of respondent to send warning letters to all persons who respondent has reason to believe are engaged commercially in the business of exchanging respondent's stamps for other trading stamps or for merchandise, services or money, and to bring suit if necessary to enjoin such actions (adm. 23).

68. Respondent filed as many as 16 complaints seeking injunctions from January 1, 1957, to April 1, 1965, and in this period it issued 140 warning letters to firms exchanging S&H stamps and 175 warnings to persons engaged in redeeming S&H stamps (adm. 24 and 25).

69. Other trading stamp companies, including some of the largest, also reserve title to their trading stamps in a notice in collectors books similar to the restrictions in respondent's collectors books. These include Top Value, King Korn, Gold Bond, Plaid, Merchants Green and Triple S (CXs 209-212, 216-218; adm. 82-86, 116; stip. 43-48).

70. It is respondent's policy to encourage the pooling of stamps for charitable reasons. An example of this is where a church organization decides to acquire a school bus with trading stamps (tr. 2225-2230, 4896, 5976, 6030; RXs 1000-A to 1004-B).

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71. Respondent cooperated with or received the cooperation of other trading stamp companies in suppressing the operation of trading stamp exchanges. The hearing examiner's findings on this question, not disputed by the parties as to the facts shown, are incorporated herein and constitute the Commission's findings to follow, numbered 72 through 82.

72. In May of 1962, Robert W. Sweet of counsel to respondent, authorized its local counsel to join Texas Gold Stamp Company in an action to enjoin an unauthorized use in Raymondville, Texas (CX 312; stip. 49; CPF 82; RPF 165).

73. In December of 1961, Peter A. Cooper, attorney for respondent, wrote United Trading Stamp Company requesting that company to have their licensee, Sponangles Mobile Service, discontinued redeeming S&H stamps (see CPF 89). Shortly thereafter United Trading Stamp Company responded that they were investigating, and that they would take the necessary steps if they found evidence of improper redemption. They also assured respondent of their continued cooperation in matters of this type (CXs 313-316; stip. 50). The gasoline station ceased redeeming S&H stamps (CX 317; RCPF CPF 89).

74. The attorney for Quality Stamp Company in June 1961 notified respondent's general counsel of an advertisement in an East Memphis, Tennessee, paper by Warren Wooley offering to exchange stamps. Quality's counsel requested assistance in the form of explaining the theory of respondent's actions against such exchanges (CPF 81). Respondent's counsel shortly thereafter warned Wooley to cease his activity and suggested to Quality Stamp Company's counsel that they coordinate their activity with S&H to avoid a multiplicity of suits, if action were required. Some time later, local counsel for respondent in Tennessee talked with Quality's counsel and with counsel for Top Value. Top Value's counsel said that he would have no objection to respondent's joining his action, but that Quality Stamps would not do so because of other matters making it preferable for them not to litigate. Top Value also requested assistance in securing evidence against Wooley. Wooley later gave up its trading stamp exchange business just as Top Value counsel was about to start a proceeding for an injunction (CXs 318-325; stip. 51).

75. In April 1959, respondent's counsel instructed a local official to speak to Karbe's Supermarkets in Joplin, Missouri, because Top Value's general counsel had advised him that Karbe's was exchanging Top Value for S&H stamps. Respondent's counsel said he had agreed to do all possible to stop the practice. The local official reported that Karbe's agreed to discontinue the practice in accordance with the

request of Top Value's counsel (CXs 326-327; stip. 54; CPF 80; CCPF RPF 168).

76. In September 1959, the general attorney for Top Value Enterprises, Inc., wrote respondent's assistant general counsel that Kirk's Gift Shops in Dayton, Ohio, had ceased redeeming Top Value stamps but were still accepting S&H and King Korn and that he thought respondent would be interested in stopping the practice (CX 328; stip. 52). Respondent's assistant general counsel replied with thanks, stating "we will follow up on this and stop the practice to which you refer" (CX 329). This matter was then referred to outside general counsel to handle (CX 330; stip. 52; CPF 86).

77. In June of 1959, the Gold Bond manager in Denver, Colorado, informed the Grand Junction office of respondent that Kirby Vacuum Cleaner Company in Denver was accepting S&H stamps in lieu of money and that Gold Bond had notified their counsel. The local branch manager of respondent notified respondent's vice president. Then respondent's assistant general counsel sent the matter to outside counsel to handle "in their usual competent way" (CXs 331, 332; stip. 53; CPF 87). Outside counsel wrote Kirby's and received assurances of discontinuance. The local manager of respondent then rechecked Kirby's and found it in compliance (CXs 331-339).

78. In February of 1959, counsel for respondent were informed by Triple S's attorney that Food Land, Inc., in Worcester, Massachusetts, was redeeming S&H and other brands of trading stamps. Respondent's counsel then wired Food Land to cease and, after receiving assurance of discontinuance, told the local manager to check to see that Food Land had, in fact, ceased (CXs 340-344; stip. 55; adm. 87; CPF 88).

79. In March of 1957, respondent was informed that Mayfair Market in Red Bank, New Jersey, was accepting S&H stamps for Yellow stamps. In addition to notifying Mayfair Market to cease, respondent notified Philadelphia Yellow Stamp Company that its licensee, Mayfair, was improperly dealing in its stamps. Philadelphia Yellow Trading Stamp Co. agreed that its licensee should discontinue and so notified Mayfair Market. Mayfair needed further urging and so respondent again requested Philadelphia Yellow Trading Stamp Company to take action. Respondent subsequently received a letter from the attorney for Yellow stamps stating that they had again written Mayfair Markets and agreed that trading stamp companies should redeem only their own stamps. The attorney for Yellow Stamp thanked respondent's counsel for advising of the instance and assured respondent's counsel of continued cooperation (CXs 345-352; adm.

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88; stip. 59). Following this exchange respondent instructed its Asbury Park employee to recheck and report (CX 53; stip. 59; CPF 83).

80. In May of 1956, Mr. Collins, then a member of the firm of Casey, Lane and Mittendorf as outside general counsel for respondent, arranged with counsel for United Trading Stamp Company and counsel for Top Value to have respondent's counsel in Oklahoma represent all three companies in connection with unauthorized redemption of their stamps by Open Front Food Market in Duncan, Oklahoma (stip. 60; adm. 89; CX 354; CPF 84). Respondent checked and found that this practice had been discontinued. In 1957 it started again. Counsel for S&H requested counsel for United, whose licensee Open Front Food Market had then become, to take steps to stop Open Front's practice of exchanging S&H stamps (CXs 355-358). United's counsel took the action requested (CX 359).

81. In October 1956, counsel for Community Stamp Company asked respondent whether or not it would be interested in sharing legal fees if Community decided "to go to bat" to prevent Baries of Saxonburg, Pennsylvania, from redeeming S&H and Community stamps. Respondent turned the matter over to outside general counsel, who wrote Baries to stop, thanked Community's counsel for the information, but reserved decision on whether or not to proceed jointly with Community. Community's counsel later wrote that Baries had discontinued (CXs 360-363; stip. 61). Apparently Baries started again, because in March 1957, respondent's outside counsel wrote to counsel for Prudential Premium Company, whose licensee Baries was, to have Baries cease their unlawful activity, because S&H was "under considerable pressure from licensees in the Saxonburg area to do something about Baries * * *." Prudential's counsel informed respondent's counsel that he had instructed Prudential to notify Baries to stop (CXs 364-366; stip. 61; CPF 89).

82. In January of 1960, an S&H zone manager notified the home office that R. Donosky, a pawnshop operator in Roswell, New Mexico, was advertising that he would buy S&H and other stamps for \$1.25 per book. The matter was referred through channels to outside general counsel. General counsel wrote Donosky to cease and desist and also wrote three other trading stamp companies—Frontier, Gold Bond and Scottie—sending them a copy of his letter to Donosky. In sending the letter to the other trading stamp companies, Mr. Joyce of outside general counsel wrote: "We trust that you, too, will wish to take immediate steps to eliminate Mr. Donosky's unlawful interference with your trading stamp business" (CX 372). The letter to Donosky and a second registered letter were returned unclaimed. Gold Bond wrote

that it would look into the matter, and Frontier wrote Donosky to cease. An attempt was then made to make contact with Donosky locally. This resulted in securing information that the trafficking in S&H stamps has ceased (CXs 367-a-386; stip. 62; CPF 85; RCPF CPF 85).

83. Respondent suppressed or restricted the activities of the trading stamp exchanges engaged practically exclusively in the business of exchanging or redeeming trading stamps. These include the exchanges listed in finding 60, above. The trading stamp exchanges suffered a serious loss of business when they were compelled to discontinue dealing in respondent's stamps. For instance, William Rance testified that his best estimate of the business lost after respondent obtained an injunction against him was a gross income decline of between 40 and 60 percent (tr. 1912; CX 526-A-X). Mrs. DeBolt testified that 60 percent of the transactions in her exchange involved S&H stamps (tr. 2231).

84. Certain stores and exchanges were forced out of trading stamp exchange operations entirely. For example, the trading stamp exchange in Los Angeles discontinued exchanging stamps upon threat of an injunction (CX 311). Warren Wooley was forced to quit his exchange operation (CX 325).

85. Victor H. Savin, president of the V. Savin Company, Inc., doing business as Tifon Jewelers in New Haven, Connecticut, in 1958 offered to take in trading stamp books towards the purchase of the products the company sold, such as diamonds, watches, appliances, luggage, etc. Tifon was forced to discontinue this practice by the respondent. Mr. Savin considered that he was in competition with the trading stamp redemption centers (tr. 2662-2668).

86. Respondent, in suppressing and eliminating trading stamp exchanges and other exchange and redemption activity involving S&H stamps, prevented or restricted retailers from using an effective competitive device.

87. Respondent's dominance in the trading stamp field and the popularity of its S&H stamps magnified the effects of its suppression practices. William Rance testified that in Oklahoma City there were approximately 15 different kinds of stamps but that the three most important were Top Value, Gunn Brothers and S&H (tr. 1904-1912). The effect of respondent's injunction against him went beyond S&H stamps because if customers had S&H green stamps and could not exchange them as part of the whole deal he would lose the transaction (tr. 1912-1913). Respondent had in effect, therefore, a monopoly power over the small trading stamp exchanges. Respondent's actions

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in suppressing the redemption and exchange of its stamps by trading stamp exchanges has curtailed the operations of a whole class of small businessmen (references in findings 66-68, above).

88. Respondent's policy of suppressing exchanges and the free and open redemption of trading stamps, both alone and in combination with others, has restrained trade. In many instances, the firms—many of which were retailers—were forced to abandon their redemption and exchange practices, thus curtailing their competitive responses (references in findings 66-68, above).

89. The effect of respondent's acts and practices relative to trading stamp exchanges and redemption activity has been

(a) To unfairly suppress such exchanges and the business of retailers and others engaged in trading stamp redemption or exchange activity, to the detriment of the persons engaged therein and the consuming public;

(b) To substantially impair and restrain competition.

90. The foregoing acts and practices relative to trading stamp exchange and redemption activity constitute and are unfair acts and practices and unfair methods of competition within the meaning of Section 5 of the Federal Trade Commission Act.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent herein.

2. The aforesaid acts and practices of the respondent, for the reasons stated in the accompanying opinion, are to the prejudice and injury of the public, have unreasonably restrained, injured and impaired competition, and thereby constitute unfair methods of competition in commerce and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act.

3. This proceeding is in the public interest.

ORDER

It is ordered. That respondent, The Sperry and Hutchinson Company, its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with the issuing, distribution, sale, or the redemption of trading stamps in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Putting into effect, maintaining, or enforcing any plan or policy under which contracts, agreements, or understandings are entered into with any retailer which have the purpose or effect of:

(a) Fixing or establishing the maximum number of trading stamps which may be dispensed by retailers to their customers in relation to such customers' purchases of goods or services;

(b) Requiring, expressly or by implication, or suggesting to or inviting any retailer to dispense trading stamps on a basis not to exceed a specified number of trading stamps in relation to purchases by such retailer's customers of goods or services.

2. Securing adherence to a scheme or policy of foreclosing the dispensing of trading stamps at the retail level in excess of any specified ratio of stamps to goods or services sold, by terminating or threatening to terminate or cancel, or refusing to enter into contractual relationship with, or threatening to refuse to deal with, any retailer, or taking any other affirmative action which goes beyond the mere declination to deal with a customer who will not observe such policy.

3. Combining, conspiring, or otherwise knowingly acting in concert with any other person to cause any retailer to dispense trading stamps in any specified ratio of the number of stamps to goods or services sold.

4. Communicating in any way with any other trading stamp company, or acting in any way in response to any communication from any trading stamp company, with respect to the ratio of the number of trading stamps dispensed in relation to goods or services sold by the retailer.

5. Attempting in any way to:

(a) Impair, limit, or make subject to any conditions, whether by a purported retention of legal interest or otherwise, the freedom of any retailer to whom the respondent has issued trading stamps or any person to whom such retailer dispenses or transfers such respondent's trading stamps, to alienate such stamps, and

(b) To suppress or prevent the free and open redemption or exchange of trading stamps or the operation of trading stamp exchanges, whether by bringing any action in any court of any jurisdiction to enforce any purported legal interest referred to herein, or otherwise,

except that the provisions of this paragraph shall not apply to the extent that respondent can establish that dispensing or transferring of respondent's stamps was made with the sale of goods or the furnishing of services by persons or concerns not licensees of respondent.

6. Combining or conspiring with, or soliciting concerted action from, any other trading stamp company to prevent redemption of trading stamps or the operation of a trading stamp exchange.

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7. Communicating in any way with any other trading stamp company or acting in any way in response to any communication from any trading stamp company with respect to preventing the operation of any trading stamp exchange or the free and open redemption or exchange of trading stamps by any person.

It is further ordered, That the respondent, within sixty (60) days after the effective date of this order:

1. (a) Notify in writing all of its sales employees, sales representatives, and licensees of the provisions of this cease and desist order;

(b) Reform all contracts with retailers or others who dispense S&H green stamps to the public to conform with the provisions of this cease and desist order;

(c) Eliminate the "Notice" contained in the S&H stamp-saving book, or reform said "Notice" to conform with the provisions of this cease and desist order.

2. Except as respondent can show that the situations consisted of the dispensing or transferring of respondent's stamps with the sale of goods or the furnishing of services by persons or concerns not licensees of respondent:

(a) Notify in writing each person to whom it has written, within the five years preceding the effective date of this order, a letter warning such person not to operate a trading stamp exchange or otherwise engage in the free and open redemption of trading stamps, that the respondent no longer intends to, nor will in any way, prevent such acts by such person;

(b) Notify in writing each person against whom it has secured, within the ten years preceding the effective date of this order, an injunction or other restraining order in any court of any jurisdiction, forbidding such person to engage in the operation of a trading stamp exchange or otherwise engage in the free and open redemption of trading stamps, that the respondent will not oppose the dissolution of such injunction or other restraining order.

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

Commissioner Elman concurred and has filed a concurring statement; Commissioner Jones dissented and has filed a dissenting statement; and Commissioner Nicholson did not participate for the reason that oral argument was heard prior to his appointment to the Commission.

Complaint

IN THE MATTER OF

GLAMOUR SPORTSWEAR CORP. ET AL

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket C-1351. Complaint, June 27, 1968—Decision, June 27, 1968

Consent order requiring two New York City manufacturers of ladies' sportswear and blouses to cease misbranding its textile fiber products and furnishing false guarantees.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Glamour Sportswear Corp., a corporation, and Pantops by Glamour, Inc., a corporation, and Mark Lederman and Eugene Lederman, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Textile Fiber Products Identification 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 Glamour Sportswear Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 132 West 36th Street, New York, New York.

Respondent Pantops by Glamour, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 132 West 36th Street, New York, New York.

Individual respondents Mark Lederman and Eugene Lederman are officers of said corporate respondents. They formulate, direct and control the acts, practices and policies of said corporate respondents, including the acts and practices hereinafter referred to. The office and principal place of business of these individual respondents is 132 West 36th Street, New York, New York.

Respondents are engaged in the manufacture and sale of ladies' sportswear and ladies' blouses.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the introduction, manufacture for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States, of textile fiber products: and have sold, offered for sale, advertised, delivered, transported and caused to be transported, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products; as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by the respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, invoiced, advertised, or otherwise identified as to the name or amount of the constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products (ladies' pants) with labels which set forth the fiber content of a bonded fabric as "90% Acetate, 10% Nylon," thereby representing the entire fabric to be as described, whereas, in truth and in fact, the said fibers contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of such textile fiber products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified to show each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products with labels which failed:

1. To disclose the true generic names of the fibers present; and
2. To disclose the true percentage of such fibers; and
3. To disclose the name, or other identification issued and registered by the Commission, of the manufacturer of the product or one or more persons subject to Section 3 of the said Act, with respect to such product.

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PAR. 5. Certain of said textile fiber products were misbranded in violation of the Textile Fiber Products Identification Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in the following respects:

1. Generic names and fiber trademarks were used on labels without a full and complete fiber content disclosure appearing on such labels the first time the generic name or fiber trademark appeared on the said labels, in violation of Rule 17(b) of the aforesaid Rules and Regulations.

2. The required information as to fiber content was not set forth in such a manner as to separately show the fiber content of each section of textile fiber products containing two or more sections, in violation of Rule 25(b) of the aforesaid Rules and Regulations.

PAR. 6. Respondents have furnished false guaranties that their textile fiber products were not misbranded by falsely representing on invoices that respondents had a continuing guaranty under the Textile Fiber Products Identification Act on file with the Federal Trade Commission, when such was not the fact, in violation of Section 10(b) of the said Act and Rule 38(d) of the Rules and Regulations promulgated under such Act.

PAR. 7. The acts and practices of respondents, as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts or practices in commerce, under the Federal Trade Commission Act.

DECISION AND ORDER

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 Textiles and Furs 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 Textile Fiber Products Identification 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 agree-

ment 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 Acts, 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 Glamour Sportswear Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 132 West 36th Street, New York, New York.

Respondent Pantops by Glamour, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 132 West 36th Street, New York, New York.

Respondents Mark Lederman and Eugene Lederman are officers of said corporations and their address is the same as that of said corporations.

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 Glamour Sportswear Corp., a corporation, and its officers, Pantops by Glamour, Inc., a corporation, and its officers, and Mark Lederman and Eugene Lederman, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising, or offering for sale in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product, which has been advertised or offered for sale in commerce; or in connection with the sale, offering for sale, advertising,

delivery, transportation or causing to be transported, after shipment in commerce of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

Misbranding textile fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.
2. Failing to affix a stamp, tag, label or other means of identification to each such product showing in a clear, legible and conspicuous manner each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.
3. Using a generic name or fiber trademark on any label, whether required or non-required, without making a full and complete fiber content disclosure in accordance with the Act and the Rules and Regulations thereunder the first time such generic name or fiber trademark appears on the label.
4. Failing to make a disclosure on the required label on or affixed to textile fiber products composed of two or more sections of different fiber composition, in such a manner as to show the fiber composition of each section in all instances where such disclosure is necessary to avoid deception.

It is further ordered, That respondents Glamour Sportswear Corp., a corporation, and its officers, Pantops by Glamour, Inc., a corporation, and its officers, and Mark Lederman and Eugene Lederman, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty that any textile fiber product is not misbranded or falsely invoiced.

It is further ordered, That the respondent corporations shall forthwith distribute a copy of this Order to each of their 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.

INTERLOCUTORY, VACATING, AND
MISCELLANEOUS ORDERS

JACOBY-BENDER, INC., ET AL.

Docket 8728. Order, Jan. 5, 1968

Ordering denying motion to dismiss on the ground that complaint counsel was late in filing notice of appeal; and granting respondents extension of time to file reply.

ORDER DENYING MOTION TO DISMISS APPEAL

This matter is before the Commission on respondents' motion to dismiss the appeal on the ground that the notice of intention to appeal and the appeal brief of complaint counsel were not filed within the time prescribed by the Rules, and complaint counsel's answer in opposition thereto. It appears that complaint counsel, in their notice of intention to appeal, by inadvertence stated the initial decision was served November 16, 1967. This error is the basis of the motion to dismiss. In fact, the Commission's records show that the date of service was November 21, 1967. Complaint counsel's notice of intent and appeal brief were therefore timely filed. The Commission has further determined that in view of their misunderstanding as to the timeliness of complaint counsel's appeal respondents should be granted an extension of 30 days from the date of service of this order upon them within which to file their answer to the appeal. Accordingly,

It is ordered, That respondents' motion to dismiss the appeal be, and it hereby is, denied.

It is further ordered, That respondents be, and they hereby are, granted an extension of 30 days from the date of service of this order upon them within which to file their answer to the appeal.

CURTISS-WRIGHT CORPORATION

Docket 8703. Order, Jan. 24, 1968

Order denying respondent's appeal from hearing examiner's order directing compliance with a subpoena duces tecum.

ORDER DENYING APPEAL FROM EXAMINER'S RULING ON
SUBPOENA DUCES TECUM

This matter having come on to be heard upon the appeal of respondent and Martin A. Sherry from the hearing examiner's order filed

December 18, 1967, directing compliance with a subpoena duces tecum issued October 12, 1967, and rescheduling return date, and upon the answer of complaint counsel in opposition thereto; and

The Commission having determined that the issues raised on the appeal were in substance decided in the Commission's order issued December 1, 1967 [72 F.T.C. 1027], and that respondent and Martin A. Sherry have raised no new or different contentions; that no showing has been made that the ruling complained of involves substantial rights and will materially affect the final decision and that a determination of its correctness before the conclusion of the hearing is essential to serve the interest of justice; and having further determined that the appeal for such reasons should be denied:

It is ordered, That the appeal of respondent and Martin A. Sherry from the hearing examiner's order filed December 18, 1967, directing compliance with a subpoena duces tecum and rescheduling return date, be, and it hereby is, denied.

Commissioner Elman not concurring.

NATIONAL EXECUTIVE SEARCH, INC., ET AL.

Docket 8731. Order, Jan. 26, 1968

Order granting respondents' request to quash subpoena duces tecum directed to the president of the corporate respondent.

ORDER GRANTING APPEAL AND REMANDING TO EXAMINER WITH INSTRUCTIONS

This matter is before the Commission upon respondents' appeal filed December 1, 1967, from the part of the order of the hearing examiner, of November 27, 1967, denying their request to quash subpoena duces tecum directed to John W. Costello, president, National Executive Search, Inc., and upon complaint counsel's answer in opposition thereto; and it appearing to the Commission that the actions of the hearing examiner in issuing such subpoena duces tecum and denying in part the motion to quash exceeded the limits of the pretrial order; and the Commission having determined, therefore, that the matter should be remanded to the hearing examiner for his reconsideration of the issues raised in the light of the pretrial order:

It is ordered, That respondents' appeal from the part of the hearing examiner's order of November 27, 1967, denying their request to quash subpoena duces tecum directed to John W. Costello, president, National Executive Search, Inc., be, and it hereby is, granted.

It is further ordered, That inasmuch as the hearing examiner's order ruling on the subpoena duces tecum directed to John W. Costello, president, National Executive Search, Inc., exceeds the limits of his

pretrial order entered in this proceeding, the hearing examiner shall, in connection with such subpoena, modify the pretrial order to such extent as may be appropriate under § 3.21(d) of the Commission's Rules of Practice (*i.e.*, to prevent manifest injustice), after which the course of the proceedings shall be governed in accordance with these determinations and actions.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order, Feb. 15, 1968

Order remanding respondent's request for disclosure of certain documents to the hearing examiner to allow respondent to supplement its application.

ORDER REMANDING APPLICATION TO THE HEARING EXAMINER

The respondent has filed an application, certified to the Commission by the hearing examiner, requesting the disclosure of certain specified documents allegedly in the Commission's files. The application was filed "Pursuant to the Freedom of Information Act of 1966 and the Commission's 1967 Rules of Practice, and in light of the Hearing Examiner's and Commission's discretion to regulate discovery in adjudicative proceedings."

The Commission having considered the matter:

It is ordered, That the application for disclosure of documents be, and it hereby is, remanded to the hearing examiner with the direction to afford the respondent an opportunity to supplement the application so that, as regards such documents referred to therein which are subject to § 3.36 of the rules of practice, said application will meet the requirements of the rule. If this is done, the hearing examiner is further directed to again certify the matter to the Commission with his recommendation.

Commissioner MacIntyre not participating.

ASSOCIATED MERCHANDISING CORPORATION ET AL.

Docket 8651. Order, Feb. 16, 1968

Order remanding respondents' request for consent order procedure to hearing examiner for resubmission to Commission.

ORDER REFERRING REQUEST UNDER § 2.34(d) TO HEARING EXAMINER

Respondents, Associated Merchandising Corporation et al., have submitted a request to the Commission asking that this matter be withdrawn from adjudication pursuant to § 2.34(d) of the Commission's

Rules of Practice for the purpose of negotiating a settlement by the entry of a consent order.

Any request for withdrawal of a matter from adjudication for the purpose of negotiating a settlement by the entry of a consent order should be in the form of a motion addressed to the hearing examiner and by him certified to the Commission with his recommendation (§ 3.22 of the Rules of Practice); accordingly, without having considered the merits of this request,

The Commission refers this matter to the hearing examiner with directions (1) to have complaint counsel respond to respondents' request and (2) to then certify the matter back to the Commission with his recommendation as to whether it should be withdrawn from adjudication for the purpose of negotiating a settlement by the entry of a consent order.

It is so ordered.

NATIONAL EXECUTIVE SEARCH, INC., ET AL.

Docket 8731. Order, Feb. 21, 1968

Order denying complaint counsel's request to file interlocutory appeal relative to the issuance of a subpoena duces tecum directed to the president of the corporate respondent.

ORDER DENYING PERMISSION TO FILE INTERLOCUTORY APPEAL

This matter having come on to be heard upon complaint counsel's request filed February 5, 1968, for permission to file an interlocutory appeal from the hearing examiner's ruling on the record on January 30, 1968, denying their motion requesting him to amend the pre-hearing order so as to provide for the issuance of a subpoena duces tecum to John W. Costello, president, National Executive Search, Inc.; and respondents' motion for permission to answer interlocutory appeal or to otherwise plead; and

It appearing that the Commission on January 26, 1968 [p. 1236 herein], issued an order directing the hearing examiner, in connection with the disputed subpoena, to modify the pretrial order to the extent appropriate under § 3.21(d) of the Commission's Rules of Practice, and to proceed accordingly; and that the examiner, on January 30, 1968, denied complaint counsel's motion to amend the pretrial order for the reason that the application at that stage of the proceeding (which was at or near the end of the presentation of complaint counsel's case-in-chief) was untimely, the hearing examiner stating on the record in this connection that he would consider the issuance of the requested subpoena at the rebuttal stage of the pro-

ceeding to the extent the door is opened by respondents on the question; and

The Commission having determined in the circumstances that the hearing examiner's ruling is limited to the stage of the proceeding at the time of the ruling relating only to the request for the issuance of a subpoena in connection with complaint counsel's case-in-chief; that as to such limited ruling complaint counsel have failed to show that it involves substantial rights and will materially affect the final decision and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice, as required by § 3.23(a) of the Commission's Rules of Practice, and that therefore the request should be denied; and having further determined that in the circumstances respondents' motion for permission to answer is moot and need not be acted upon:

It is ordered, That complaint counsel's request for permission to file an interlocutory appeal, filed February 5, 1968, be, and it hereby is, denied.

LAKELAND NURSERIES SALES CORP. ET AL.*

Docket 6666. Order, Feb. 29, 1968

Order denying respondents' request to remand case to hearing examiner to receive evidence disproving certain facts allowed in record by official notice.

ORDER DENYING REQUEST TO REMAND PROCEEDINGS TO THE
HEARING EXAMINER

This matter having come on to be heard upon respondents' motion, filed February 5, 1968, requesting, pursuant to Rule 3.43(d) of the Commission's Rules of Practice, that the Commission remand the proceedings herein to the hearing examiner for the purpose of affording the respondents the opportunity to disprove certain facts as to which the hearing examiner took official notice and to offer evidence with respect to the scope of subparagraph 1 of the first paragraph of the order, which assertedly rests on the finding as to which the hearing examiner took official notice, and for a stay or extension of time for respondents to file an appeal from the initial decision pending a determination of the request here made: and upon complaint counsel's answer in opposition to respondents' motion, filed February 15, 1968: and

It appearing that the hearing examiner issued his initial decision herein on January 12, 1968, and that the respondents filed a notice of an intention to appeal therefrom: that respondents, on their appeal.

*Formerly known as Lakeland-Deering Nurseries Sales trading as Lakeland Nurseries Sales.

will have full opportunity to challenge the initial decision or any part thereof, including the scope of subparagraph 1 of the first paragraph of the order in the initial decision and the action of the hearing examiner in taking official notice of a fact or of facts; that the Commission, after hearing such appeal and upon its consideration of the whole record, will then have an opportunity to dispose of the issues and to make a determination whether or not the taking of official notice was proper and necessary; and that at such time it would be appropriate to grant to respondents, to the extent, if any, that the decision relies on official notice, the opportunity to show to the contrary; and it further appearing that respondents, by order of February 20, 1968, have been granted an extension of time from February 24, 1968, to and including March 25, 1968, within which to file their appeal from the initial decision: and

The Commission having determined that until such time as it has had the opportunity to review the issues on the whole record the remand to the examiner as requested would be premature and therefore should be denied:

It is ordered. That respondents' motion to remand this matter to the hearing examiner for the purpose of affording respondents the opportunity to disprove facts as to which the hearing examiner took official notice and to offer evidence with respect to the scope of subparagraph 1 of the first paragraph of the order contained in the initial decision be, and it hereby is, denied.

VENT-AIR LENS LABORATORIES, INC., ET AL.

Docket 8715. Order. Mar. 7, 1968

Order denying respondents' request for withdrawal of case from adjudication for consent order procedure.

ORDER DENYING REQUEST TO WITHDRAW MATTER FROM ADJUDICATION

The hearing examiner having certified to the Commission, on February 21, 1968, the motion of respondents to withdraw the matter from adjudication for the purpose of negotiating a consent settlement by the entry of a consent order; and

The Commission having determined that respondents have not shown exceptional and unusual circumstances as required by § 2.34(d) of the Commission's Rules of Practice and that therefore the matter should not be withdrawn from adjudication:

It is ordered. That respondents' request to withdraw this matter from adjudication be, and it hereby is, denied.

It is further ordered, That any further motion in this matter seeking withdrawal from adjudication be filed jointly by complaint counsel and respondents and that it contain an assurance that counsel have every reason to believe that consent negotiations will result in an order acceptable to the Commission.

UNIVERSE CHEMICALS, INC., ET AL.

Docket 8752. Order, Mar. 13, 1968

Order directing respondents and complaint counsel to file affidavits relative to the question of holding hearings in more than one place.

ORDER DIRECTING FILING OF SUPPLEMENTAL AFFIDAVITS

Respondents, on February 29, 1968, filed a motion requesting permission to file an interlocutory appeal, under Section 3.23(a) of the Commission's Rules of Practice, from the hearing examiner's order filed February 16, 1968, granting in part and denying in part complaint counsel's motion for hearings in more than one place. As a result of the hearing examiner's order, hearings are scheduled to be held in Chicago, Illinois, Evansville, Indiana, Omaha, Nebraska, and Minneapolis, Minnesota. Complaint counsel, on March 5, 1968, filed an answer opposing respondents' request.

Respondents argue that, because they operate an assertedly small business enterprise which requires their presence for its operation, the scheduling of hearings in more than one place would be financially oppressive to them.

The hearing examiner, in his order ruling on the request for scheduling hearings at different locations, stated that he had taken into account not only the convenience of respondents but the witnesses to be called as well. He determined that respondents, in their objections, did no more than suggest that the proposed hearings would be inconvenient and involve some additional expense; that there was no showing that the proposed schedule was unduly burdensome or otherwise prejudicial. On the other hand, he found that there would be twenty-seven witnesses called who would need to be transported from various locations if the hearing was held only in Chicago and that the inconvenience and expense involved in such transportation would outweigh the inconvenience and expense to respondents.

Section 3.41(b) of the Commission's Rules of Practice provides, in pertinent part, as follows: "Hearings shall proceed with all reasonable expedition, and, insofar as practicable, shall be held at one place and shall continue without suspension until concluded. Consistent with the

requirements of expedition, the hearing examiner shall have the authority to order brief intervals of the sort normally involved in judicial proceedings and, in unusual and exceptional circumstances for good cause stated on the record, he shall have the authority to order hearings at more than one place." The objective of this provision is to avoid unnecessary delay in the conduct of adjudicative proceedings. It plays an important part in effectuating "the policy of the Commission that, to the extent practicable and consistent with requirements of law, such proceedings shall be conducted expeditiously. In the conduct of such proceedings the hearing examiner and counsel for all parties shall make every effort at each stage of a proceeding to avoid delay." (Section 3.1.) Under the Commission's Rules hearings at more than one place are the exception, not the rule, and must be affirmatively justified, where so ordered by the hearing examiner, by "unusual and exceptional circumstances for good cause stated on the record."

In order to determine whether the hearing examiner's order in this matter meets the standards required by Section 3.41, the Commission finds that additional specific information is required. The assertions of both parties, on the basis of which the hearing examiner entered his order, were too generalized. Complaint counsel are directed to file with the Secretary of the Commission, within five days after service of this order upon them, a supplemental affidavit specifying in detail the cost or difficulties which would be involved in holding the hearings in only one place, together with any other "unusual and exceptional circumstances" asserted to constitute good cause for the hearing examiner's order. Similarly, respondents shall, within the same period, file with the Secretary a supplemental affidavit specifying in detail the nature and extent of the alleged financial and other burdens upon them if the hearing examiner's order should be upheld.

It is so ordered.

By the Commission, without the concurrence of Commissioner MacIntyre.

ALL-STATE INDUSTRIES OF NORTH CAROLINA, INC.,
ET AL.

Docket 8738. Order and Opinion, Mar. 18, 1968

Order denying respondents' motion to dismiss complaint on grounds that the Chairman had prejudged the case and that complaint counsel was conducting post-complaint investigation.

OPINION OF THE COMMISSION

MARCH 18, 1968

This matter is before the Commission upon the hearing examiner's

certification of respondents' motion to dismiss the complaint filed pursuant to § 3.22 of the Commission's rules of practice.

The motion, filed February 1, 1968, is based upon two grounds:

1. The members of the Commission are disqualified from performing a judicial function in this case because of the prejudgment of the facts as set forth in their letter to the Chairman of the Committee on Commerce of the United States Senate under date of November 28, 1967 * * *.¹

2. The incorrigible persistence of Complaint Counsel in conducting post-complaint investigations now in the form of a request for a subpoena *duces tecum* * * *.²

On February 14, 1968, the examiner certified this motion to the Commission with a recommendation that the motion to dismiss be denied. We adopt the examiner's recommendation.

The letter which allegedly is responsible for a prejudgment of the facts in this matter was a response, signed by Chairman Paul Rand Dixon, to Senator Warren G. Magnuson's letter of October 10, 1967, "requesting an outline of the Commission's current program in the area of home improvement frauds together with suggestions for additional legislation to improve the enforcement program in this field."

Respondents' complete argument on the disqualification issue is that:

Chairman Dixon, speaking for the Commission, stated on page 2 of the letter that "generally speaking, these firms [home improvement companies] operate through a program of offering phony bargains, easy credit and exaggerated performance claims." The letter goes on to set forth in great detail a restatement of the complaint issued in this matter. There can be no doubt that there has been a prejudgment of this case which destroys the ability of the Commissioners to perform the judicial function imposed upon them by law. The letter cited states on page 6 that two cases are "presently being litigated." This case must be one of those cases.

We have therefore both a general and a specific prejudgment.³

Respondents also cite the *Amos Treat & Co.*⁴ and *Teraco, Inc.*⁵ cases as authority for their position.

The entire context of the letter, which is the basis for this motion, provides the Senate Committee on Commerce with general information relative to problems with which the Committee had a legitimate and constitutional concern. The letter simply advises the Senate Committee that the Commission is aware that problems exist in some segments of the home improvement industry, outlines certain of the problems, and advises in generalized terms what the Commission is doing in this area.

¹ Motion to dismiss, p. 1.

² *Id.* at pp. 1-2.

³ *Id.* at p. 2.

⁴ *Amos Treat & Co. v. Securities and Exchange Commission*, 306 F. 2d 260 (D.C. Cir. 1962).

⁵ *Teraco, Inc. v. Federal Trade Commission*, 336 F. 2d 754 (D.C. Cir. 1964).

In the fifth paragraph on page nine, the letter recognized that the great majority of firms in this industry are both honest and reliable. In quoting Chairman Dixon's letter, respondents inserted the words "home improvement companies" in brackets. The insertion of these words had the effect of altering the meaning of this sentence because it was taken out of the context of the third paragraph. The words "these firms" as utilized in the letter, do not refer to "home improvement companies" in general.

The first paragraph on page two contains an estimate that 50,000 firms are engaged in the sale and installation of residential siding and storm windows. The true meaning of the third paragraph on this page, when read in connection with the two preceding paragraphs, is simply that, of the estimated 50,000 home improvement dealers in this country, a substantial number (without specific identification of any company) operate through a program of offering nonexistent bargains, etc. This, obviously, is not a general prejudgment of home improvement contractors, but a simple recognition that there are many firms in this industry that are engaging in deceptive and unfair trade practices.

Chairman Dixon's letter enumerates 14 operational patterns of the unethical firms in the home improvement industry which have become almost standardized. Among others, the following are mentioned on pages two and three: bogus contracts (No. 5); scare tactics (No. 9); referral selling (No. 10); spiking the job (No. 12); and affirmative misrepresentations (No. 13). Not one of these practices is challenged in the complaint in this case.

Respondents further assert that on page six, the letter referred to two cases which are presently being litigated and that "this must be one of those cases." The Commission is aware that it issued the complaint in this case. This does not mean that the Commission has prejudged the matter. Whether or not respondents are engaged in the deceptive practices described in the complaint will, of course, depend on the facts, and the facts will be judged only after the record is complete. A similar complaint was issued in another home improvement case. After a full hearing before a hearing examiner, the Commission, on appeal, held for respondents and dismissed the complaint.⁶

In the *Amos Treat & Co.* case, the court held that a member of the Securities and Exchange Commission could not participate in a decision of the Commission when prior to the appeal he had engaged in the performance of specific investigative or prosecuting functions of the case on review. This is not even remotely the issue here. The *Texaco* case is likewise inapplicable. Nothing was involved there but the precise words of a particular speech. The speech was construed by the court as indicating a prejudgment because respondents were specifically referred to in a context which could be interpreted as convey-

⁶ *House of Marbet, Inc.*, Docket No. 8578, order issued September 24, 1964 [66 F.T.C. 787].

ing a belief that they had violated the law. There is nothing in the letter in this matter to indicate that any member of this Commission had decided that the respondents, or any other specific home improvement firm, have violated Section 5 of the Federal Trade Commission Act.

An implication of respondents' motion is that administrators must be disqualified from hearing a case if there is some evidence that they have made some measure of adjudgment of the law prior to consideration of the particular case. This would have, if accepted, the singular disadvantage of disqualifying any administrator or judge the second time a particular legal question came before him. As the Supreme Court has said:

Neither the *Tumey* decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions of both law and fact.⁷

And added the Court:

... the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court.⁸

If the Commission's opinions expressed in congressionally required reports would bar its members from acting in unfair trade proceedings, it would appear that opinions expressed in the first [specific industry] unfair trade proceeding would similarly disqualify them from ever passing on another. See *Morgan v. United States*, 313 U.S. 409, 421. Thus experience acquired from their work as commissioners would be a handicap instead of an advantage * * *.⁹

Indeed, it is hornbook law that the kind of bias that disqualifies¹⁰ refers to an "irrevocably closed" view of the particular parties or facts

⁷ *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 702-703 (1948).

⁸ *Id.*, at 703.

⁹ *Id.*, at 702.

¹⁰ Thus, "[i]t has been held that the bias or prejudice alleged must be 'personal,' and that a mere prejudgment of the case is not sufficient." *Marquette Cement Mfg. Co. v. Federal Trade Commission*, 147 F. 2d 589, 592 (7th Cir. 1945), *aff'd*, *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 700-703 (1948).

See *Eisler v. United States*, 170 F. 2d 273, 277-278 (D.C. Cir. 1948), *removed from docket*, 338 U.S. 189 (1949), a case involving the charge that Judge Holtzoff, having investigated "aliens and Communists, including appellant," in his former post as Special Assistant to the Attorney General, was biased and prejudiced. The Court of Appeals for the District of Columbia Circuit held: "Upon review of such an affidavit we do not hesitate to uphold the ruling of the court below that the affidavit should be stricken, for it does not establish bias and prejudice in the personal sense contemplated by the statute, assuming truth in all the facts stated. Prejudice, to require recusation, must be personal according to the terms of the statute, and impersonal prejudice resulting from a judge's background or experience is not, in our opinion, within the purview of the statute" (170 F. 2d at 278); *Lumber Mut. Casualty Ins. Co. of New York v. Locke*, 60 F. 2d 35, 38 (2d Cir. 1932) (held that, while "tactless" for administrator to have written letter saying he had investigated matter to his satisfaction and hearing would be mere formality, the letter "fell short of a statement that nothing that might be sown at such a hearing would change his mind . . ."); *O'Malley v. United States*, 128 F. 2d 676, 680 (8th Cir. 1942), *rev'd on other grounds*, 317

involved in a specific case, not to the adjudicator's preconceptions about the *law*. "Bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification."¹¹ Respondents have failed to demonstrate either a general or specific prejudgment by any member of this Commission of the facts and issues in this proceeding.

The respondents' second contention is likewise without merit. The examiner stated in his certification that he has made no rulings on complaint counsel's current attempts to obtain information from respondents. The examiner has signed no subpoenas nor directed the taking of any depositions at this juncture. Section 3.35 of the rules of practice does not grant respondents any right to appeal until such time as the examiner makes his rulings on complaint counsel's applications. Accordingly, the certified motion to dismiss the complaint will be denied. An appropriate order will be entered.

ORDER RULING ON EXAMINER'S CERTIFICATION OF RESPONDENTS'
MOTION TO DISMISS THE COMPLAINT AND REMANDING TO HEARING
EXAMINER

The hearing examiner herein pursuant to § 3.22 of the Commission's rules of practice, on February 14, 1968, certified to the Commission respondents' February 1, 1968, motion to dismiss the complaint; and

The Commission for the reasons set forth in the accompanying opinion, has determined that respondents' motion to dismiss the complaint should be denied and that the matter should be remanded for further proceedings. Accordingly,

It is ordered, That respondents' motion of February 1, 1968, to dismiss the complaint be, and it hereby is, denied.

It is further ordered, That the matter be, and it hereby is, remanded to the hearing examiner for further proceedings.

U.S. 412 (1943) (held district judge not disqualified to hear contempt case although he had directed U.S. District Attorney to commence it with observation that it was "apparent from the statement of counsel upon both sides here that there is, in the evidence in this regard, ground for believing that there has been a very gross imposition and fraud perpetrated in and upon this court by at least Pendergast, O'Malley and McCormack and there may be others"); *National Lawyers Guild v. Brownell*, 225 F. 2d 552, 555 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 927 (1956) (held Attorney General not disqualified to adjudicate whether Lawyers Guild should be designated a subversive organization although he had made a public speech declaring that it was "because the evidence shows that the National Lawyers Guild is at present a Communist dominated and controlled organization fully committed to the Communist Party line that I have today served notice to it to show cause why it should not be designated on the Attorney General's list of subversive organizations").

¹¹ Davis, 2 *Administrative Law Treatise* 130, 131 (1958). "Our tradition rightly interpreted is that the judge should be neutral toward the question of whether the specific defendant is guilty. It is a perversion of that tradition to demand that the judge be neutral toward the purposes of the law." *Id.* at 138, n. 28, quoting Jaffe. "The Reform of Administrative Procedure," 2 Pub. Ad. Rev. 131, 149 (1942).

LEHIGH PORTLAND CEMENT CO.

Docket 8680. Order and Opinion, Mar. 19, 1968

Order denying a third party's appeal from hearing examiner's order refusing to quash a subpoena duces tecum on behalf of the respondent in this case.

OPINION OF THE COMMISSION

MARCH 19, 1968

This matter is before the Commission upon the interlocutory appeal of Buffalo Concrete, a Division of Joseph Smith & Son, Inc. (Buffalo). This appeal, filed pursuant to § 3.35(b) of the Commission's rules of practice, is based upon the hearing examiner's order of January 31, 1968, denying in part¹ Buffalo's motion to quash a subpoena duces tecum issued to Buffalo by the hearing examiner on behalf of respondent Lehigh Portland Cement Co.

The examiner ruled that the contested subpoena was authorized by § 3.34(b)(2) of the current rules of practice. Buffalo contends that § 3.34(b)(2) does not authorize the issuance of a subpoena duces tecum, returnable at a prehearing conference for discovery purposes, to a nonparty for the production of documents which may not contain or constitute evidence.

Buffalo's argument that the Commission's rules of practice do not authorize the issuance of prehearing subpoenas duces tecum to persons other than complaint counsel or respondent is based upon its reading of § 3.34(b)(2). This subparagraph provides:

(2) Subpoenas duces tecum may be used by any party for purposes of discovery or for obtaining documents for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require any party to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of such party.

Buffalo interprets the second sentence as imposing a limitation on the first by requiring that subpoenas duces tecum, when used for discovery purposes, "only be directed to parties to the litigation." At the same time it concedes that when the proper showing has been made under § 3.33, a subpoena duces tecum for discovery purposes may be directed to persons other than parties to the litigation if the subpoena is to be used in connection with the taking of a deposition. Buffalo does not explain its theory of the basis for such a third-party subpoena if, as it contends, § 3.34 imposes a general limitation on the use of prehearing subpoenas duces tecum for purposes of discovery.

¹ Buffalo also moved that portions of the subpoena duces tecum be quashed on the ground of irrelevancy. The examiner has not yet ruled upon this ground. This appeal is limited to the examiner's denial of the motion to quash on the ground that the Commission's rules do not authorize the issuance of subpoenas duces tecum to third parties.

Subparagraph (b)(1) of § 3.34 specifies the form and method of making application for issuance of "a subpoena requiring a person to appear and depose *or testify and to produce specified documents* * * * at the taking of a deposition, *or at a prehearing conference*, or at an adjudicative hearing * * *" (emphasis added). Subparagraph (2) of that section relates to the same subpoenas duces tecum, and the first sentence clearly authorizes, without restriction, the use of such subpoenas "for purposes of discovery or for obtaining documents for use in evidence, or for both purposes." The second sentence of this paragraph supplements the first sentence, as the hearing examiner has held. It does not, however, limit the scope of the coverage of the first. It simply makes explicit what might otherwise be open to interpretation, namely, that under the rules of practice if a subpoena is used for discovery purposes, it may require any party (as well as a nonparty) to produce and permit the inspection and copying of documents and exhibits therein referred to.

A consideration of the development of this rule illustrates the specific purpose of the second sentence. As noted in the footnote to the second sentence of § 3.34(b)(2), "Orders for the production of documents, provided for under former rules of practice, are no longer used." This footnote (1) calls attention to the fact that the rules of practice no longer provide for the use of orders to produce, and (2) makes clear that the use of subpoenas has been substituted for the use of orders to produce as provided for in former rules.

Section 3.11 of the former rules stated in pertinent part:

§ 3.11 Production of documents.—Upon motion of any party showing good cause therefor and upon such notice as the hearing examiner may provide, the hearing examiner may order any party to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits which constitute or contain evidence relevant to the subject matter involved and which are in the possession, custody, or control of such party * * *.

This rule was very similar to Rule 34 of the Federal Rules of Civil Procedure. It specifically provided for orders requiring the production of documents by a *party*. It had nothing to do with and was not related to any other process which might be available under this or any other rule to require the production of documents by nonparties.² Thus, since the Commission in promulgating its new rules of practice abolished the use of orders to produce (by a party) and substituted therefor the use of subpoenas to require production (also by a party), it merely undertook by the second sentence of § 3.34(b)(2) to make this clear. It did not by this provision limit or restrict the use of subpoenas elsewhere authorized (in the first sentence of § 3.34(b)(2) to require the

² The scope of § 3.34 is in some respects similar to Rule 45 of the Federal Rules of Civil Procedure. Rule 45 authorizes the issuance of subpoenas duces tecum to parties and nonparties for purposes of general discovery before trial as well as for testimony and production of documents at the trial. Moore *Federal Practice and Procedure* 1168, 1453 (1964).

production of documents generally whether for discovery purposes or for obtaining documents for use in evidence, or for both purposes.

Section 3.34, read as a whole, makes it clear that the Commission is authorizing the fullest and most complete discovery practicable.

The rules for adjudicatory proceedings are intended to embody the Commission's conviction that, to the fullest extent practicable, the strategy of surprise and the art of concealment will have no place in a Commission proceeding. Hence, we have also provided for thorough *post-complaint discovery* procedures. It should be obvious that discovery is a two-way street and that it is the hearing examiner's responsibility to insist that both complaint counsel and respondent's counsel be provided with sufficient data to insure an expeditious and completely fair hearing.³

The examiner's ruling was in compliance with the spirit and letter of the rules of practice. Buffalo has failed to make any showing that the examiner abused his discretion or authority. The examiner is responsible for the conduct of adjudicative proceedings, and his rulings on procedural matters in the absence of unusual circumstances will not be reviewed or disturbed by the Commission.⁴ The appeal of Buffalo from the part of the examiner's action denying its motion to quash the subpoena duces tecum on the ground that the subpoena duces tecum issued to Buffalo was not authorized by the Commission's rules will be denied. Accordingly, the motion will be denied and an appropriate order will be entered.

Commissioner MacIntyre did not participate.

ORDER DENYING INTERLOCUTORY APPEAL

This matter is before the Commission upon the interlocutory appeal of Buffalo Concrete, a Division of Joseph Smith & Son, Inc. (Buffalo). This appeal, filed pursuant to § 3.35(b) of the Commission's rules of practice, is based upon the hearing examiner's order of January 31, 1968, denying in part Buffalo's motion to quash a subpoena duces tecum issued to Buffalo on behalf of respondent Lehigh Portland Cement Co. The Commission has determined that the appeal should be denied. Accordingly,

It is ordered, That the appeal of Buffalo Concrete, Division of Joseph Smith & Sons, Inc., from the ruling of the hearing examiner on the motion to quash or limit subpoena duces tecum on the ground that the subpoena duces tecum issued to Buffalo was not authorized by the Commission's rules be, and it hereby is, denied.

By the Commission, with Commissioner MacIntyre not participating.

³ *All-State Industries of North Carolina, Inc.*, Docket No. 8738, order issued November 13, 1967 (emphasis in original) [72 F.T.C. 1020, 1023].

⁴ *Topps Cheiving Gum, Inc.*, Docket No. 8463, order issued July 2, 1963 [63 F.T.C. 2196].

MARLO FURNITURE COMPANY ET AL.

Docket 8745. Order, Mar. 28, 1968

Order denying respondents' motion to discuss complaint and quash hearing examiner's order for a post-complaint investigation.

ORDER DENYING MOTION TO DISMISS AND APPEAL FROM
HEARING EXAMINER'S ORDER

This matter is before the Commission on respondents' motion to dismiss the complaint certified by the examiner with the recommendation it be denied and their appeal from the hearing examiner's order of February 27, 1968, refusing to quash an order for access. The complaint in this proceeding, which issued on September 27, 1967, charges respondents with engaging in fictitious pricing, misrepresenting in certain instances the identity of the seller appearing in their advertisements, and the composition and construction of certain products, failing to advise purchasers that deposits were not refundable, and not disclosing that conditional sales contracts or other instruments of indebtedness may be assigned or transferred to a finance company or other third party to whom the customer thereby becomes indebted.

On February 2, 1968, complaint counsel filed an application for an order requiring access to certain respondents' records relevant to the fictitious pricing allegations set out in paragraphs 4 through 6 of the complaint. By order of the same date, the hearing examiner required respondents to grant access to the inventory stock records and sales vouchers relating to certain items promoted in specific advertisements which have already been identified as Commission Exhibits. Respondents moved to quash the order for access on the ground complaint counsel were embarking on a post-complaint investigation in violation of the Commission's rules. Respondents argue that the request for access goes beyond the "rounding out" permitted once the case is in the adjudicative stage by recent Commission decisions, *viz*, *All-State Industries of North Carolina, Inc., et al.*¹ and *Curtiss-Wright Corporation*,² since Commission counsel seek evidence necessary to prove the charges set forth in the complaint. In addition, respondents assert that the order for access is improper on the ground that it would be unduly burdensome, and that the records sought could have been secured prior to issuance of complaint.

Essentially, the motion to dismiss and the appeal from the hearing examiner's refusal to quash the order for access are based on the

¹ Docket 8738, November 13, 1967 [72 F.T.C. 1020].

² Docket 8703, December 1, 1967 [72 F.T.C. 1027].

same grounds. Respondents argue in effect that in asking for the order of access, complaint counsel conceded they have insufficient evidence to sustain the charges in the complaint. They contend, therefore, the complaint should be dismissed, since the Commission was misled into believing that there was good cause to issue it. The examiner in certifying respondents' motion to dismiss expressly held, however, that the access required by his order is consistent with the Commission's decisions in *All-State Industries*, and *Curtiss-Wright Corporation*.

The determination of whether complaint counsel's request is within the bounds of permissible post-complaint discovery outlined by *All-State Industries* is of necessity largely within the examiner's discretion. He is responsible for the conduct of the proceedings and the definition of the issues; and the decision on whether the criterion of *All-State Industries* has been met depends on the particular facts and circumstances of every case. His ruling on whether requests for discovery are appropriate will, therefore, in the absence of unusual circumstances not be disturbed by the Commission. In this instance, the documents encompassed within the order requiring access on their face do not involve a post-complaint attempt to investigate such as that condemned in *All-State Industries*. In this case, requiring access to stock record cards and sales vouchers for six items of furniture for a ten month period pertinent to advertisements already specifically identified as Commission Exhibits is well within the examiner's discretion.

Respondents' arguments on the basis of these facts that the Commission did not have good cause to issue complaint is also without merit. Contrary to respondents' apparent position, the preliminary investigation need not "encompass the gathering of *all* of the details for each and every transaction which may eventually become an evidentiary item in a subsequent complaint." Complaint counsel may properly after the issues have been defined in a prehearing conference request additional documentation to round out, extend or supply further details for the particular transactions to be pursued in the course of the hearings. *All-State Industries, supra*. Since it appears that the examiner's exercise of discretion in issuing the order complained of was on its face reasonable, the motion to dismiss and respondents' appeal from his refusal to quash will both be denied. Accordingly,

It is ordered, That respondents' motion to dismiss the complaint be, and it hereby is, denied.

It is further ordered, That respondents' appeal from the hearing examiner's order of February 27, 1968, refusing to quash the order for access be, and it hereby is, denied.

It is further ordered, That respondents' request for oral argument be, and it hereby is, denied.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, Apr. 8, 1968

Order denying a third party's motion to quash a subpoena directed to it on behalf of the respondent.

OPINION OF THE COMMISSION

APRIL 8, 1968

This matter is before the Commission upon the interlocutory appeal of District Concrete Company, Inc. (District). This appeal, filed pursuant to § 3.35(b) of the Commission's Rules of Practice, is based upon the hearing examiner's order of February 28, 1968. The order denied District's motion to quash a subpoena duces tecum issued to District by the hearing examiner on behalf of respondent Lehigh Portland Cement Co. and also denied District's incidental request for access to respondent's *ex parte* application for the subpoena duces tecum.

The examiner denied the motion on the ground that it was not made within ten days after service of the subpoena as provided for in § 3.34(b). Moreover, the examiner ruled that District neither requested an extension of time nor showed any "good cause" for an extension as required by § 4.3(b).

The motion to quash was filed thirty days after service and nineteen days after the expiration of time for filing such motion under the Commission's rule. Furthermore, the examiner noted that ten days after receipt of the subpoena, District, by its counsel at that time, executed a stipulation with respondent's counsel binding District to "comply in full with the subpoena duces tecum" by "mailing all responsive documents, correspondence, data and verified summaries" to respondent's counsel by February 9, 1968.¹

The examiner found that District had not demonstrated "good cause" or other extenuating circumstances, which would permit him to allow movant to make its late motion. Additionally, the examiner noted that to allow District's motion would be tantamount to special treatment which "would produce a disorderly result in this case where over 100 witnesses have been subpoenaed to produce documents and over half of them have already informally complied."²

Moreover, the examiner did state that he "is not ruling, however, that after timely motions to quash of contesting witnesses have been passed on, he may not direct that the disposition thereof may in part apply to other witnesses."³

¹ Order denying Motion to Quash, p. 2 (February 28, 1968).

² *Id.*, at p. 3.

³ *Id.*

As to the request for access to the subpoena application, the only reason set forth for this request is that the application "is obviously necessary for District Concrete to know" respondent's reasons for seeking the information.⁴ The examiner stated that granting the request might "prejudice the respondent, inasmuch as respondent prepared its application and supporting grounds, involving the disclosure of its strategy in this case, in respect to two different kinds of subpoenas and in respect to various types of witnesses, in reliance on the *ex parte* status."⁵ The *ex parte* status of a subpoena application submitted by a respondent should not be disturbed without compelling reason. District has not made such a showing.

Section 3.35(b) states that interlocutory appeals will be entertained by the Commission only "upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice." District has failed to meet any of these requisites. In the absence of the required showing, the examiner's rulings upon evidentiary or procedural matters arising in the course of such proceedings will not be reviewed or disturbed.⁶ Accordingly, District's appeal will be denied and an appropriate order will be entered.

Commissioner MacIntyre did not participate.

ORDER DENYING INTERLOCUTORY APPEAL

This matter is before the Commission upon the interlocutory appeal of District Concrete Company, Inc. (District). This appeal, filed pursuant to § 3.35(b) of the Commission's Rules of Practice, is based upon the hearing examiner's order of February 29, 1968. The order denied District's motion to quash a subpoena duces tecum issued to District by the hearing examiner on behalf of respondent Lehigh Portland Cement Co. and also denied District's incidental request for access to respondent's *ex parte* application for the subpoena duces tecum.

For the reasons stated in the accompanying opinion, the Commission has determined that District's appeal should be denied. Accordingly,

It is ordered, That the appeal of District Concrete Company, Inc., from the ruling of the hearing examiner on the motion to quash subpoena duces tecum and for production of the application therefor be, and it hereby, is, denied.

By the Commission, with Commissioner MacIntyre not participating.

⁴ Appeal to the Commission, p. 5.

⁵ Order, p. 4.

⁶ See, e.g., *Topps Chewing Gum, Inc.*, Docker S463 (order issued July 2, 1965).

REPUBLIC CONSTRUCTION COMPANY, INC., ET AL.

Docket C-1164. Order, Apr. 8, 1968

Order denying petition to reopen proceeding for the purpose of amending a prohibition in the order.

OPINION AND ORDER DENYING PETITION TO REOPEN THE PROCEEDING
FOR THE PURPOSE OF AMENDING ORDER TO CEASE AND DESIST

This matter is before the Commission upon the petition of respondents Lester Mossman and Irving Kaplow, filed March 4, 1968, termed a petition for modification of decision and order and construed to be a request for a reopening of the proceeding and for a modification of the order to cease and desist pursuant to § 3.72(b) (2) of the Commission's Rules of Practice. The petitioners allege that the order of the Federal Trade Commission issued January 31, 1967 [71 F.T.C. 84], based upon a consent agreement, prohibits respondents, in paragraph 3 thereof, from representing that:

Any commission is given by respondents to purchasers of respondents' products for referrals who subsequently purchased respondents' products;

that the petitioners intended such paragraph to contain the modifying phrase "unless such commissions are in fact given as represented," and that they believe the absence of such qualifying language was a mistake. The Acting Director of the Bureau of Deceptive Practices filed an answer opposing such requested reopening and modification of the order, and in the event respondents produce evidence supporting their position that significant payments of referral commissions are now being made, proposing an alternative form of order.

The petitioners have made no showing, other than the bare assertion that they did not intend the unqualified prohibition in paragraph 3, that this provision is contrary to the understanding of the parties at the time of the execution of the consent agreement. Respondents do not claim that there is any ambiguity or unclarity in the challenged provision nor do they state any circumstances which might suggest an original misunderstanding as to its meaning.

Moreover, the petitioners have made no sufficient showing under § 3.72(b) (2) of the Commission's Rules of Practice that changed conditions of fact or law require the modification of paragraph 3 or that the public interest so requires the modification of paragraph 3 or that ing for modification of an order must state the changes desired, the grounds therefor, and must include, when available, such supporting evidence and argument as will, in the absence of a contest, provide a basis for a Commission decision on the petition. Petitioners have made no such showing. All that they have done is to include in their petition the unsupported assertion that they and other companies in their marketing area and throughout the United States "have offered and given

[c]ommissions and [g]ifts." Petitioners do not claim, as we construe their statement, that they are presently offering or paying commissions and gifts for referrals; that they have any current program for such payments, or even that they anticipate beginning such a program. In other words, they have not shown any presently existing change in law or fact or public interest considerations which would constitute grounds for reopening the matter for the purpose stated. Accordingly,

It is ordered, That the request of Lester Mossman and Irving Kapor for the reopening of this proceeding and for the modification of the order to cease and desist be, and it hereby is, denied.

AMERICAN BRAKE SHOE COMPANY

Docket 8622. Order and Memorandum, Apr. 9, 1968

Order denying respondent's motion to disqualify Commissioner Jones and for additional information and stay.

MEMORANDUM OF COMMISSIONER JONES IN RESPONSE TO THE MOTION OF RESPONDENT AMERICAN BRAKE SHOE COMPANY THAT SHE WITH- DRAW FROM THIS PROCEEDING

MARCH 29, 1968

Respondent American Brake Shoe Company by motion dated March 26, 1968, has requested that I disqualify myself from participation in the decision in the above-captioned case. If I decide not to disqualify myself, respondent moves the Commission to determine that I be disqualified from such participation.

As alleged grounds for its motion, respondent relies on the facts communicated to it in my letter of March 12, 1968, that subsequent to the oral argument of this case before the Commission, the attorney of record, V. Rock Grundman, Jr., joined my staff as attorney-advisor. I am attaching a copy of my letter to respondent which further advised that I have not discussed this case in any way with Mr. Grundman, and do not intend to do so in the future and that Mr. Grundman and my other assistants are under instructions not to discuss this case among themselves.

Respondent, American Brake Shoe Company, has also moved for additional information with respect to whether Mr. Grundman has "communicated about this case with any persons on the staff of the Chairman or any Commissioner" and whether such persons have "subsequently communicated about the case with the Chairman or any Commissioner who participated in the decision."

Since I wish the public record to be as complete as possible on this matter, I have asked Mr. Grundman to furnish me with a statement

as to any and all communications he may have had with any Commissioner or member of the staff of any Commissioner about this case since he has been on my staff. A copy of Mr. Grundman's statement is attached hereto.

I am fully cognizant of the provisions of Section 5(c) of the Administrative Procedure Act and of Section 4.7 of the Commission's Rules of Practice with respect to *ex parte* communications and of Canon 17 of the Canon of Judicial Ethics. There has been no breach either of the letter or of the spirit of any of my legal, ethical or moral obligations as reflected in any of these provisions and principles. Accordingly, there is no ground on which I should or must disqualify myself. It is my decision, therefore, not to disqualify myself from participation in this proceeding.

I shall not be present and shall not participate in any deliberation or decision by the Commission on respondent's alternate request that I be disqualified from participation by the Commission.

EARL W. KINTNER, Esq.,
RALPH S. CUNNINGHAM, JR., Esq.,
GEORGE KUCIK, Esq.,
ARENT, FOX, KINTNER, PLOTKIN & KAHN,
1815 H Street, N.W.,
Washington, D.C. 20006

HUGH J. KELLY, Esq.,
Counsel for Complaint,
Bureau of Restraint of Trade,
Federal Trade Commission,
Washington, D.C. 20580

Re: In the Matter of American Brake Shoe Company
Docket No. 8622

GENTLEMEN:

I wish to advise you that in July, 1967, subsequent to the oral argument before the Commission in the above-captioned case, one of the complaint counsel, Mr. V. Rock Grundman, joined my staff as an attorney-advisor.

I have never discussed this case with Mr. Grundman. I do not intend to discuss this case with Mr. Grundman nor ask him to furnish me with any assistance on any matter which may arise in connection with this case. Furthermore, I have instructed Mr. Grundman not to discuss this case with any member of my staff, as an added precaution in case I decide to utilize the assistance of another member of my staff in connection with this case.

I wish to advise you that I intend to participate in the decision

in this case, but I wanted you to know of Mr. Grundman's present connection with my office and of my instructions to him.

Very sincerely yours,

MARY GARDINER JONES,
Commissioner.

AFFIDAVIT OF V. ROCK GRUNDMAN, JR.

I received this day copies of (1) a motion for stay, (2) a motion for additional information and (3) a motion for disqualification of Commissioner Jones filed by respondent in this matter. The motion for additional information requests information including but not limited to:

(a) whether Mr. Grundman has communicated about this case with any persons on the staff of the Chairman or any Commissioner and

(b) whether any of those persons subsequently communicated about the case with the Chairman or any Commissioner who participated in the decision.

Since the date of oral argument in this case in February of 1967 I have done nothing related to the case in any way. I have written no letters, memoranda, or anything else to any person either within or without the Commission. I have spoken to no Commissioners, their individual staffs nor member of the Commission's staff with respect to the case except to mention to Commissioner Jones, prior to accepting the position as attorney advisor, that I was counsel on the case, I also mentioned to each of Commissioner Jones' other staff members that I was counsel on the case to ensure that nothing related to the case would come to my attention.

In my position as attorney advisor with Commissioner Jones I have seen no writing nor participated in any conversation nor heard any conversation dealing with the merits of the case. The only thing I have seen which mentions the case is a routine circulation put out by the Secretary of the Commission listing the names of the cases pending with the Commission, the docket number and the date of the oral argument.

The only other person with whom I have discussed the case since the oral argument is Mr. George R. Kucik, attorney for respondent. That conversation was a casual one on meeting in the street and consisted of mutual speculation on when the Commission decision would be forthcoming and what we might do differently if the case were to be tried again.

The foregoing is true and correct to the best of my knowledge and belief.

V. ROCK GRUNDMAN, JR.

ORDER DENYING MOTIONS FOR DISQUALIFICATION, ADDITIONAL
INFORMATION AND STAY

Respondent moved on March 26, 1968, that Commissioner Jones disqualify herself from participating in the decision in this proceeding. In the alternative, respondent has moved that if Commissioner Jones does not disqualify herself that the full Commission consider the request for disqualification. In addition, respondent has filed a motion for additional information and a motion for a stay in the proceedings until five (5) days after disposition of the motion for additional information and the motion for disqualification filed by respondent on the same date. Commissioner Jones for the reasons stated in her memorandum attached hereto has decided not to disqualify herself. Mr. Grundman, complaint counsel in this proceeding, has filed an affidavit in response to respondent's motion for additional information, a copy of which is also attached.

Section 7(a) of the Administrative Procedure Act clearly empowers the Commission to determine whether a presiding officer conducting a "hearing" on behalf of the Commission is subject to "personal bias or disqualification." It is not so clear whether this provision was meant to apply to the participation of an individual agency member in final or appellate determinations. The inquiry on the basis of which such motions must be decided is necessarily subjective. Weighing the ability of one of its own members to make an objective judgment is of necessity a difficult and delicate responsibility for a tribunal. In addition, the existence of such a power to disqualify carries with it an inherent danger of abuse as a potential instrument for suppression of dissent.

Under the Commission's practice, disqualification is treated as a matter primarily for determination by the individual member concerned, resting within the exercise of his sound and responsible discretion. In the Commission's view, this practice is proper and consistent with the law and in the instant proceeding no basis for departing from that practice has been shown. The motion for disqualification, the motion for a stay of the proceedings, and the motion for additional information, except to the extent that it has been satisfied by Commissioner Jones's memorandum and Mr. Grundman's affidavit are denied. Accordingly,

It is ordered, That the motion for disqualification of Commissioner Jones be, and it hereby is, denied.

It is further ordered, That the motion for additional information, except to the extent already satisfied by Commissioner Jones's memorandum and Mr. Grundman's affidavit, be, and it hereby is, denied.

It is further ordered, That the motion for a stay of the proceedings be, and it hereby is, denied.

By the Commission, with Commissioner Jones not participating.

UNIVERSE CHEMICALS, INC., ET AL.

Docket 8752. Order and Opinion, Apr. 9, 1968

Order denying appeal from hearing examiner's order scheduling hearings in more than one place.

DISSENTING OPINION

APRIL 9, 1968

BY ELMAN, *Commissioner*:

Under Section 3.41(b) of the Commission's Rules of Practice, hearings in more than one place are supposed to be the rare exception, and not the rule. The Rules say that they may be allowed by the hearing examiner only in "unusual and exceptional circumstances [and] for good cause stated on the record." In this case, the only justification for the hearing examiner's order is a desire to avoid inconvenience to witnesses and extra expense to the Commission. That is not enough. The Commission should firmly hold the line against retreating to the old pre-1961 peripatetic hearings. We should instruct the hearing examiners that the Rules of Practice mean what they say. Actions speak louder than words—by upholding the hearing examiner's order here, the Commission tolerates unnecessary delays in the conduct of adjudicative proceedings.

ORDER DENYING PERMISSION TO FILE INTERLOCUTORY APPEAL

Respondents, on February 29, 1968, filed a motion requesting permission to file an interlocutory appeal, under Section 3.23(a) of the Commission's Rules of Practice, from the hearing examiner's order filed February 16, 1968, granting in part and denying in part complaint counsel's motion for hearings in more than one place. As a result of the hearing examiner's order, hearings were scheduled to be held in Chicago, Illinois, Evansville, Indiana, Omaha, Nebraska, and Minneapolis, Minnesota. Complaint counsel, on March 5, 1968, filed an answer opposing respondents' request.

Respondents argued that, because they operate an assertedly small business enterprise which requires their presence for its operation, the scheduling of hearings in more than one place would be financially oppressive to them.

In order to facilitate our consideration of whether the hearing examiner's order satisfies the requirements of Section 3.14 of the Commission's Rules permitting the hearing examiner to order hearings in more than one place "in unusual and exceptional circumstances" or whether, on the other hand, appeal should be granted under Section 3.23(a) as involving substantial rights and materially affecting the final decision,

we directed the filing of supplemental affidavits by the parties setting forth respectively their reasons in support of their respective positions. The affidavits have been duly filed.

Section 3.41(b) of the Commission's Rules requires that hearings be held in one place insofar as practicable. The party requesting departure from that Rule has the burden of showing the unusual and exceptional circumstances justifying hearings at more than one place.

We are at pains to point out that matters such as that involved here are best left to the sound discretion of the hearing examiner, and we are satisfied from the affidavits submitted that complaint counsel has made sufficient showing warranting holding of hearings in more than one place. Thus, in the circumstances presented we do not believe that the hearing examiner has abused his discretion in this matter. Accordingly,

It is ordered, That respondents' request for permission to file an interlocutory appeal, filed February 29, 1968, be, and it hereby is, denied.

Commissioner Elman dissented and has filed a statement.

CONSOLIDATED MORTGAGE COMPANY ET AL.

Docket 8723. Order, Apr. 19, 1968.

Order reopening case and setting aside the complaint and order as to corporate respondent.

ORDER REOPENING AND DISMISSING COMPLAINT AND SETTING ASIDE ORDER AS TO CORPORATE RESPONDENT

Respondents, on March 18, 1968, filed with the Commission a petition, requesting the Commission to reconsider its opinion and final order issued February 19, 1968 (p. 376 herein), on the grounds that the Commission assertedly failed or did not have the opportunity to consider respondents' submission of February 21, 1968, relating to a petition for dissolution filed in Superior Court of Rhode Island and that the Commission assertedly did not follow an interpretation of law as contained in certain cases referred to, and further requesting the Commission to grant respondents a reasonable time within which to submit to the Commission a final court order dissolving respondent corporation and to grant respondents an oral hearing on their petition. Complaint counsel, on March 25, 1968, filed an answer in opposition to the petition.

Subsequently, on April 8, 1968, respondents filed a letter with the Commission, enclosing a copy of the final decree of Superior Court of the State of Rhode Island, entered April 3, 1968, ordering that Consolidated Mortgage Company be dissolved. Complaint counsel filed

a supplemental answer April 11, 1968, in which he states he is opposed to any reconsideration of the Commission's decision and final order but that he has no objection to the exclusion of the corporate respondent from the order to cease and desist in view of its dissolution.

In the circumstances, the Commission is of the opinion that this proceeding should be reopened pursuant to § 3.72(a) of the Commission's Rules of Practice, the complaint dismissed and the order set aside as to the dissolved corporate respondent. This action will render moot or irrelevant respondents' other specific requests. Accordingly,

It is ordered, That this matter be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist as to respondent Consolidated Mortgage Corporation be, and it hereby is, set aside and that the complaint as to such respondent be, and it hereby is, dismissed.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion. May 14, 1968

Order granting respondent's request that complaint counsel furnish him with a list of acquisitions of portland cement companies manufacturing ready-mixed concrete for the years 1965 through 1968.

OPINION OF THE COMMISSION

MAY 14, 1968

On April 30, 1968, counsel supporting the complaint requested: (1) Commission authorization to disclose certain confidential information and (2) permission to file an interlocutory appeal pursuant to § 3.23(a) of the rules of practice. Both requests are predicated upon the hearing examiner's order of April 23, 1968, requiring complaint counsel to furnish this information to respondent by April 30, 1968.¹ Pursuant to respondent's requests for admissions of fact and disclosure of information dated April 1, and April 3, 1968, the examiner ordered complaint counsel to divulge information " * * * insofar as known by complaint counsel or as they have reason to believe" concerning the identities and dates of acquisitions of ready-mixed concrete companies by cement companies. Complaint counsel wish to appeal from this portion of the order. Additionally, the examiner ordered complaint counsel to either furnish *all* such information from Commission files, regardless of whether they had knowledge thereof, or in lieu thereof, to seek authorization from the Commission to divulge this information. Respondent in its April 1, and April 3, 1968, requests asked for information in addition to that which the examiner recommends be disclosed. However, respondent, in its May 2, 1968, Opposition to Com-

¹ The effective date of the hearing examiner's order was stayed by the Commission on May 2, 1968.

plaint Counsel's Request for Permission to File an Interlocutory Appeal, urges support for the examiner's actions. Furthermore, since respondent has raised no objection to the scope of the information recommended for disclosure, we assume that the earlier additional requests are not before us.

Complaint counsel base their request for appeal upon the following assertions: (1) the information required by the examiner's order is confidential within the meaning of § 4.10 of the Commission's rules of practice, (2) respondent has not made a proper request for this information, (3) the hearing examiner has no authority to order disclosure, and (4) complaint counsel have no authority to disclose confidential information without Commission authorization.

It is evident that the orderly procedures specified by the Commission's rules of practice have not been followed in this instance.² However, complaint counsel have specifically requested Commission authorization to disclose the information covered by the examiner's order. Furthermore, on May 1, 1968, the examiner filed a certification to the Commission in which he stated: "Insofar as this [complaint counsel's request] may be regarded as a *motion* authorizing disclosure (and entirely apart from the request for permission to appeal) the examiner, having no authority to rule on a motion authorizing disclosure of confidential information, certifies the motion to the Commission under Section 3.22(a) of the Rules, and makes an affirmative recommendation." (Emphasis in original.) Inasmuch as we grant the disclosure requested by complaint counsel and the examiner, the appeal is moot.

The examiner has recommended that respondent's counsel be furnished with a list of acquisitions for the years 1965 through 1968, of portland cement companies engaged in the manufacture of ready-mixed concrete, containing the following:

- (1) The name of the acquiring cement manufacturer.
- (2) The name of the acquired ready-mixed concrete company.
- (3) The date of the acquisition.

The only documents which would appear to contain such information are FTC Forms A (1-67) contained in File No. 681 0620, "Investigation to Effectuate Enforcement Policy With Respect to Vertical Mergers in Cement Industry."

The Commission, acting upon the examiner's certification and complaint counsel's request for permission to disclose, has determined to order disclosure. Further, the Commission has considered this matter and has determined that the respondent's interest in being furnished with this information for the purpose of making its defense in this proceeding, and the Commission's interest in preventing unnecessary

² See *Lehigh Portland Cement Co.*, Docket 8680, order issued February 15, 1968 [p. 1237 herein].

or improper disclosure of information concerning the operation of many portland cement companies, including competitors of respondent, which have filed special reports pursuant to Commission orders, can best be accommodated and satisfied by establishing certain conditions and safeguards upon the disclosure of this information to counsel for respondent.³

An appropriate order will be entered.

Commissioner MacIntyre did not participate.

ORDER DIRECTING DISCLOSURE OF INFORMATION

The Commission has determined, as stated in the accompanying opinion, that complaint counsel's request for permission to disclose certain information, as certified by the examiner, should be granted. Accordingly,

It is ordered, That, without delay, complaint counsel furnish respondent's counsel with a list of acquisitions for the years 1965, 1966, 1967 and 1968 of portland cement companies engaged in the manufacture of ready-mixed concrete. The list shall contain the following:

- (1) The name of the acquiring cement manufacturer.
- (2) The name of the acquired ready-mixed concrete company.
- (3) The date of the acquisition.

This list shall be compiled from documents contained in File No. 681 0620, "Investigation to Effectuate Enforcement Policy With Respect to Vertical Mergers in Cement Industry."

It is further ordered, That said list may be furnished only to counsel for respondent who have filed an appearance and are actually engaged in the defense of this proceeding, and only for the purpose of preparing such defense, and no information contained in such list shall be disclosed to any other person, including any officer or employees of respondent.

It is further ordered, That counsel for respondent may make application to the hearing examiner for permission to disclose said list or any information contained therein, to other specified persons for use in the defense of this proceeding. Application for such permission shall identify the names and positions of the persons to whom the list or information would be disclosed and the purposes for which this would be examined or used by those persons. Permission may be granted by the hearing examiner only upon a showing that such disclosure is necessary for the respondent's defense in this proceeding.

It is further ordered, That the hearing examiner's order of April 23, 1968, be, and it hereby is, vacated.

It is further ordered, That complaint counsel's request for permission to file an interlocutory appeal be, and it hereby is, denied.

By the Commission, with Commissioner MacIntyre not participating.

³ See, e.g., *The Grand Union Co.*, 62 F.T.C. 1491 (1963).

SCHOOL SERVICES, INC., ET AL.

Docket 8729. Order and Memorandum, May 14, 1968

Order denying the respondents' motion that the Chairman be disqualified from hearing this case.

MEMORANDUM OF CHAIRMAN DIXON

MAY 14, 1968

Respondents, School Services, Inc., et al., by motion filed May 3, 1968, have requested me to withdraw from further participation in this proceeding, or in the alternative that the Commission determine that I be disqualified from such further participation.

The complaint in this matter charges, in part, that respondents have falsely represented that they offer a course of instruction that qualifies students to be airline stewardesses and that Cinderella Career College and Finishing School is a college. In his initial decision issued on January 26, 1968 [74 F.T.C. 920, 926], the hearing examiner found that the evidence does not sustain the charges and ordered that the complaint be dismissed. The case is now pending before the Commission upon appeal of counsel supporting the complaint.

On March 15, 1968, I delivered an address before the Government Relations Workshop of the National Newspaper Association. Respondents, in their motion, quote the following excerpt from that speech:

If really effective brakes are to be applied, they will have to be applied by business itself. Government can throw an assist, but whether our system of free competitive enterprise can survive depends on the vigor with which reputable business can serve the consumer. Granted that this is a very broad generalization, it is nonetheless valid. Consider, for example, how it fits the newspaper business. What kind of vigor can a reputable newspaper exhibit? The quick answer, of course, pertains to its editorial policy, its willingness to present the news without bias. However, that is only half the coin. How about ethics on the business side of running a paper? What standards are maintained on advertising acceptance? What would be the attitude toward accepting good money for advertising by a merchant who conducts a "going out of business" sale every five months? *What about carrying ads that offer college educations in five weeks, fortunes by raising mushrooms in the basement, getting rid of pimples with a magic lotion, or becoming an airline's hostess by attending a charm school?* Or, to raise the target a bit, how many newspapers would hesitate to accept an ad promising an unqualified guarantee for a product when the guarantee is subject to many limitations? Without belaboring the point, I'm sure you're aware that advertising acceptance standards could stand more tightening by many newspapers. *Granted that newspapers are not in the advertising policing business, their advertising managers are savvy enough to smell deception when the odor is strong enough.* And it is in the public interest, as well as their own, that their sensory organs become more discriminating. The Federal Trade Commission, even where it has jurisdiction, could not protect the public as quickly. (Emphasis added by respondents.)

It is respondents contention that the emphasized references to advertisements offering "college educations in five weeks" and "becoming an airline's hostess by attending a charm school" were "unmistakenly an allusion to the allegations in the present case." They request that I withdraw for the reason that my remarks reflect prejudgment of the issues or, if I have not prejudged the issues, that I should withdraw to assure the appearance of complete fairness in this proceeding.

In the first place, respondents' assertion that the advertising representations used as examples in my remarks "unmistakenly" allude to the allegations in this matter is completely without foundation. Indeed, respondents make no attempt to show any correlation between the charges before the Commission and my remarks. My reference was to claims for a college education in five weeks, but there is no allegation in the complaint that respondents' courses are limited to such a time period. In fact, the examiner's decision, which issued before my remarks were made, states that respondents' courses extend for an appreciably longer period of time. The reference to advertising representations that a person may become an airline hostess by attending a charm school is likewise not related to any questions involved in this case at the time my remarks were made. The complaint is directed in part at the respondents' alleged advertising claims that one of their specific courses of instruction qualifies students to be airline stewardesses. The issue before the Commission, however, is not the truth or falsity of such claim¹ but whether or not respondents have made the alleged representation. And this, obviously, is not a matter to which my remarks were directed.

In referring to the advertising representations mentioned in my remarks, I had no particular case in mind. I merely listed certain principles in advertising which, based on my judgment and experience, would indicate a possible breach of acceptable standards.

In my opinion, this matter falls squarely within the holding of the Supreme Court in the *Cement Institute* case.² In that case, the Commission issued a formal complaint based on an earlier investigation of the basing point system as used in the cement industry. Prior to complaint, the Commission had reported to Congress that the industry's basing point system was a price fixing device and was unlawful under the Sherman Act and the Federal Trade Commission Act. In denying respondents' motion for disqualification of the Commission, the Supreme Court stated that:

Neither the *Tumey* decision nor any other decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types

¹ The parties stipulated that none of respondents students, merely because they had completed a course of instruction in Cinderella Career College & Finishing School, qualify for a job as an airline stewardess (Initial Decision, p. 40) [74 F.T.C. 920, 958-959].

² *Federal Trade Commission v. Cement Institute*, 333 U.S. 683 (1948).

of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court. (333 U.S. at 702-703.)

It is established law that the kind of personal bias that requires disqualification is that which has led to an irrevocably closed mind on the issues. On this point, the Supreme Court in the *Cement Institute* case has stated that:

In the first place, the fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence—volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities. (333 U.S. at 701.)

The court of appeals in commenting on this question of prejudice in *Eisler v. United States*, 170 F. 2d 273 (D.C. Cir. 1948) has stated that "Prejudice, to require recusation, must be personal according to the terms of the statute, and impersonal prejudice resulting from a judge's background or experience is not, in our opinion, within the purview of the statute."

The issues in this case have been fully litigated and the record is before us. My decision on these issues will be based solely on the evidence in this record. If my decision is adverse to respondents, and I am in the majority, respondents will have an absolute, statutory right to test, in the courts, whether the majority's findings are supported by evidence.³

As to the "appearances" contention in respondents' motion, I have stated in my memorandum refusing to withdraw from participation in *Bakers of Washington*, Docket 8309 (November 4, 1964) [66 F.T.C. 1562, 1566], that this principle "is not a rigid command of the law, compelling disqualification for trifling causes, but a consideration addressed to the discretion and sound judgment of the administrator himself in determining whether, irrespective of the law's requirements, he should disqualify himself." The Supreme Court's decision in the *Cement Institute* case, *supra*, makes it clear that an administrator's duty is presumed, in the absence of clear proof to the contrary, to be not only regular in all respects but affirmatively in the public interest.

³ Section 5(c) of the Federal Trade Commission Act provides in part that any party "required by an order of the Commission to cease and desist . . . may obtain a review of such order" in the appropriate court of appeals. "Upon such filing of the petition and transcript the court . . . shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission. . . . The findings of the Commission as to the facts, if supported by evidence, shall be conclusive" (emphasis added).

As I further pointed out in my memorandum in the *Bakers of Washington* matter, this principle has been summed up in the statement of a recent commentator that "every adjudicator has a positive duty to fulfill his adjudicative functions unless actually disqualified, and both the individual parties to a controversy and the public at large have a vested interest in such administrator's participation in the case involved. Consequently, while an administrator should scrupulously search his conscience to test his impartiality, it is almost as great a fault to employ self-disqualification too readily as too sparingly."⁴

I can state without reservation that I have scrupulously searched my conscience and that I have not prejudged the issues in this case, nor do I harbor any bias or prejudice against the respondents. My decision will be based entirely on the facts contained in the record. Accordingly, it is my decision not to withdraw from participation in this proceeding.

I shall not participate in any deliberation or decision by the Commission on respondents' alternate request.

ORDER DENYING MOTION TO DISQUALIFY

Respondents, School Services, Inc., et al., by motion filed May 3, 1968, requested that Chairman Dixon withdraw from further participation in this proceeding, or, in the alternative, that the full Commission disqualify Chairman Dixon. Chairman Dixon, for the reasons stated in the attached memorandum, has decided not to withdraw from participation in any further proceedings in this matter.

A tribunal which is asked to rule on the ability of one of its own members to make an objective and impartial judgment faces a most difficult and delicate responsibility. This responsibility cannot be treated lightly.

Traditionally, the Commission has viewed requests for disqualification as a matter primarily to be determined by the individual member concerned, leaving it within the exercise of his sound and responsible discretion. This is only proper and consistent with the law and no basis for departing therefrom has been demonstrated in the instant proceeding. Accordingly,

It is ordered. That the motion for disqualification of Chairman Dixon be, and it hereby is, denied.

By the Commission, with Chairman Dixon and Commissioner Elman not participating.

⁴ Comment "Prejudice and the Administrative Process," 59 *Northwestern Univ. L. Rev.* 216, 233-234 (May-June 1964).

SWINGLINE INC.

Docket 8759. Order, May 24, 1968

Order denying respondent's request that proceeding be withdrawn from adjudication.

ORDER DENYING REQUEST TO WITHDRAW PROCEEDING FROM
ADJUDICATION

This matter is before the Commission upon the hearing examiner's certification of May 10, 1968, of respondent's request to certify a motion to withdraw the proceeding from adjudication. The hearing examiner recommends that the motion be denied.

Although § 2.34(d) of the Rules of Practice and Procedure provides that the consent order procedure is not available after complaint has issued, it also provides that the Commission, upon request, may in exceptional and unusual circumstances and for good cause shown withdraw a proceeding from adjudication in order to negotiate a consent order.

In its motion respondent states that since the issuance of the complaint it has obtained new counsel and it now desires the opportunity to negotiate a consent order. In addition, respondent claims that changed circumstances warrant withdrawal of the matter from adjudication.

Respondent has not met the exceptional and unusual circumstances requirement nor shown good cause which would warrant withdrawal of the proceeding from adjudication. It should be noted that prior to the issuance of the complaint an attempt was made to settle the matter by entry of a consent order to cease and desist. Moreover, as a general rule the Commission will not entertain a request to withdraw a proceeding from adjudication unless it is accompanied by at least a concrete proposal of settlement by respondent. In the instant proceeding, respondent has done no more than express a desire to dispose of the matter through negotiation of a consent order without even submitting to the Commission, for its consideration, a proposed order to cease and desist.

For these reasons we agree with the hearing examiner that the requirements of § 2.34(d) for withdrawal of the proceeding from adjudication have not been met. Accordingly,

It is ordered, That the request to withdraw the proceeding from adjudication be, and it hereby is, denied.

SUBURBAN PROPANE GAS CORPORATION

Docket 8672. Order and Opinions, June 3, 1968

Order granting complaint counsel's appeal from hearing examiner's ruling against amending complaint counsel's trial brief.

OPINION OF THE COMMISSION

JUNE 3, 1968

This matter is before the Commission on the interlocutory appeal of counsel supporting the complaint from the hearing examiner's order of October 20, 1967, granting respondent's motion to strike an amendment to complaint counsel's trial brief and respondent's answer in opposition to the appeal. Also before the Commission is the hearing examiner's certification of complaint counsel's motion of October 18, 1967, to postpone commencement of formal hearings from November 13, 1967, to February 5, 1968, together with the examiner's recommendation that said motion be denied and that the proceeding be dismissed for want of prosecution. The hearing examiner has also certified to the Commission, with request for instructions, complaint counsel's request for subpoenas returnable during the week of November 13 through November 17, 1967.

I. Complaint Counsel's Appeal from the Hearing Examiner's Order of October 20, 1967

The question presented by this appeal concerns complaint counsel's initial burden in coming forward with evidence in a proceeding under Section 2(f) of the Clayton Act. The facts relevant to this appeal are as follows:

On February 28, 1967, respondent, having apparently convinced the hearing examiner that it purchased in larger quantities and was served by different methods than its competitors, asked the examiner for an order which in substance would state (a) that complaint counsel would have the burden of showing that the difference in methods by which Suburban was served by its supplier, Phillips Petroleum Company (Phillips), and the different quantities involved, compared with alleged disfavored competitors, could not give rise to sufficient savings to cost justify the alleged differential in prices between Suburban and said disfavored competitors, and that Suburban knew or should have known that the differences involved as to methods and quantities could not have given rise to sufficient pertinent savings to justify such differentials, and (b) require that complaint

counsel amend their previously filed trial brief and therein allocate exhibits and otherwise specify in indicated detail the evidence to be offered on the cost justification issue.

The hearing examiner denied this request, stating that he "assumes that complaint counsel are familiar with the legal precedents which respondent has cited and will interpret them correctly with reference to the evidentiary burden imposed upon complaint counsel to prove the absence of cost justification." On appeal from this denial, the Commission pointed out in its order of May 25, 1967 [71 F.T.C. 1695], that the examiner had erred in refusing to resolve the question raised by respondent and instructed him to hear complaint counsel in answer to respondent's motion and to dispose of the matter in such a way as to provide respondent with sufficient knowledge of the evidence complaint counsel would adduce on the cost justification issue to allow respondent adequately to prepare its defense. We also made the following comment with respect to complaint counsel's burden in those instances where the favored buyer purchases in different quantities or by different methods than its competitors [71 F.T.C. 1699]:

* * * assuming the matter to involve different methods or quantities, if complaint counsel show such facts and circumstances as would have given the buyer reason to believe, based on the knowledge available to him, including knowledge of the methods of doing business in the particular industry, that the different methods or quantities could not have resulted in cost savings sufficient to justify the differential allegedly accorded him, they would have met their initial burden.

On June 26, 1967, the hearing examiner entered a pretrial order which provided in pertinent part:

* * * that complaint counsel shall have the burden of showing, as part of their prima facie case, that the difference in the methods by which Suburban was served by Phillips and the difference in the quantities purchased by Suburban from Phillips, as compared with the alleged disfavored competitors, could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the alleged differential in prices paid to Phillips by Suburban as compared with prices paid to Phillips by the alleged disfavored competitors *and* that Suburban knew or should have known that the difference in the methods by which it was served and the difference in the quantities which it purchased could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the aforesaid price differentials * * *.

Complaint counsel disagreed with this order since they interpreted it as requiring them to introduce into evidence a cost study which would indicate statistically that the discriminatory prices accorded to respondent were not in fact cost justified. Since they so construed the order they requested permission to file an interlocutory appeal. We denied this request by order of July 20, 1967 [72 F.T.C. 989], but specifically pointed out that if the hearing examiner intended by the order to require complaint counsel to introduce a formal cost study

such order would be inconsistent with applicable case law. We went on to say that we did not interpret the pretrial order as requiring the introduction by counsel supporting the complaint of a cost study and we assumed that the hearing examiner would apply the pretrial order in accordance with the Commission's order of May 25 [72 F.T.C. 1695]. It seems, however, that this assumption was incorrect.

On September 22 complaint counsel, pursuant to the examiner's order of June 26, filed an amendment to trial brief allocating exhibits and summarizing expected testimony of witnesses with respect to the cost justification issue. Respondent then moved that this amendment be stricken on the ground that it failed to comply with that part of the examiner's order which required a showing that differences in methods and quantities of purchases could not give rise to sufficient savings in cost to justify the price differential. Respondent also requested that the examiner either direct complaint counsel to comply with the order or dismiss the complaint. On October 20, the examiner issued the following order striking the amended trial brief:

IT IS ORDERED that respondent's motion filed October 13, 1967, to strike complaint counsel's Amendment to Trial Brief filed September 22, 1967, be, and hereby is, granted; and

IT IS FURTHER ORDER that complaint counsel comply with the hearing examiner's order of June 26, 1967, within two weeks after the Federal Trade Commission acts upon the hearing examiner's recommendation, being forwarded this date, that this proceeding be dismissed, if the Commission does not dismiss this proceeding.

It is from this order that the present appeal is taken.

Unfortunately, the hearing examiner has failed to indicate in what respect he found the amended trial brief to be deficient. It seems fairly obvious, however, that he accepted the arguments made in respondent's motion to strike the amendment. We note in this connection that respondent argued to the examiner that the Commission, by refusing to grant complaint counsel's request to file an interlocutory appeal from the examiner's order of June 26, not only upheld that order but also approved the examiner's interpretation of the order as requiring the introduction of a statistical cost study. This is, of course, a wholly erroneous version of the Commission's ruling since we specifically pointed out in our order denying the request to file an interlocutory appeal that "the pretrial order would indeed be incorrect as inconsistent with the case law on this point" if it were interpreted as requiring complaint counsel "to introduce into evidence a cost study which indicates statistically that the discriminatory prices accorded to Suburban were not cost justified."

Respondent also argued in its motion to strike that complaint counsel had openly defied the examiner and had conceded that the amendment to their trial brief did not comply with his order of June 26.

Respondent asserted, in this connection, that "by complaint counsel's own admission the amendment to their trial brief does not comply with the hearing examiner's order" and that "It is apparent that complaint counsel are attempting to ignore not only the order of the hearing examiner, but the decision of the Commission in affirming that order." These arguments would have some semblance of merit only if the examiner's order would require the introduction by complaint counsel of a statistical cost study, which, as we have held, it does not. Even the most casual reading of the amended trial brief clearly reveals that complaint counsel are prepared to come forward with evidence as to respondent's supplier's costs, although not in the form of a formal cost study.¹

The position maintained by complaint counsel throughout this proceeding has been that, insofar as the cost justification issue is concerned, the burden imposed upon them by *Automatic Canteen*² is satisfied by the prima facie showing that a reasonable and prudent businessman, on the basis of facts known to him, should have believed that a favorable price granted to him could not have been cost justified by his supplier. In other words, they have claimed that their initial burden is limited to a prima facie showing of *knowledge* on the buyer's part that the lower prices it received could not be cost justified. They have never denied, however, and in fact have recognized that to make this showing of knowledge complaint counsel may in some instances be required to come forward with evidence as to the seller's costs. In this connection, they stated in answer to respondent's interlocutory appeal filed April 24, 1967, that in certain factual situations "general testimony as to costs involved [must] necessarily [be] elicited by complaint counsel in order to establish the requisite knowledge on the part of the buyer," and in their request for permission to file an interlocutory appeal on June 30, 1967, they reiterated that "complaint counsel recognize that they must come forward with some generalized evidence as to costs from which the inference can be drawn that Suburban knew or should have known that the price differences could not have been cost justified."

¹ Complaint counsel state on page 2 of the amended brief that "Necessarily included is the allocation of evidence of certain facts related to costs which indicate that Suburban knew or should have known that cost justification by Phillips was improbable." And an example of such facts is set forth in a study referred to as follows in the Explanatory Note to the brief: "The following study was undertaken on an invoice-by-invoice basis to compare the relative expense incurred by Phillips Petroleum Company in shipping LPG to Suburban with the costs incurred by Phillips with respect to five nonfavored customers who took product primarily by truck. This study was made necessary when an issue was raised by respondent in the course of interlocutory appeals as to whether it cost Phillips substantially more to transport LPG to these nonfavored purchasers than to ship to Suburban, and whether these cost differentials more than compensate for the lower prices accorded Suburban."

² *Automatic Canteen Co. v. Federal Trade Commission*, 246 U.S. 61 (1953).

Throughout this proceeding, therefore, complaint counsel have maintained that their burden of establishing a *prima facie* case may be satisfied with something less than a formal cost study demonstrating that the lower prices to respondent were not in fact cost justified. They consider that their burden may be met by the introduction of such evidence that will create a *prima facie* showing that respondent, as a reasonable and prudent businessman, should have known that the differential it received could not be cost justified.

As indicated in our earlier rulings in this matter, we believe that complaint counsel's position is consistent with applicable case law. In the leading case on point, *Automatic Canteen, supra*, the sole issue before the court was whether the *prima facie* showing that respondent induced and received a discriminatory price which it knew may have proscribed anticompetitive effects was sufficient to shift to respondent the burden of introducing evidence. The court held that the Commission had an additional burden, that as part of its *prima facie* case it must show actual or constructive knowledge on the part of respondent that the difference in the prices involved were not based on cost differences. The court also pointed out "by way of example" that this burden could be sustained by a showing that there was no difference in the quantities and methods, by which respondent and its disfavored competitors were served and that respondent was aware of that fact, or, if there was such a difference, that it could not result in sufficient cost savings to justify the discrimination and that respondent was aware of that fact. In either case the showing to be made by the Commission was that respondent *knew or should have known* that the lower prices it received could not be cost justified. It is apparent that counsel for the Commission is not required to introduce into evidence a detailed cost study. An application of common sense makes the correctness of this conclusion obvious, for in any factual situation where the discrepancy between the price differential and the cost differential is so minute that it can be demonstrated only by a cost study, knowledge of the absence of a cost justification defense cannot reasonably be imputed to the recipient of the lower price by such a showing. In a case in which complaint counsel's proof consists of a showing that the differences in quantities or methods of purchase could not give rise to sufficient cost savings to justify the lower price, the requisite knowledge may be inferred, in the absence of other circumstances indicating knowledge, only in those instances where "the cost differences are very small compared with the price differential and could not reasonably have been thought to justify the price difference." (346 U.S. at 80.)

It is also clear from the court's opinion in *Automatic Canteen* that in making the *prima facie* showing of knowledge on the part of the recipient of the lower price, the Commission is not restricted to the

type of proof specifically mentioned in the court's example. As a matter of fact, the court stated that it need not attempt to illustrate "what other circumstances can be shown to indicate knowledge on the buyer's part that the price cannot be justified." (*Id.*, at 80.) And that there are other circumstances which can be shown to indicate such knowledge is a fact not unknown to the Commission. *In the Matter of Fred Meyer, Inc.*, Docket 7492 (March 29, 1963) [63 F.T.C. 1, 26], for example, a showing of circumstances other than those mentioned by the court was held to be sufficient to support an inference of knowledge on the part of the buyer-respondent. The Commission held in that case that "... a buyer who gets a 33 $\frac{1}{3}$ % price concession during only one month out of each year, paying the same price as his competitors during the other eleven months, has every reason to believe that there is not the remotest possibility of 'cost justification' for that temporary concession. . . . In the absence of . . . an explanation, we think the inference is inescapable that respondents 'knew' there could be no cost justification" (Commission opinion, p.58) [63 F.T.C. at 70]. In affirming the Commission's decision on this point, the court held that the Commission's failure to prove the suppliers' costs was immaterial and that "... where the facts and the inferences to be drawn are as clear as they are on this point, we think the method of proof adopted by the Commission here is appropriate to . . . showing that the buyer 'is not an *unsuspecting recipient* of prohibited discriminations.'" *Fred Meyer, Inc. v. Federal Trade Commission*, 359 F. 2d 351, 364 (9th Cir. 1966) (emphasis in original).³

In the matter now before us, complaint counsel, according to their amended trial brief, intend to come forward with evidence as to Phillips' costs in selling to Suburban and to certain of Suburban's nonfavored competitors for the purpose of showing the awareness of Suburban as a reasonable and prudent businessman that the lower price it received could not be cost justified. The ultimate burden of persuasion may require that additional evidence be adduced in response to evidence of respondent's counsel to whom the burden shifts upon proof of the initial *prima facie* case. It cannot be doubted that the ultimate burden of persuasion rests with counsel supporting the complaint, although the burden of going forward may shift back and forth dur-

³ There may, of course, be other circumstances which will demonstrate the requisite knowledge that price differences are not based on cost differences. For example, an intra-company memorandum prepared by a responsible official of the recipient of a lower price which would state that the discriminatory price was below the supplier's cost and could not therefore be justified by the different quantities or methods in which the recipient purchased, would, in our opinion, suffice to show that the recipient knew that the discriminatory price could not be cost justified. If in this case complaint counsel intend to rely on such a document to make a *prima facie* showing of knowledge, an order of the type issued by the hearing examiner would, of course, be wholly inappropriate. As in *Fred Meyer*, complaint counsel would not be required as part of their initial burden to introduce any evidence whatsoever as to the seller's actual costs.

ing the hearing. We now hold only that the amended trial brief on its face complies with the hearing examiner's order of June 26 as we have interpreted it, and that the examiner erred in striking this brief.

II. Certification of Motion to Postpone Hearings and Recommendations for Dismissal of Complaint

By motion filed October 18, 1967, complaint counsel requested the hearing examiner to cancel formal hearings set in Washington for November 13, 1967, and to reschedule them to commence on or about February 5, 1968, in New York City. Complaint counsel's motion also included an alternative request that the hearings be reset for New York City if the hearing examiner believed that they should commence on November 13, 1967.

This motion seems to be one upon which the hearing examiner should have been able to rule. Certainly he had the authority to do so. Instead of granting or denying complaint counsel's request, however, he certified the motion to the Commission without giving any reason for his refusal to rule.

Included in his certification is the recommendation that the proceeding be dismissed for want of prosecution. According to the examiner, complaint counsel were not prepared at the time the complaint issued to prove their case and "have repeatedly expressed reluctance to proceed to formal hearings and still do." We find nothing in the public record of this proceeding, however, to support this statement. While there has been a misunderstanding on the part of the examiner as to the nature of the proof required to make a prima facie showing of the knowing inducement or receipt of an unlawful price discrimination, we have no reason to believe from any public statements or documents filed by complaint counsel that they are not prepared to make out a prima facie case. The record does not indicate that complaint counsel must bear the responsibility for the seemingly interminable delay in bringing this matter to trial.

The hearing examiner also bases his recommendation for dismissal on certain assertions made by Suburban in a motion filed on February 28, 1967, requesting dismissal of the proceeding on the ground that the practices complained of had been terminated and that the public interest no longer required the Commission to seek the issuance of a cease-and-desist order against respondent. The hearing examiner's reliance on these statements is difficult to understand since he had previously denied respondent's motion in which these statements were made, and the Commission had held on appeal from his ruling that the issue of whether the practices had been discontinued "if further raised, should be resolved * * * on the basis of the whole record to be made in this proceeding." The fact that the issue has now been raised by the examiner is no reason for changing our earlier ruling.

We will consider the issue of abandonment only when the record has been completed.

The passing of time since the matter was certified to the Commission has rendered moot complaint counsel's request for postponement of formal hearings as well as complaint counsel's request for subpoenas returnable during the week of November 13 through November 17, 1967. The matter is, therefore, being returned to the examiner with instructions to commence hearings at the earliest date possible, allowing complaint counsel sufficient time to make the necessary arrangements for an orderly and continuous presentation of their case-in-chief.

Commissioner Elman dissented and has filed a dissenting opinion.

DISSENTING OPINION

JUNE 3, 1968

BY ELMAN, *Commissioner*:

The issue here is a narrow one, concerning the burden of coming forward with evidence on the issue of cost justification in a proceeding against the buyer under Section 2(f) of the Clayton Act.¹ As the Commission recognizes, this is not a novel question. On the contrary, the Supreme Court has in the *Automatic Canteen* case² already decided the precise point. Our duty, as I see it, is simply to follow the clear and explicit mandate of *Automatic Canteen*. Although professing to follow the Supreme Court's decision, the Commission in my view has "rewritten" *Automatic Canteen*, reaching a result which is inconsistent with that case and unjustifiably scrambling the equitable allocation of the burden of proof there made by the Supreme Court.

I

Section 2(f) makes it unlawful for any person "knowingly to induce or receive a discrimination in price which is prohibited by" that Section of the Act. In the present case it is alleged that respondent induced its suppliers to sell liquefied petroleum gas to it at discount prices not available to respondent's competitors. This discount would not be illegal under Section 2(a), and *a fortiori* under Section 2(f), if the price differential 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 respondent. It is, therefore, a premise of the instant complaint, unarticulated but nevertheless present, that the "prohibited" prices induced by respondent were not cost justified.

¹ 15 U.S.C. § 13(f).

² 346 U.S. 61 (1953).

In an ordinary proceeding against the seller under Section 2(a) it is not part of complaint counsel's *prima facie* case to show that the discriminatory prices charged were not cost justified. Cost justification is an affirmative defense to be alleged and proved by the respondent in a 2(a) case. The reasons for imposing such a burden on the seller are obvious. He has in his possession, or can obtain, the relevant information concerning his costs of manufacture, sale and delivery; he can undertake the necessary study, allocation, and analysis of these costs even more readily than can complaint counsel. In a case brought against the seller, therefore, it is reasonable and proper to invoke the ordinary rule of statutory construction that "the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits."³

On the other hand, in a case brought against the buyer these considerations are inapplicable. Different but equally persuasive factors dictate that both the burden of going forward with evidence and the burden of persuasion be placed on complaint counsel. The Supreme Court set out these countervailing factors and stressed their importance in the *Automatic Canteen* opinion:

Insistence on proof of costs by the buyer might thus have other implications; it would almost inevitably require a degree of cooperation between buyer and seller, as against other buyers, that may offend other antitrust policies, and it might also expose the seller's cost secrets to the prejudice of arm's-length bargaining in the future. Finally, not one but, as here, approximately 80 different sellers' costs may be in issue.

* * * * *

[T]he fact that the buyer does not have the required information, and for good reason should not be required to obtain it, has controlling importance in striking the balance in this case. . . . Certainly the Commission with its broad power of investigation and subpoena, prior to the filing of a complaint, is on a better footing to obtain this information than the buyer. 346 U.S. at 68, 78-79.

The Commission suggests that the *Automatic Canteen* case is distinguishable, and the Court's careful language inapposite, because, the majority opinion argues, the question whether the prices paid by Automatic Canteen were cost justified was not at issue.⁴ There is no merit to this argument. In defining the issue before it the Court explained that the Commission had not only failed to "make any findings as to [respondent's] . . . knowledge of actual cost savings" but had also "made no finding negating the existence of cost savings or stating that whatever cost savings there were did not at least equal price differentials [respondent] * * * may have received." 346 U.S. at 66-67. The Court's decision as to burden of proof is thus controlling here. It is no casual dictum but reflects careful consideration of the Act's "infelicitous language" in light of its legislative his-

³ *Federal Trade Commission v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948).

⁴ Majority opinion, p. 1273.

tory, and analysis of the consequences of possible alternative constructions. It is not a decision to be disregarded or eviscerated because it makes more difficult the prosecution of a buyer under Section 2(f). The short of it is that, on the cost-justification issue in a 2(f) case, the burden of coming forward with evidence, as well as the burden of persuasion, rests squarely on complaint counsel.

How those burdens can be met was also discussed by the Supreme Court. In the case where it is shown by complaint counsel that the buyer knows he purchases "in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer," he can be charged with notice that substantial price differential cannot be cost justified. A showing by the Commission of such knowledge on the buyer's part would satisfy its obligation to come forward and make out a *prima facie* case. On the other hand, the Court held that in a case like that before us, where the methods or quantities differ:

[T]he Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings. 346 U.S. at 80.

The import of these words is clear. Complaint counsel must show that the prices paid by respondent could not be cost justified, and that respondent knew or should have known this. At an earlier stage of this proceeding, the Commission itself recognized the two-pronged nature of complaint counsel's burden. In its order of May 25, 1967 [71 F.T.C. 1695, 1699], the Commission, quoting the *Automatic Canteen* decision, said:

[I]f the methods or quantities differ, the Commission must only show that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings.

Now the Commission departs from this ruling, holds erroneous the hearing examiner's order which is cast in the same language as *Automatic Canteen*, and, in effect, upholds complaint counsel's contention that "evidence showing actual or constructive knowledge on the buyer's part as to lack of probable cost justification by his seller completely satisfies the burden imposed in all 2(f) proceedings." Brief, p. 4. No justification is offered for this refusal to follow controlling precedent, and none is discernible save for the impermissible one that it makes complaint counsel's case easier to prove.

As was pointed out in our order of July 20, 1967 [72 F.T.C. 989], complaint counsel are not compelled to introduce a formal cost study. I do not suggest that, nor does respondent so contend. The question is not what kind or quantum of evidence will satisfy complaint counsel's

burden of persuasion as to absence of cost justification, but whether they have the burden of coming forward with evidence on this issue as part of their *prima facie* case. I agree, of course, that in a case brought under Section 2(f), just as in a case brought under 2(a), a detailed cost study should be unnecessary. It is unfair to expect a seller engaged in hard bargaining over price with his buyer, and concerned lest he be underbid by his competitors, to prepare a precise and complete cost study before setting his price. Some flexibility in assessing the quantum of proof required to establish a cost justification defense is also made necessary by the elusiveness of cost data.⁵ Similarly, in a Section 2(f) case complaint counsel might satisfy their initial burden on this issue by showing a large price discrimination manifestly disproportionate to any plausible cost savings attributable to the particular sale involved. How that burden is met will of necessity vary in each case, but some such showing is essential if the Commission is to make a finding supported by evidence that the price discrimination alleged was not cost justified, a finding that is essential if the discrimination is to be held illegal.

By ignoring the first branch of the *Automatic Canteen* rule the Commission permits a finding of illegality to be based solely on the buyer's "guilty knowledge," a result plainly at odds with the statute's meaning and purpose. Suppose, for example, a search of respondent's files uncovered a memorandum from the director of the purchasing department to the company's president in which he said, "I just obtained an incredibly large discount from X supplier, so large that I cannot believe it is cost justified. I just hope the FTC doesn't hear about it." Respondent's "guilty knowledge" would be manifest from such a memorandum, but the Section 2(f) violation would not be proven. However illegal respondent might have thought the discount to be, however evil its intentions, the discount would be perfectly legal if it were in fact cost justified; and since "the buyer does not have the required information, and for good reason should not be required to obtain it," the burden of bringing forward objective facts showing the discount to be illegal and not cost justified would be on complaint counsel.

The Commission shifts this example somewhat and argues that such an intra-company memorandum not only would "suffice to show that the recipient knew that the discriminatory price could not be cost justified," but would also relieve complaint counsel entirely of "their initial burden to introduce any evidence whatsoever as to the seller's actual costs."⁶ I agree that such a memorandum would satisfy complaint counsel's initial burden to introduce evidence of the buyer's

⁵ See, e.g., *American Motors Corp. v. Federal Trade Commission*, 384 F. 2d 247 (6th Cir. 1967), cert. denied, April 9, 1968.

⁶ Majority opinion, p. 1274, n. 3.

"guilty" state of mind. Similarly, in a murder case, the fact that the accused carefully pointed his gun at a third person and pulled the trigger would be evidence of an intent to kill. But could the prosecutor rest his case with such evidence? Certainly not. He would still have to present evidence that the intent to kill was consummated, that the shot did not go awry, and that the victim died as a result of the shot, *i.e.*, there was a *corpus delicti*. Absent such evidence the accused might be convicted of some other offense perhaps, but not murder. In a Section 2(f) case, too, mere evidence of guilty intent, although essential, is not sufficient. Where cost justification is put in issue, there must also be objective evidence that the price received was not in fact cost justified, for otherwise the price would be legal. The initial burden of coming forward with such evidence, as *Automatic Canteen* establishes, must be borne by complaint counsel.⁷

The *Fred Meyer* case⁸ is not a precedent for the Commission's ruling in this case. In that case the respondent chose not to litigate the issue whether the prices it paid were not cost justified, defending instead on the ground that it had no knowledge, actual or constructive, of that fact.⁹ Since (1) the large discount there involved, amounting to a price differential of as much as one third of the regular price, was granted Meyer in only one month of the year, (2) Meyer paid regular prices during the other eleven months although it purchased in somewhat larger quantities than its competitors, and (3) the suppliers offered no regular quantity discounts, the court held "not unwarranted" the inference drawn by the Commission that respondent "should have known that something was amiss." 359 F. 2d at 364.¹⁰ The court did not, either expressly or by implication, undermine its earlier ruling in *Alhambra Motor Parts v. Federal Trade Commission*¹¹ that in a case where the buyer is shown to have been served by different methods from its disfavored competitors, "the burden [is] on the Commission

⁷ I repeat that the question of what evidence will suffice to carry complaint counsel's burden of persuasion is not before us, and that it is not argued by respondents or suggested by me that only a detailed cost study will carry that burden. Neither in 2(f) cases, nor in 2(a) cases, should the standards of proof on this question be so exacting. If unduly strict criteria have been erected by the Commission in Section 2(a) cases and if it is feared that complaint counsel cannot obtain evidence that satisfies such criteria, the answer lies not in withdrawing the burden from complaint counsel in cases brought under Section 2(f), but in revising the existing arbitrary standards of proof to comport more reasonably with marketing realities.

⁸ *Fred Meyer, Inc. v. Federal Trade Commission*, 359 F. 2d 351 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968).

⁹ The Court stated:

"The Commission relied on several factors in reaching its conclusion that Meyer had reason to believe¹⁰ that its suppliers could have no cost justification defense.

¹⁰ The inquiry here was devoted to ascertaining this fact, not to whether cost justification did or did not exist in fact. No cost studies were introduced by either party." (359 F. 2d at 364.)

¹¹ It is possible that proof of such an irregular and disproportionate discount might in itself support the inference that the discount was not cost justified.

¹² 309 F. 2d 213 (9th Cir. 1962).

to show that the cost saving could not be commensurate with the price differential." 309 F. 2d at 219.

In short, the *Fred Meyer* case deals only with the question of knowledge and is not at all concerned with the point here at issue. While the *Automatic Canteen* decision, which was followed in *Alhambra*, is dispositive of the question before us, the Commission does not follow the latter two cases. The Commission throws on respondent both the burden of coming forward with evidence showing cost justification and the burden of persuasion, despite the Supreme Court's holding that buyers should not be required or even permitted to ferret out such information and despite the manifest unfairness of requiring respondent to obtain evidence more readily available to the Commission. In addition, because cost data invoked to prove cost justification must, under existing Commission decisions, be comprehensive and meet unreasonably stringent standards of exactness, to prepare an adequate cost-justification defense respondent will have to engage in extensive discovery from the seller here involved—a procedure in which the seller (whom the Commission decided not to make a party to this proceeding) is unlikely to acquiesce—further complicating and prolonging this already protracted case.

II

I do not concur in the Commission's assertions that delays in this proceeding are attributable to "a misunderstanding on the part of the examiner as to the nature of the proof required to make a *prima facie* showing of the knowing inducement or receipt of an unlawful price discrimination" and that "the record does not indicate that complaint counsel must bear the responsibility for the seemingly interminable delay in bringing this matter to trial."

The examiner has correctly followed and applied the Supreme Court's decision in *Automatic Canteen*. On the other hand, more than two-and-a-half years after complaint issued, and despite extensive and prolonged post-complaint discovery by complaint counsel, they are not yet prepared to prove their *prima facie* case. This intolerable delay would not have occurred if the Commission, before issuing the complaint, had required complaint counsel to have in hand all evidence relevant to their case-in-chief. In view of the Commission's ample power to investigate before issuance of complaint, both the extensive post-complaint discovery here undertaken and the unusual procrastination that characterizes this proceeding could and should have been avoided.

Delay is the bane of the administrative process, abhorred and deplored by all the members of the Commission. The majority's action in this case is therefore both sad and paradoxical. It guarantees that despite our common concern to avoid unnecessary delay, disposition of

this case will take at least four or five more years before it is finally concluded. Moreover, far from clarifying the requirements of Section 2(f), the present ruling obscures them by departing from the clear guidelines laid down by the Supreme Court in *Automatic Canteen*. There will probably be no judicial review of the Commission's present order until the administrative proceedings culminate in a cease and desist order some years hence. If, as seems inevitable, a reviewing court determines that the Commission was incorrect in allocating the burden of proof on the crucial cost-justification issue, this case, and any other Section 2(f) case that may be brought in the interim, will have to be retried or dismissed. We have, in short, created a litigant's paradise. We can be sure that from now on all respondents in Section 2(f) cases will request an order concerning allocation of the burden of proof, and will then appeal to the Commission the examiner's decision against them, all in the interests of making a record before this agency and exhausting their administrative remedies. If, as a practical result, Section 2(f) becomes largely a dead letter and if the cancer of delay infects the Commission's proceedings under the Robinson-Patman Act, it will not be because the courts have imposed unreasonable evidentiary burdens on the Commission, or because the statute is inartfully drafted, but because the Commission, by giving the Robinson-Patman Act an interpretation which is unreasonable and in disregard of legal precedents and economic realities, has accommodated the litigious by providing grist for their mill.

ORDER RULING ON INTERLOCUTORY APPEAL AND CERTIFICATIONS

This matter having come on for a hearing on the interlocutory appeal of complaint counsel from the hearing examiner's order of October 20, 1967, striking an amendment to complaint counsel's trial brief and respondent's answer thereto, and upon the examiner's certification of complaint counsel's motion to postpone commencement of formal hearings and their request for subpoenas; and

The Commission, for the reasons set forth in the accompanying opinion, having determined that the appeal of complaint counsel should be granted and that the matter should be remanded to the hearing examiner:

It is ordered, That complaint counsel's interlocutory appeal from the hearing examiner's order of October 20, 1967, be, and it hereby is, granted.

It is further ordered, That the hearing examiner be, and he hereby is, directed to receive complaint counsel's amended trial brief.

It is further ordered, That this matter be, and it hereby is, remanded to the hearing examiner for further conduct of the proceeding in accordance with the views expressed in the accompanying opinion.

Commissioner Elman dissenting.

UNIVERSE CHEMICALS, INC., ET AL.

Docket 8752. Order, June 7, 1968

Order denying respondents' request to file answer to complaint counsel's affidavit regarding holding hearings in more than one place.

ORDER DENYING MOTION FOR LEAVE TO FILE REPLY AND SUPPLEMENTAL
MOTION FOR PERMISSION TO FILE INTERLOCUTORY APPEAL

Respondents, on February 29, 1968, filed a motion requesting permission to file an interlocutory appeal, under Section 3.23(a) of the Commission's Rules of Practice, from the hearing examiner's order filed February 16, 1968, granting to the extent relevant herein complaint counsel's motion for hearings in more than one place. As a result of the hearing examiner's order, hearings were scheduled to be held in Chicago, Illinois, Evansville, Indiana, Omaha, Nebraska, and Minneapolis, Minnesota. Complaint counsel, on March 5, 1968, filed an answer opposing respondents' request.

In order to facilitate its consideration of this matter the Commission by order dated March 13, 1968 [p. 1241 herein], directed that complaint counsel file an affidavit specifying the cost or difficulty which would be involved in holding the hearings in only one place and including a description of any unusual or exceptional circumstances justifying the hearing examiner's order. Respondents were directed to file an affidavit specifying in detail the nature and extent of the alleged financial and other burdens upon them should the hearing examiner's order be upheld.

Following consideration of the affidavits submitted in compliance with the foregoing order, the Commission by order dated April 9, 1968 [p. 1259 herein], Commissioner Elman dissenting, denied respondents' motion for permission to file interlocutory appeal.

On June 3, 1968, respondents filed with the Secretary of the Commission their Motion for Leave to File Reply to Allegations of New Matter Contained in Supplemental Affidavit Filed by Complaint Counsel and a Supplemental Motion for Permission to File Interlocutory Appeal. This motion supplemented a telegram from respondents' counsel dated March 22, 1968, requesting leave to reply to new matter contained in complaint counsel's affidavit.

The burden of these submissions is to the effect that respondents should be permitted to reply to averments as to gross business, extent of interstate commerce, and number of salesmen made in the affidavit of complaint counsel submitted pursuant to the Commission's order of March 13, 1968 [p. 1241 herein], and to complaint counsel's further averments in its affidavit, the general tenor of which was that having created an interstate enterprise and having engaged in the practices giving rise to the litigation, respondents had no standing to complain against hearings in multiple locations.

Having considered respondents' Motion for Leave to File Reply to Allegations of New Matter Contained in Supplemental Affidavit Filed by Complaint Counsel and a Supplemental Motion for Permission to File Interlocutory Appeal filed June 3, 1968, and being of the opinion that it does not raise questions not previously considered by the Commission in disposition of respondents' earlier motion for permission to file interlocutory appeal and therefore reconsideration of its denial by order date April 9, 1968 [p. 1259 herein], of respondents' request for permission to file interlocutory appeal is not warranted.

It is ordered, That respondents' Motion for Leave to File Reply to Allegations of New Matter Contained in Supplemental Affidavit Filed by Complaint Counsel and a Supplemental Motion for Permission to File Interlocutory Appeal filed June 3, 1968, be, and it hereby is, denied.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order, June 14, 1968

Order granting several third parties permission to file one consolidated brief involving subpoenas directed to them.

ORDER GRANTING EXTENSION OF TIME TO FILE CONSOLIDATED BRIEF

On June 10, 1968, respondent filed an appeal from the hearing examiner's order dated May 29, 1968, in the above matter "Modifying Subpoenas Duces Tecum, In Respondent's Behalf, Directed Against Third Party Concrete Companies." Pursuant to § 3.35 of the rules of practice, fourteen third party concrete companies also determined to file an appeal from the same order. Since the third party appeals and respondent's appeal involve common issues of fact and law, the third parties have requested (1) permission to file one consolidated brief which will consist of both their appeal brief and their answering brief to respondent's appeal and (2) an extension of time to file such consolidated brief. For good cause shown:

It is ordered, That M. E. Rinker, president of Rinker Materials Corp.; J. D. Monroe, comptroller of MPS Industries, Inc.; D. W. Reading, president of Oolite Industries, Inc.; Thomas N. Kearns, president of Meekins, Inc.; S. Howard Banaszak, president of Banaszak Concrete Corporation; W. L. Currie, president of Central Concrete Co., Inc.; James F. Dawson, owner of Mobile Ready Mix; A. L. Satee, executive vice president of Maule Industries, Inc.; Louis C. Schilling, president of I. E. Schilling Co.; Carl H. Moritz, general manager of Burnup & Sims, Inc.; Roy B. Loughlin, president of Dixie Concrete, Inc.; Kenneth D. Buzard, president of Powermix, Inc.; Douglas A. Brooks, vice president of Erwin Concrete Corporation;

and Murray S. Simpson, president of Super Concrete Corporation be, and they hereby are, granted (1) permission to file one consolidated brief which will consist of both an appeal brief and an answering brief to respondent's appeal and (2) an extension of time to and including July 1, 1968, within which to file such consolidated brief.

Commissioner MacIntyre not participating.

LENOX, INCORPORATED

Docket 8718. Order, June 21, 1968

Order denying respondent's request for reconsideration and alteration of final order.

ORDER DENYING PETITION FOR RECONSIDERATION

The Commission issued its decision in this matter on April 9, 1968 [p. 578 herein]. On May 16, 1968, respondent, pursuant to § 3.55 of the Commission's Rules of Practice, requested the Commission to reconsider and alter the Final Order contained in that decision in the following manner:

1. By eliminating paragraph 9 of said Order, which temporarily bars respondent from entering into fair trade contracts, since a prohibition on fair trade contracts does not remedy unlawful agreements found to have been made in fair trade states. On the contrary, the making of fair trade contracts remedies such illegality.

2. By changing paragraphs 5 and 6 of said Order, which temporarily bar the use of retail price lists, to provide that price charts may be offered to dealers provided such charts clearly and prominently state that they are for the dealer's convenience only and that he is under no obligation or agreement, express or implied, to follow the particular prices calculated on the charts. Such a statement would effectively eliminate any implied price agreements found to have been made with dealers. The present complete bar on the use of such charts prevents respondent from offering an important merchandising service which china dealers expect from all manufacturers and particularly from respondent who sells more than 70 china patterns.

On May 21, 1968, complaint counsel filed their answer in opposition thereto.

The pertinent part of § 3.55 of the Commission's Rules of Practice provides that

[a]ny petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission.

In its petition respondent does not allege that the decision or final order raises any new questions and that respondent did not have the opportunity to argue these before the Commission. Indeed, a review of the record in this proceeding discloses that the two modifications of the final order urged by respondent are not the result of new questions raised by the decision and final order but were amply briefed and

argued by respondent at each step of the proceeding. Accordingly,

It is ordered, That respondent's petition for reconsideration be, and it hereby is, denied.

Commissioner Nicholson did not participate for the reason that oral argument was heard prior to his appointment to the Commission.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, June 28, 1968

Order denying motion by 14 cement companies to strike respondent's appeal brief relating to subpoenas directed to them.

OPINION OF THE COMMISSION

JUNE 28, 1968

On June 10, 1968, respondent filed an appeal from the hearing examiner's order dated May 29, 1968, "Modifying Subpoenas Duces Tecum, In Respondent's Behalf, Directed Against Third Party Concrete Companies." On June 13, 1968, movants (fourteen third party concrete companies) filed with the Commission a motion to strike respondent's appeal brief and dismiss respondent's appeal.¹

The stated basis for this motion is the fact that page 15 of the respondent's appeal brief:

... quoted at length from the Hearing Examiner's comments made at page 1577 of the transcript. However, the transcript of the prehearing conferences, including the transcript of the hearing from which Lehigh quotes, has, pursuant to § 3.21(c) of the Commission's rules, not been made public. Moreover, these hearings with regard to movants' motion to quash was [sic] held without movants' being present.²

Movants assert that they would be denied due process if the Commission considers the appeal and the brief since the relevant prehearing conference was held without their knowledge and because Lehigh is relying upon part of the record unavailable to movants.

The quoted transcript excerpt at issue here does not deal with the merits of movant's position. It is clear that at no time during the entire prehearing conference of May 24, 1968, was there any discussion of the merits of movants' or respondent's positions relating to the then pending motions to quash subpoenas duces tecum issued to third parties on respondent's behalf. Movants have neither particularized the manner in which they have been prejudiced nor have they made a request for access to the relevant portions of the transcript. There is no justifi-

¹ On June 14, 1968 [p. 1284 herein] the Commission granted movants (1) permission to file a consolidated appeal and answering brief, and (2) an extension of time to file until July 1, 1968.

² Motion to Strike the Appeal Brief, p. 2 (June 13, 1968).

cation for granting the more drastic remedy requested when movants have failed to either seek the logical remedy afforded by access, or to explain why access would be unsatisfactory.

Even though we find no merit in movants' contentions, we nevertheless adopt the suggestion of respondent.³ To avoid further dispute, we shall strike the prehearing conference excerpt quoted at page 15 of respondent's appeal brief to which movants take offense. An appropriate order will be entered.

Commissioner MacIntyre did not participate.

ORDER DENYING MOTION TO STRIKE APPEAL BRIEF AND TO DISMISS
APPEAL

On June 10, 1968, respondent filed an interlocutory appeal from the hearing examiner's order of May 29, 1968. On June 13, 1968, movants (fourteen third party concrete companies) filed with the Commission a motion to strike respondent's appeal brief and dismiss respondent's appeal.

For the reasons stated in the accompanying opinion, the Commission has determined that the motion should be denied. Accordingly,

It is ordered, That the motion to strike the appeal brief of Lehigh Portland Cement Company and dismiss its appeal filed by M. E. Rinker, president of Rinker Materials Corp.; J. D. Monroe, comptroller of MPS Industries, Inc.; D. W. Reading, president of Oolite Industries, Inc.; Thomas N. Kearns, president of Meekins, Inc.; S. Howard Banaszak, president of Banaszak Concrete Corporation; W. L. Currie, president of Central Concrete Co., Inc.; James F. Dawson, owner of Mobile Ready-Mix; A. L. Sattée, executive vice president of Maule Industries, Inc.; Louis C. Schilling, president of I. E. Schilling Co.; Carl H. Moritz, general manager of Burnup & Sims, Inc.; Roy B. Loughlin, president of Dixie Concrete, Inc.; Kenneth D. Buzard, president of Powermix, Inc.; Douglas A. Brooks, vice president of Erwin Concrete Corporation; and Murray S. Simpson, president of Super Concrete Corporation be, and it hereby is, denied.

It is further ordered, That the excerpt of the hearing examiner's comments made at page 1577 of the prehearing conference of May 24, 1968, which is quoted by respondent be, and it hereby is, stricken from page 15 of respondent's June 10, 1968, appeal brief.

By the Commission, with Commissioner MacIntyre not participating.

³ Opposition to Motion to Strike the Appeal Brief, p. 2 (June 18, 1968).

THE BENDIX CORPORATION ET AL.

Docket 8739. Order, June 28, 1968

Order remanding to hearing examiner complaint counsel's request for issuance of subpoenas ad testificandum to certain federal employees.

ORDER REMANDING WITH INSTRUCTION

Upon consideration of the hearing examiner's certification, filed June 21, 1968, of complaint counsel's application requesting the issuance of subpoenas ad testificandum directed to certain employees of government agencies:

It is ordered, That the matter be, and it hereby is, remanded to the hearing examiner for such action within his regular authority as he deems appropriate with respect to the request for subpoenas herein certified.

STAR OFFICE SUPPLY CO. ET AL.

Docket 8749. Order, June 28, 1968

Order granting leave to file appeal from ruling of hearing examiner relative to witness interview reports.

ORDER GRANTING LEAVE TO FILE INTERLOCUTORY APPEAL

Upon consideration of complaint counsel's request, filed May 27, 1968, for permission to file an interlocutory appeal from rulings of the hearing examiner on May 21, 1968, relating to the production of interview reports with complaint counsel's witnesses and the striking of the direct testimony of two such witnesses:

It is ordered, That leave be, and it hereby is, granted to complaint counsel to file an interlocutory appeal from said rulings.

Commissioner Elman dissents.

ADVISORY OPINION DIGESTS*

No. 157. Paying advertising allowances in selected trade area.

The Commission rendered an advisory opinion in which it advised a manufacturer of a household product that it would be permissible to pay advertising allowances to all customers in a limited trading area without offering the allowance to all of its customers.

In its opinion, the Commission said that it was a well settled principle of law that if a supplier offers advertising allowances to one customer, he is required by Section 2(d) of the Robinson-Patman Act to make those allowances available to those customers who compete in the distribution of the product for which an allowance is being paid. Under these circumstances, it follows that the supplier can limit the area in which the promotional allowance will be paid, as long as the allowance is made available on proportionally equal terms to all customers who compete in the distribution of the product being promoted.

"This means," the Commission concluded, "that if there are customers located on the periphery of the selected trade area who in fact compete with the favored customers, they must also have the opportunity of participating in the promotional program on proportionally equal terms."

Concluding its opinion, the Commission said:

Assuming that you selected a reasonable trading area, even though limited, and assuming that you confine the duration of the program within the strict time limits absolutely necessary for you to determine the efficacy or feasibility of the program, we do not believe that your action will run afoul of any law administered by this Commission.

(File No. 683 7035, released Jan. 4, 1968.)

No. 158. Proposed trade association adoption of a pricing manual for common use by electronics servicemen members.

The Commission rendered an advisory opinion with respect to the legality of a trade association preparing and distributing a standard rate and service pricing manual for common use by electronics servicemen in dealing with the general public.

*In conformity with policy of the Commission, advisory opinions are confidential and are not available to the public, only digests of advisory opinions are of public record. Digests of advisory opinions are currently published in the Federal Register.

It was represented that a major problem in the industry is the lack of guides by which the public can determine whether prices charged for various repair services are fair and equitable. This lack has led to many customer complaints and to fraudulent operations by unethical repairmen. The association took the position that a standard rate schedule would protect the public and free ethical servicemen from unjust accusations.

The Commission advised that it could not give its approval to the proposed common use of a standard rate and service pricing manual by competing electronics servicemen. While the adoption and dissemination by the association of such a manual may be motivated by a purpose to remove evils affecting the industry, it appears to go further than is reasonably necessary to accomplish the desired result. Even though use of such manual be accompanied by disclaimers, there is implicit therein too grave a danger that it will serve as a device through which service rates and fees would become uniform and stable throughout the industry. While adoption of a means likely to create competitive uniformity in terms of service pricing may be a convenience to trade association members, this factor is far outweighed by the benefits to the public of the intense competition between competing servicemen, and it is this competition which the law protects. (File No. 683 7045, released Jan. 4, 1968.)

No. 159. Advertising offering sale of treatment for athlete's foot.

The Commission rendered an advisory opinion in which it declined to give approval to advertising which offered to sell information as to a method of treatment which was represented to effect a cure for athlete's foot.

For a stated sum of money, the advertisement in question offered to send prospective purchasers complete information detailing a simple, inexpensive cure for athlete's foot "with two products probably at present in your medicine cabinet." The treatment in question involved washing the feet with water and alcohol and then applying a common household salve. The Commission advised that it could not give its approval to any advertising which represents that this method of treatment will effect a cure for athlete's foot or to any advertising which goes beyond claims that the treatment will afford temporary relief from the itching and burning associated with athlete's foot.

The opinion went on to state that the laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case, in the Commission's view the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered.

Finally, the Commission advised that the opinion in no way related to the question of whether the proposal would constitute the practice of medicine nor to the legality of the requesting party doing so. (File No. 683 7047, released Jan. 12, 1968.)

No. 160. Advertising promoting sale of information and a product.

The Commission issued an advisory opinion today in regard to the legality of proposed advertising promoting the sale of information, which in turn advocated the purchase of an alleged stomach remedy. The individual requesting the opinion had no financial interest in or contractual right to advertise the product in question.

The initial advertisement offered the sale of information for 20 cents and claimed that the information would enable one "to get that nervous stomach functioning properly again." Based upon the scientific information available to it, the Commission ruled that the product being advocated in the information being sold was not in fact a cure or treatment for nervous stomach or any other stomach ailment. Under the circumstances, the Commission concluded that the claim in the initial advertisement was deceptive.

Its opinion concluded with the following statement:

The laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered.

This opinion in no way relates to the question of whether your proposal would constitute the practice of medicine or to the legality of your doing so.

(File No. 663 7009, released Jan. 12, 1968.)

No. 161. Advertising promoting sale of information and a product.

The Commission issued its advisory opinion concerning proposed advertising offering for sale for \$1 a pamphlet which (1) advises a method for curing athlete's foot and (2) recommends the use of a specific proprietary product for this purpose. The advertiser has no financial interest in the product in question. He does not himself propose to sell the product.

The Commission stated that use of the proposed advertising would be violative of Sections 5 and 12 of the Federal Trade Commission Act in that it implies, contrary to fact, that all cases of athlete's foot can be eliminated or cured by use of the advertised method and product "within a very short time" and with "patience and a little care." The Commission believes that the proposed advertising implies, contrary to fact, that through it some new facts as to the care and cure of athlete's

foot are now available which have hitherto been withheld from the public.

Its opinion concluded with the following statement:

The laws against deceptive advertising apply equally to those who are selling advice or information and to those who are selling products. In either case the test is whether the advice (or product) being offered will in fact achieve the results claimed for it in the advertising. If the advice recommends the use of a product, the efficacy of the product for the use recommended must of course also be considered.

This opinion in no way relates to the question of whether your proposal would constitute the practice of medicine or to the legality of your doing so.

DISSENTING OPINION

BY ELMAN, *Commissioner*:

He does not agree that selling advice is in the same category as selling a product. Recognizing that a good deal of foolish and worthless advice is being peddled to the American people, and not merely in the field of medicine or health, Commissioner Elman does not believe that Congress intended that the Federal Trade Commission or any other government agency should set itself up as a board of review examining into the validity or worth of ideas, opinions, beliefs, and theories disseminated to the public. (File No. 673 7028, released Jan. 18, 1968.)

No. 162. Exchanging wage rates among association members.

The Commission rendered an advisory opinion in regard to the legality of a trade association's proposed statistical reporting plan.

Specifically, the Commission was asked to rule upon the question of whether it would be permissible for the members of an association to exchange copies of their labor contracts.

The Commission ruled that it had no objection to the proposed plan itself, provided it was not used for some illegal purpose. If the plan is used as a means for fixing or tampering with the price of milk, or for some other illegal purpose, the Commission stated it would of course have serious objection to the plan. Pointing to the antitrust hazards inherent in such a plan, the Commission said:

Statistical reporting plans which involve the collection and dissemination of data related to future prices are not illegal per se. However, experience in other cases indicates that an association's price reporting plan which involves future or advance prices, particularly when that plan invites an industrywide pricing policy, may provide the basis for an inference of an agreement or combination to fix prices in violation of Section 5 of the FTC Act. Since labor costs represent a very significant element bearing upon the future price of milk, an agreement among competitors as to wage rates would be illegal, since it would have the effect of fixing the price of milk. In essence it is the potential danger

inherent in the reporting plan which is related to future prices that prompts the Commission to suggest that it be used with extreme care.

(File No. 683 7051, released Jan. 27, 1968.)

No. 163. Publication of dealer sales standards announcing a policy of not selling to dealers who advertise sale prices.

The Federal Trade Commission rendered an advisory opinion stating its objection to a proposal by a seller of photographic products to announce to the trade its policy to sell only to dealers who advertise in a manner which will not damage the prestige of the seller, avoiding the use of characterizations such as "Sale," "Bargain," "Close-Out," "Clearance" or other similar terminology.

The seller advised that it proposed to implement the standards by delivering a copy to each existing dealer, not for the purpose of terminating any presently unsatisfactory dealers, but to upgrade them to a satisfactory level. This the seller proposed to do by having its representatives work with the dealers to see that they observe the standards and contended that this is permissible since this is simply an advertising restriction, not an effort at resale price maintenance. It was further argued that although the price at which its products are sold is the prerogative of the dealer, the seller has a legitimate business interest in the manner in which its products are advertised by those dealers. The Commission also noted that the standards concluded with the statement that evaluation of the progress of dealers will be made from time to time and those who are not keeping pace will be discontinued.

The Commission advised that it could not give its approval to this proposal for the reason that its implementation as outlined would be likely to result in an illegal restraint of trade. In the first place, the Commission advised that it could not view the proposal as a simple restriction on advertising apart from the effect which that restriction would have on the price at which those dealers sell. While there is a difference between this and a policy of selling only to dealers who maintain the prices suggested by the seller, in that the dealers are ostensibly left free to sell at any price they choose, still a restriction on their ability to advertise sale prices is certainly a grave handicap on their ability to sell at prices below those suggested. Hence the provision, if not designed to maintain suggested prices, is one which will seriously affect those prices.

The Commission further advised that its view of the present state of the law in this area was that a seller not acting to create or maintain a monopoly may make a unilateral announcement of his policy as to those with whom he will deal, including policies affecting price, and he may refuse to deal with those who do not observe that policy. However, when the seller's actions, as they would under this proposal, go

beyond a mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his policy, he is in serious danger of having put together a combination in violation of the antitrust laws. Thus, the Commission stated, the line between legal and illegal conduct here is a very narrow one and if the seller chooses to walk that line, he must do so at his peril. (File No. 683 7063, released Jan. 31, 1968.)

No. 164. Premerger clearance: No anticompetitive effects foreseeable.

The Commission issued an advisory opinion on May 14, 1964, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a distributor by the manufacturer of products distributed.

A franchised distributor of electrical equipment sought clearance of its acquisition by the manufacturer of products he distributed. The relationship between the firms had existed for many years, was cancellable on 90 days notice, the trend in the line of business involved was to direct sales from manufacturer to purchaser and no substantial adverse competitive effects were foreseeable.

The Commission advised the requesting party that the acquisition would not violate Commission administered law; however, he was advised that the opinion was predicated on the understanding (1) that competing distributors would not be foreclosed from supplies he distributed and (2) that preexisted relationships between him and said supplier would not be altered without prior Commission approval. (File No. 643 7025, released Feb. 13, 1968.)

No. 165. Premerger clearance: Deteriorating financial condition.

The Commission issued an advisory opinion on July 30, 1964, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a deteriorating competitor.

A national manufacturer and distributor of consumer goods sought clearance of its proposed acquisition of a smaller manufacturer and distributor of the same products. Most of the business of the smaller firm was in a limited geographical area. The industry involved could be entered with a relatively modest sum of money. The firm to be acquired had experienced declining sales, a deteriorating, nonviable financial situation, personnel problems and had made reasonable but unsuccessful efforts to sell to others.

The Commission advised that basing its belief on the information currently available to it that the proposed transaction, if consummated, probably would not violate any of the laws which the Commission administers. (File No. 653 7003, released Feb. 13, 1968.)

No. 166. Premerger clearance: Declining industry.

The Commission issued an advisory opinion July 30, 1964, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a failing company in a declining industry.

A single-line manufacturer of a byproduct of the cotton industry desiring to be acquired by a multiproduct company in the chemical industry sought clearance of its proposed acquisition. The firms were competitors but demand for the product was declining due largely to wide fluctuations in price. There was also increasing production of competitive products made from wood pulp which could be used for the same purposes, and reasonable, but unsuccessful attempts had been made to sell to others.

The Commission, basing its belief on the information then before it, advised that the proposed sale probably would not violate any of the laws it administers.

The Commission added that the opinion should not be construed as in any way affecting any other matter involving the requesting party or the purchaser which the Commission was then or might thereafter investigate. (File No. 643 7036, released Feb. 13, 1968.)

No. 167. Premerger clearance: Deteriorating industry.

The Commission issued an advisory opinion on August 18, 1964, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a failing competitor.

One of the larger manufacturers of industrial clay products sought clearance to acquire a smaller manufacturer of the same product. The smaller manufacturer did not have as extensive a product line as the larger company. The companies partially competed in a limited geographical area; however the smaller firm had been unable to replace key personnel and the trend in its financial condition was downward. Further, its employees, comprising about 20 percent of the work force in a small community, faced loss of jobs if the smaller company went out of business. Lastly, the other party was the only available purchaser.

Basing its belief on the information then before it, the Commission advised the proposed sale probably would not violate any of the laws which it administers. (File No. 653 7005, released Feb. 13, 1968.)

No. 168. Premerger clearance: Imminent insolvency.

The Commission issued an advisory opinion on October 27, 1964, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a failing competitor in financial distress.

A firm in a local service business requested clearance to merge with a competitor, with whom it was aligned in its activities, and to form a new corporation. The service firm had experienced declining earnings for the past eight years and there was strong competition from other service businesses in the area in which both did business. The requesting party had experienced an increase in operating costs and expenses in relation to sales, was in a critical financial condition and apparently could not long continue to operate as a solvent and going concern. A national chain was the only other possible purchaser.

The Commission basing its belief on the information then available to it advised that the transaction would not violate any of the laws which it administers. (File No. 653 7025, released Feb. 13, 1968.)

No. 169. Premerger clearance: Financial distress.

The Commission issued an advisory opinion on May 26, 1965, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of an integrated competitor in poor financial condition.

A large diversified manufacturer of closures with less than 3 percent of its total sales accounted for by a specialty closure product, sought to acquire the second largest integrated manufacturer of such products, in an industry dominated by another fully integrated company. The first four firms in the industry accounted for about 55 percent of the market. The company to be acquired was in poor financial condition, and it was doubtful whether its credit standing could support the new financing necessary for plant improvement and extension of product lines which were needed to improve its competitive position.

The Commission basing its opinion on the information available to it advised (1) that it would not challenge the acquisition if consummated, but (2) that such advice was given without prejudice to the right to reconsider in the event anticompetitive effects causally connected to the acquisition were manifested in the future. (File No. 653 7058, released Feb. 13, 1968.)

No. 170. Premerger clearance: De minimis competitive effect.

The Commission issued an advisory opinion on June 8, 1965, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a competitor's unprofitable operating division.

A large manufacturer of a diverse line of aeronautical supplies sought Commission approval for the disposition of one of its operating divisions which was an unprofitable part of its total business. The proposed purchaser was another diversified corporation also engaged to a small degree in the same line of commerce. It was evident that although

these two companies ranked high in market shares, there were many others in the business, and that restrictive licenses were often used by customers to exercise an effective consumer-control of the survey market. The total dollar value of the business being sold was small and it appeared there would be a liquidation of the assets if the sale was not made.

The applicant was advised that based on the available information a proceeding would not be initiated by the Commission to challenge the acquisition. The Commission added that the advice was being given without prejudice to its right to reconsider the questions involved in the event substantial anticompetitive effects attributable to the acquisition were manifested in the future. (File No. 653 7060, released Feb. 13, 1968.)

No. 171. Premerger clearance denied: Adverse competitive effects probable.

The Commission issued an advisory opinion on June 10, 1965, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was denied because of the existence of probable adverse competitive effects.

A manufacturer/retailer of consumer leather goods requested clearance for its proposed acquisition of a major regional retailer of products produced by the manufacturer. The horizontal and vertical implications of this proposed merger were similar to those which were declared unlawful in the case of *United States v. Brown Shoe*, 370 U.S. 294 (1962). However, the market shares were smaller and probable adverse competitive effects somewhat less than were present in the *Brown Shoe* case.

The Commission advised there existed a substantial probability that the proposed acquisition would be a violation of the Clayton and Federal Trade Commission Acts. The application for premerger clearance was denied.

Thereafter, the acquisition was consummated. A complaint issued and a consent settlement effected whereby the acquiring company agreed to make no further acquisitions of retailers or manufacturers of the product involved for a period of several years without prior Commission approval. (File No. 653 7051, released Feb. 13, 1968.)

No. 172. Premerger clearance: Adverse competitive effects not discernible.

The Commission issued an advisory opinion on July 23, 1965, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was given limited approval because it did not appear that the acquisition would result in the requisite adverse competitive effects.

A diversified processor, wholesaler and retailer sought clearance for its proposed acquisition of an independent food supplier which sold a major portion of its products to a subsidiary of the acquiring company. The isolated transaction did not appear to have the requisite substantial adverse competitive effects called for by the statute, but in view of pending investigations of additional acquisitions by the acquiring company, an unrestricted clearance could not be approved by the Commission.

The Commission advised that it would take no action solely as to the proposed transaction if it was consummated. The Commission added that it conditioned its advice on assurances that by accepting and acting upon the opinion, the acquiring company would not use the opinion as precedent or argument in the investigation, or in the formal or informal hearings, of any matter involving the acquiring company then pending or which might come before the Commission or any other court or agency.

The Commission added that if at some future date the acquiring company was required to divest the subsidiary which was actually taking over the independent company, the parent company would not object to divestiture of the independent food supplier on terms set by the Commission or other court or agency. (File No. 653 7057, released Feb. 13, 1968.)

No. 173. Premerger clearance denied: Lack of competitive information.

The Commission issued an advisory opinion on October 29, 1965, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was denied for lack of competitive information concerning competition in the line of commerce involved.

A leading manufacturer of dispensing machines sought approval of its proposed purchase of a smaller, family held manufacturer of dispensing machines which were complementary to the product line of the acquiring company.

The Commission declined to render an opinion because of (1) the paucity of competitive information concerning competition in the line of commerce with which the acquired company's machine was identified, and (2) the short time period available between the date of the request and the closing date agreed upon between the parties. This short time precluded a more complete investigation and analysis. (File No. 663 7014, released Feb. 13, 1968.)

No. 171. Premerger clearance denied: Vertical merger would raise questions.

The Commission issued an advisory opinion September 8, 1966, in which a request for premerger clearance from liability under Sec-

tion 7, amended Clayton Act, was denied because the competitive implications of the acquisition would raise economic questions resolvable only by investigation.

A leading construction material producer applied for clearance of its proposed acquisition of a diversified company having a large share of a regional market in the sale of raw materials such as sand, gravel and stone, which were complementary to its principal product line. The requesting party offered to dispose of certain producing plants now operated by the company, and to continue appropriate leases of other such plants as the company owned.

The Commission advised the requesting party that the competitive implications of the integration of construction material distributors with sources of raw materials were such that an investigation to assess the economic effects of the acquisition, if it was consummated, would be necessary. (File No. 673 7004, released Feb. 13, 1968.)

**No. 175. Interpretation of request for premerger clearance:
Declining industry.**

The Commission issued an opinion October 8, 1965, in connection with a request for advice by two respondents as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting them from, among other matters, uniting facilities so as to eliminate competition.

One respondent, a small company in the coin operated machine business, desiring to be acquired by the other, a larger company in the same industry, applied for clearance of the proposed acquisition under Commission established procedures. It was reported that the smaller respondent was in financial difficulties to the point where it was approaching failure. Further reasons advanced to support the proposed merger were that demand for the product was on the decline, the industry easy to enter, and reasonable efforts to locate another purchaser had been unsuccessful.

On the basis of available information, the Commission advised that if the smaller respondent sold its business to any company, the Commission did not intend to initiate proceedings with regard to such sale. (File No. D-6124, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 176. Premerger clearance: De minimis competitive effects.

The Commission issued an advisory opinion on November 29, 1966, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a company in financial distress.

A dairy products processing company in financial difficulty desiring to be acquired by a larger company in the same field applied for clearance of the proposed acquisition. The companies competed to a limited extent; however, the applicant had losses for a number of years, could not obtain long term financing and had made numerous unsuccessful attempts to sell to others.

The requesting party was advised that, relying on his representations as to the hopeless financial condition and unsuccessful efforts to sell, the Commission would not challenge the proposed acquisition if it were consummated. (File No. 671 0615, released Feb. 13, 1968.)

No. 177. Compliance interpretation of request for premerger clearance: Imminent insolvency.

The Commission issued an opinion February 14, 1964, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting the acquiring company from making certain acquisitions.

A small company manufacturing food products applied for clearance of its acquisition by a larger producer engaged in operations in the same product line. The larger producer was subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval.

Both producers competed in the same general trading area. It was presented that the smaller company was in imminent danger of insolvency and that it had exhausted every possibility of locating another purchaser without success.

On the basis of available information, but primarily because of the equities affecting the smaller company's position in the industry, the Commission gave its approval to the proposed acquisition. (File No. D-6651, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 178. Compliance interpretation of request for premerger clearance: Denied, other purchasers available.

The Commission issued an opinion April 2, 1964, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting the acquiring company from making certain acquisitions.

A large company in the food products field applied for clearance, of its proposed acquisition of a smaller company engaged in operations in the same product line. The larger company was subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval.

Both companies were in substantial competition in the same general trading area. It was determined that other prospective purchasers were

available and that the smaller company was of considerable size when compared with other regional producers.

The Commission advised that the proposed merger could not be approved under the circumstances. (File No. D-6495, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 179. Compliance interpretation of request for premerger clearance: Imminent bankruptcy.

The Commission issued an opinion October 28, 1964, in connection with a request for advice from a small company as to whether its proposal to merge with any other company in the same field would, if consummated, be in violation of Section 7, amended Clayton Act.

A small food products manufacturer applied for advice from the Commission regarding the possibility of selling out to any other company operating in the same field, particularly to a large processor in the same products line. The larger producer was subject to a Commission order prohibiting such acquisitions for a designated period of time without prior Commission approval.

It was presented that the requesting company had made reasonable but unsuccessful attempts to locate a purchaser other than the larger company, and moreover was on the verge of bankruptcy.

On the basis of available information, but primarily because of the equities affecting the requesting company's position in the industry, the Commission advised that an acquisition by another producer in the same field would not be in violation of Section 7; amended Clayton Act, and in the event a sale is made to a company which is under Commission order requiring approval of such acquisition, said approval would be granted.

In clearing the proposed sale the Commission pointed out that the approval might be reconsidered, revoked or rescinded if it subsequently appeared the facts submitted were inaccurate, incomplete or that they had changed at the time a sale was made. (File No. D-6652, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 180. Compliance interpretation of request for premerger clearance: Imminent insolvency.

The Commission issued an opinion September 24, 1965, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding Commission order prohibiting the acquiring company from making certain acquisitions for a designated period of time without prior Commission approval.

A small food products manufacturer applied for clearance of its proposed acquisition by larger company under Commission order and which was much more extensively engaged in the same product line.

The requesting company was experiencing a decline in annual profits to the point of insolvency. It was reported that refinancing was not available and the smaller company was not, for a number of reasons, a viable concern in the context of the particular market. Exhaustive efforts to locate another purchaser had been unsuccessful.

On the basis of available information, the Commission gave its approval to the proposed acquisition. (File No. D-6651, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 181. Compliance interpretation of requests for premerger clearance: De minimis competitive effects; one request denied.

The Commission issued opinions on February 9, 1966 and January 26, 1967, in connection with requests for advice as to whether several proposed mergers, if consummated, would be in violation of an outstanding Commission order prohibiting future acquisitions by respondent for a designated period of time without prior Commission approval.

A large automatic machine company under Commission order sought approval for the proposed acquisition of two smaller, local companies engaged in the same line of business. In one metropolitan area respondent and the first smaller company were in competition, and in the other trading area respondent and the second smaller company did not compete to any significant degree. In the first area there were a substantial number of local and national competitors involved, and in the other area a substantial number of local competitors and one national competitor were involved.

In these two instances the Commission approved the proposed acquisitions.

In a third request for advice involving a different trading area, the respondent sought clearance for the proposed acquisition of a smaller, local company engaged in the same line of business in direct competition with the larger company. There was a concentration in the line of commerce involved. The Commission denied the request for clearance because it was incompatible with the objectives of the order prohibiting such acquisitions. (File No. C-809, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 182. Compliance interpretation of request for premerger clearance: Liquidation probable.

The Commission issued an opinion May 24, 1966, in connection with a request for advice as to whether a proposed acquisition, if consum-

mated, would be in violation of an outstanding order prohibiting respondent from making certain acquisitions for a designated period of time without prior Commission approval.

A large manufacturer of food products sought clearance of its proposal to acquire a smaller manufacturer engaged in the same general line of commerce. The requesting manufacturer was, and is now, subject to a Commission order prohibiting, among other things, the making of certain acquisitions for a designated period of time without prior Commission approval. The two manufacturers were not in competition in the same geographical trading area, but to a very limited extent the requesting manufacturer was a supplier to the smaller company.

The smaller manufacturer had made reasonable but unsuccessful attempts to sell to others in the industry and in the circumstances liquidation apparently was the only alternative to the proposed sale.

The Commission advised that, in reliance on the information submitted by the parties, if the proposed acquisition was made, the Commission would not proceed against the acquiring company. (File No. D-7880, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 183. Compliance interpretation of request for premerger clearance: Denied, competitive considerations.

The Commission issued an opinion July 20, 1966, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting the acquiring company from making certain acquisitions.

A large manufacturer of industrial products sought clearance for its proposed acquisition of a smaller company in the same as well as in a complementary product line. The requesting manufacturer was, and is now, subject to a Commission order prohibiting, among other things, the making of certain acquisitions for a designated period of time without prior Commission approval.

Both manufacturers were competitors and the smaller was quite capable of growing and developing in the industry. Further, no efforts had been made to locate other possible purchasers.

The Commission advised that approval for the proposed acquisition would not be in the public interest because it would entail the acquisition of a competitor and further increase concentration in the industry. (File No. D-6608, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 184. Compliance interpretation of request for premerger clearance: Bankruptcy imminent.

The Commission issued an opinion September 1, 1966, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding order prohibiting the acquiring company from making certain acquisitions.

A small processor of food products applied for clearance of its proposed acquisition by a larger processor engaged in operations in the same general product line. The larger processor was, and is now, subject to a Commission order prohibiting, among other matters, the making of certain acquisitions for a designated period of time without prior Commission approval.

The requesting processor was on the verge of bankruptcy and had made reasonable but unsuccessful attempts to locate another purchaser within the industry.

The Commission advised that, in reliance on the information and data supplied, it would approve the request for clearance of the proposed acquisition. (File No. D-6651, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 185. Compliance interpretation of request for premerger clearance: De minimis competitive effect.

The Commission issued opinions September 29, 1966, and January 26, 1967, in connection with requests for advice from a small company as to whether a proposal to merge, if consummated, would violate an outstanding order prohibiting either purchasing company from making certain acquisitions.

A small processor of food products which was tightly held, having declining profits, increasing expenses, a loss of key personnel, a plant too small to compete efficiently, and an owner-manager who was determined to sell, applied for clearance for its proposed acquisition by either of two larger processors in the same general line of commerce. Both of the larger processors were subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval.

On the basis of supplied information, the Commission cleared the request for acquisition by either of the two larger processors. Subsequently, however, partial acquisition by a third processor was approved, as was a partial acquisition by one of the larger concerns. (File No. D-6651 and D-6652, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 186. Compliance interpretation of request for premerger clearance: De minimis competitive effect.

The Commission issued an opinion December 23, 1966, in connection with a request for advice as to whether a proposed merger, if consummated, would violate an outstanding order prohibiting the purchasing company from making certain acquisitions.

The estate of a very small retailer of food products applied for clearance of its proposed acquisition by a larger processor engaged in operations in the same general product line. The larger company was, and is now, subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval. The retailer, a negligible factor in the industry and in the relevant geographical market, was not capable of development in the estate status.

The Commission cleared the proposed acquisition. (File No. D-6651, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 187. Compliance interpretation of request for premerger clearance: Imminent insolvency.

The Commission issued an opinion September 25, 1964, in connection with a request for advice as to whether a proposed merger, if consummated, would be in violation of an outstanding Commission order prohibiting the purchasing company from making certain acquisitions.

A large integrated company manufacturing commercial products applied for clearance to acquire a smaller company engaged in operations in the same product line in the Western States. The larger company was, and is now, subject to a Commission order prohibiting certain acquisitions for a designated period of time without prior Commission approval.

Both manufacturers were in direct competition in the geographical trading area. However, each held a relatively small share of the market involved. It was represented that the small concern had exhausted all other possibilities of selling to another purchaser, save to one or more of the other integrated manufacturers in the industry. The seller, who was suffering personal hardships because of illness in his family, had to leave the business and the area which is served.

On the basis of the information and data supplied, the Commission cleared the request for clearance of the proposed acquisition. (File No. C-751, released Feb. 13, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 188. Premerger clearance denied: Merger of firms in same industry would raise questions.

The Commission issued advisory opinions on September 27, 1962, March 28, 1963, and September 12, 1963, in which commutual requests for premerger clearance from liability under Section 7, amended Clayton Act, by a small dairy in financial difficulty were denied as to acquisition by a larger company in the same industry, but were finally approved permitting acquisition by a diversified corporation in another industry.

A small dairy in financial difficulty desiring to be acquired by a larger company in the same field applied for clearance of the proposed acquisition. The larger company, an integrated processor and distributor of dairy products, was the respondent in a complaint in litigation with the Commission.

The applicant was advised the proposed acquisition would raise questions similar to those involved in the proceeding and that the pendency of the proceedings made it inappropriate to express any further views. Reconsideration was requested. In response, the Commission informed the applicant of the decision in the Foremost Dairies case, Docket 6495 and again advised that the acquisition would raise serious questions under Section 7 of the Clayton Act. Further, the Commission pointed out that it recognized the problems of small dairies and suggested further efforts to sell to a local or regional purchaser.

Later, the small dairy requested consideration of its proposed acquisition by a large, diversified corporation in the food industry. The Commission advised it would contemplate no action if the transaction was consummated. The Commission added its advice should not be construed as affecting any position it had previously taken against the acquiring corporation nor as in any way prejudicing any pending or future action it might take against the acquiring corporation regarding other acquisitions. (File No. 633 7015, released Feb. 13, 1968.)

No. 189. Premerger clearance: Precarious financial condition.

The Commission issued an advisory opinion on March 20, 1963, in which a request for premerger clearance from liability under Section 7, amended Clayton Act, was approved permitting acquisition of a company on the verge of insolvency.

A manufacturer of consumer goods desiring to be acquired by a larger producer in the same field requested clearance of the proposed acquisition. His company had suffered declining sales for a number of years and was in a precarious financial condition to the point of being on the verge of insolvency. Further, reasonable attempts to sell to others had been made but there was no other purchaser which could preserve the competitive force possessed by the requesting manufacturer.

The requesting party was advised that if the sale were consummated, the Commission would contemplate no action based on this transaction alone. The Commission added that its decision was based on representations that the smaller firm was in such dire financial straits that it faced impending bankruptcy. Further, the Commission stated it was expressing no opinion regarding prior acquisitions or on restrictive practices, if any, by the purchaser or any other company which may have contributed to the requesting party's failing condition. (File No. 633 7040, released Feb. 13, 1968.)

No. 190. Random distribution of "bonus certificates" with purchase.

The Commission in an advisory opinion stated that the random inclusion of "bonus certificates" in egg cartons would be violative of Section 5 of the Federal Trade Commission Act.

The seller proposed to include "bonus certificates" in cartons of eggs offered for sale. The certificates were described as being worth "so many eggs or \$5 in cash." They would be randomly distributed so that some cartons would contain eggs plus a bonus certificate of value, while others would contain eggs only, or eggs plus a certificate of little or no value.

The Commission was of the view that this would be merchandising by lottery, a practice which the Commission has long held to be unfair within the meaning of Section 5 of the Federal Trade Commission Act. (File No. 683 7065, released Feb. 16, 1968.)

No. 191. Advertisements which appear in news format.

The Commission rendered an advisory opinion involving the question of whether it is deceptive to publish an advertisement in the format of a news article without disclosing it is an advertisement, as required in the Commission's press release of November 28, 1967.

The factual situation presented to the Commission involved the publication of a column in a newspaper which advertised the cuisine facilities of several restaurants. Written in narrative form, the writeup about each restaurant usually identified the chef and/or head waiter, gave a brief description of how a certain meal is prepared, and contained other factual information concerning the hours during which meals are served, whether dancing is permitted, whether cocktails are served, and some general indication of the price range of the meal.

In its opinion, the Commission concluded :

* * * the column uses the format and has the general appearance of a news feature and/or article for public information which purports to give an independent, impartial and unbiased view of the cuisine facilities of a particular restaurant. Since the column in fact consists of a series of commercial messages

which are paid for by the advertisers, the Commission is of the opinion that it will be necessary to clearly and conspicuously disclose it is an advertisement, as outlined in the aforementioned press release. This conclusion would not be altered even though the column carried the exact cost of each meal being advertised, or if it listed the price range of the various meals.

(File No. 683 7080, released Feb. 16, 1968.)

No. 192. Clearance denied for merger of competing milk companies.

The Commission rendered an advisory opinion in which clearance was denied to an applicant to sell its milk processing and dairy products distribution assets to a large, integrated food producing, processing, wholesaling and retailing concern. The proposed purchaser has a dairy products subsidiary in actual or potential competition with the applicant in the same market.

The Commission noted that the proposed merger would combine the firm now appearing to rank fourth in sales in the market with the eighth to result in a firm in second or third position. It also appears that the present top four firms have about forty percent of the sales in the market and therefore the proposed merger would further increase the market concentration.

Because the proposed merger raises such serious questions of possible violations of Section 7 of the amended Clayton Act, the Commission advised the applicant that premerger clearance cannot be granted. The Commission further stated that, if the merger occurs, the Commission may take the action it deems necessary to protect the public interest and prevent anticompetitive effects. (File No. 683 7078, released Feb. 20, 1968.)

No. 193. Substitution of merchandise unlawful even though equivalent in grade, quality, and appearance to that ordered by customers.

The Commission was requested to render an advisory opinion with respect to the legality of substituting, on customer orders for a particular fabric, a fabric produced by another manufacturer without notifying customers of the intended substitution.

It was represented that customers had long been supplied with a specific fabric and that sample display cards had been distributed to them advertising the availability of this fabric. The supplier recently discontinued production of the fabric and another supplier was located who will furnish a similar product said to be identical in pattern and of better quality. It was proposed to supply customers with the new product without resampling their display cards or otherwise advising them of the substitution, the cost of which, it was asserted, would be prohibitive.

The Commission advised that it could not give its approval to this proposed business practice. A foreseeable result of substituting the product of one manufacturer for that of another would be to mislead customers into purchasing an article which they might not wish or intend to purchase, and which they might or might not purchase if they were informed as to its origin. Nor would the prejudice thus engendered be confined to customers; other distributors and manufacturers of a competing product would be injured when orders that would normally have come to them if the fabric were rightly named are diverted to the offending firm. (File No. 683 7081, released Feb. 20, 1968.)

No. 194. Use of uniform delivered pricing system effected by deducting freight allowances from f.o.b. price.

The Commission advised a west coast manufacturer of industrial parts that it would not be illegal to use either a conventional uniform delivered pricing system based on average cost factors or a uniform delivered pricing system which will be effected by granting so-called freight allowances to be deducted from the manufacturer's f.o.b. factory price.

The facts with respect to the second alternative were that the manufacturer proposed to establish an f.o.b. factory price of, for purposes of illustration, \$99.50. Actual freight to west coast customers may be \$0.50 and such customers would receive no allowance. Thus they would pay the manufacturer \$99.50 and the carrier \$0.50, making a total of \$100. Then, again using hypothetical figures for purposes of illustration, actual freight to a Denver customer may be \$1. The manufacturer would grant such a customer a \$0.50 freight allowance to be deducted from the f.o.b. price, thus leaving the customer paying the manufacturer a price of \$99 and the carrier \$1, making a total of \$100. Continuing east, actual freight to a Kansas City customer may be \$1.50. The freight allowance would be \$1, leaving the customer paying the manufacturer \$98.50 and the carrier \$1.50, for a total again of \$100. This would continue in graduated steps across the country to where an east coast customer with actual freight costs of \$3 would receive an allowance of \$2.50, leaving him also paying a total of \$100. The manufacturer advised that it was considering this alternative for administrative reasons, since it wished to pass title to the customers upon delivery to the carrier and have the customers handle all freight bills.

With respect to the first question, the Commission advised that it was of the view that there could be no question of the manufacturer's right to unilaterally employ a uniform delivered pricing system, since if each buyer pays the same delivered price no question under the Clayton

Act, as amended by the Robinson-Patman Act, would arise. While the factual situation under the second alternative is somewhat more complicated, the Commission was further of the view that it also would not result in a violation of law if implemented exactly as outlined above. In the Commission's view, the difference between the two systems is one of form rather than of substance and that it would make no legal difference whether the manufacturer computes its factory price and adds to it an amount equal to the average freight costs for delivering to all customers, as is done in the usual uniform delivered pricing system, or whether it accomplishes the same result by deducting an amount from the factory price which would have the effect of leaving each buyer paying an amount roughly equal to the same freight factor. In either event, it would seem that the manufacturer would have made freight a part of the price, so that each buyer's out-of-pocket costs would be exactly the same.

The Commission further cautioned, however, that since this opinion deals in a projected manner with hypothetical figures chosen for illustrative purposes, the computations later to be made based upon actual cost factors must in practice achieve the result claimed in that each buyer will pay exactly the same net price including the freight. Any other result, the Commission stated, would be outside the scope of this opinion. (File No. 683 7077, released Feb. 24, 1968.)

No. 195. Notice to magazine dealers as to availability of display allowance.

The Federal Trade Commission advised a seller of magazines that it could see no objection to its proposed method of notifying dealers of the availability of a display allowance program on the assurance that all dealers would receive notice by the method selected.

Under the proposal, the display allowance plan would be offered to all retailers on the same basis. Under the method of notification proposed, an advertisement would be published in a trade publication of general circulation among dealers announcing the main details of the proposal. A one inch reminder advertisement would then be published in three subsequent issues. Then the seller proposed to work with the distributor of the publications and the wholesalers to reach every retailer competing in the distribution of the publications.

The Commission advised that while Section 2(d) of the amended Clayton Act does not specifically require that all competing customers be individually notified regarding the particulars of a promotional program, it has repeatedly held that the statute contemplates that all competitors shall be accorded equal opportunity to participate. This construction has been incorporated in the Commission's Guides for Advertising allowances, where sellers are advised that they should take some action to inform all customers competing with any partici-

pating customer that the plan is available. This may be done by any means the seller chooses, including letter, telegram, notice on invoices, salesmen, brokers, etc. While the Guides do add that if a seller wants to be able to show that he did make an offer to a certain customer, he is in a better position to do so if he made it in writing, the Commission added that it is clear that other methods are permitted if notice to all competing customers is given.

The Commission concluded that it could see no objection to the proposed program of notification based on the assurance that it will reach all competing dealers of the publications. In this connection, however, the Commission further advised that whenever a seller selects any method of notification short of actual notice to each dealer, he bears full responsibility under the law for seeing that the method selected gives each dealer the notice to which he is entitled. (File No. 683 7082, released Feb. 24, 1968.)

No. 196. Commission holds not objectionable the advertising phrase "It works * * * or we'll fix it free."

The Commission rendered an advisory opinion whereby it concluded that a proposed phrase "It works . . . or we'll fix it free." is not objectionable and thus may be used in advertising, and on boxes containing, products of a certain manufacturer. The Commission took account of information that the particular manufacturer does, in fact, repair without question and without charge of any kind (*e.g.*, for parts, labor, "handling," or return postage) all of its products sent to it directly by owners or through retailers. (File No. 683 7089, released Feb. 27, 1968.)

No. 197. Use of term "Hand Made" to describe boot with a sealed sole.

The Commission rendered an advisory opinion to the effect that the unqualified term "Hand Made" could not be used to describe a boot with a sealed sole.

The requesting party is currently selling a completely hand made boot in which all parts are cut by hand and stitched together to form the uppers. It is hand lasted and then the sole is built up and stitched together by hand. The boot is labeled "Hand Made." The seller is now considering putting on a sealed sole to replace the leather sole. Other than that all operations will be identical, including the hand sewing of the heel counter. An opinion was requested as to whether a boot so constructed could still be labeled "Hand Made."

The opinion advised that in the Commission's view the seller could not use the unqualified term "Hand Made" to describe a boot with a sealed sole. He could, however, use the term to describe the part or parts which are sewn by hand in such manner as to make it clear,

by use of an appropriate disclosure, that the sealed sole is not hand sewn. (File No. 683 7087, released Feb. 27, 1968.)

No. 198. Truckload discount for quantity purchases.

The Commission rendered an advisory opinion involving a 5 percent discount that a manufacturer proposed to offer to all customers purchasing in truck-lot quantities. The manufacturer requesting the opinion is subject to a cease and desist order prohibiting price discrimination under Section 2(a) of the amended Clayton Act.

The manufacturer operates a single factory located in the Midwest and ships its products on a uniform delivered price basis to wholesale customers located throughout the continental United States. The manufacturer desires to pass on to its customers cost savings due to lower freight rates for full truckload-lot quantities, by means of a uniform discount applicable to all truckload orders. For a recent six-month period, the manufacturer determined that its average freight saving on such orders was in excess of 5 percent. It thereupon requested an advisory opinion as to whether the Commission would approve a uniform 5 percent truckload discount.

The Commission advised the manufacturer that it could not approve the proposed 5 percent discount for truckload-lot orders because, based on the submitted data, the proposed discount would not appear to be uniformly cost justified. Accordingly, the use of such a discount could result in violation of the order in question, by producing price discriminations between customers qualifying for the discount and competing customers not able to qualify for it. The Commission noted that the alleged cost savings depend upon averaging the savings in the freight rates for truckload-lot shipments to all of the manufacturer's truckload customers in the United States and that, although the freight saving increase with the distance of customers from the manufacturer's plant, the freight savings on sales to nearby truckload customers is considerably less than 5 percent. (File No. D-7851, released Mar. 5, 1968.) (Opinion issued under authority of Section 3.16(c) of the Commission's Rules of Practice (1967).)

No. 199. Agreement by processors to sell at prices higher than minimums set by State regulation.

The Commission rendered an advisory opinion advising a State official that it would be illegal to hold a meeting at which the processors of milk within the State would agree to sell at prices higher than the minimum prices set by the State milk control agency.

The official pointed out that the State milk control agency had performed its function of setting minimum prices pursuant to State law, but that it was felt that it would be difficult for many processors to

maintain a profitable operation at these minimums in the outlying areas and towns due to higher delivery costs. The official also advised that this proposed action would not be taken pursuant to State law, but would instead be as a result of voluntary agreement among the processors involved.

The opinion advised that it was the Commission's considered opinion that such an agreement among the processors would be subject to serious question under well-settled principles of antitrust law. The Commission stated the law is clear that a State may, in the exercise of its sovereign power, itself conduct such regulation of business activities within its borders as its own legislature shall properly deem necessary in the public interest. So long as the resulting regulation is a State as opposed to individual activity, those subject to the regulation would not be subject to a charge of violating the antitrust laws by reason of their compliance with the State's orders, including orders setting minimum prices for milk.

Here it appeared that the State, speaking through its milk control agency, had already performed its regulatory function and set minimum prices for milk within its borders. While any individual processor may sell at higher prices if he so desires, for them to combine together to agree to sell at higher prices would, in the Commission's view, present an entirely different question and would be a situation which would enjoy no part of the immunity afforded by State regulation. The prices to be charged within the State may be raised or lowered only by the State itself, the opinion added. They may not be altered by agreement among those subject to the State's regulation without being fully subject to the antitrust laws, under which no principle is more firmly established than that which holds that any agreement among competitors as to the prices at which they will sell is illegal per se. (File No. 683 7085, released Mar. 5, 1968.)

No. 200. Promotion and sponsorship of price catalogs by trade association.

The Commission was requested to render an opinion with respect to an outstanding order to cease and desist which, among other things, proscribed agreements to suggest resale prices. The issue involved the legality of a covered Trade Association's sponsorship of catalogs for its member-dealers, which catalogs would contain manufacturers' suggested resale price.

The Commission advised that under an outstanding Commission order covering the Trade Association and its members such sponsorship by the Association may well violate said order. (File No. D-5979, released Mar. 11, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 201. Specialized automotive repair association wants to publish flat rate manual for its members.

The Commission issued an advisory opinion stating that it cannot approve the publication by a specialized automotive repair association of a flat rate repair manual for use by its members in determining labor charges.

The Commission commented that there is implicit too great a danger that the association's manual would facilitate price fixing between competing repair shop operators. The Commission pointed out the well-established antitrust principle that price fixing by competitors is illegal *per se*. The public expects to derive benefits from different prices offered by competing service operators. (File No. 683 7090, released Mar. 11, 1968.)

No. 202. Definition of jobbers and wholesalers for functional pricing purposes.

The Commission issued an advisory opinion to an applicant who (1) asked for a definition of the words "jobber" and "wholesaler," and (2) asked the Commission's views as to the propriety of a proposed revision in price lists.

In response the Commission stated:

As a working rule, one might suppose that, in a three level system, wholesalers are closer to producers and jobbers are closer to retailers in the distribution of a producer's goods. Traditionally, producers sell to wholesalers who sell at a higher price to jobbers who sell at a higher price to retailers.

The controlling element in your problem, however, as in similar problems arising under the amended Clayton Act, is whether or not resale competition actually exists as between and among these various resellers rather than the names they use to describe themselves. If in fact a so-called wholesaler competes with a so-called jobber in the redistribution of goods, the difference in names is of no consequence; the fact of competition is.

In *F.T.C. v. Ruberoid*, 343 U.S. 470, (1952) the Supreme Court stressed that actual competition in resale operations is decisive rather than nomenclature and approved the Commission's disregard of "ambiguous labels, which might be used to cloak discriminatory discounts to favored customers."

What you plan, as we understand it, is to sell your middlemen, whether "wholesalers" or "jobbers," at one price, while selling certain selected retailers at a higher price.

In the circumstances you present, you may properly do this provided the "wholesalers" and "jobbers" are functioning at the same distribution level and are not themselves engaged in retail operations competitive with the selected retailers.

(File No. 683 7092, released Mar. 14, 1968.)

No. 203. Common selling organization.

The Commission advised a group of geographically scattered, relatively small public warehousemen that it would not object if they were

to establish a jointly owned selling agency under the conditions described.

The Commission understands that the identified public warehousemen propose to establish, as a separate corporation, a single service organization, nationwide in scope. Each participating public warehouseman would periodically provide the service organization with information about the kind of storage space he has available, where such space is available, the times at which such space might be available and the terms and conditions under which such space would be available. The information provided is to be processed by electronic data processing equipment for use by storage space salesmen employed by the service organization. Only generalized information developed by the service organization will be made available to participants jointly.

Each participating public warehouseman is to retain and affirmatively maintain local autonomy in administration, storage, rates, and customers to be serviced. The Commission notes that, under the statutes it administers, each participating public warehouseman is required independently to set his own rates and his own terms and conditions of sale. Any use of the service organization to effect concert of action as to rates, terms, or conditions of sale would expose participants to a charged violation of Section 5 of the Federal Trade Commission Act.

The Commission would not object to the establishment of a cooperative enterprise, as above described, operating as above set forth.

The following proviso, however, was added to the opinion:

Unless the Commission has previously rescinded this approval, you are directed that at the end of three years from the date of this opinion to submit to the Commission a complete report on your membership, terms and conditions under which the cooperative is operating, including a statement for each member on the sales territory of such member, the volume of business and percentage of such members business.

(File No. 683 7088, released Mar. 14, 1968.)

No. 204. Use of terms "unconditional" and "lifetime" guarantee.

In an advisory opinion rendered to a watch manufacturer, the Commission ruled that a guarantee which has conditions and limitations, other than as to time, may not be represented as an "unconditional" guarantee. It also advised the requesting party that a guarantee which lasts for only three years cannot be described as a "lifetime" guarantee. Moreover, the Commission objected to the guarantee being described as "4-Ever."

With respect to the claim "unconditional," the Commission said that it would be proper to claim that a product is "Unconditionally guaranteed for three years" if in fact no other conditions existed. However,

where there are conditions other than time, such as were present in the case presented for review, the Commission said that it would be improper under Sec. 5 of the FTC Act to claim that the guarantee is "unconditional." The reason for this, it was concluded, is that the term "unconditional" means there are no conditions attached, and it is a contradiction in terms rather than an attempt at modification to permit use of the claim "unconditional" provided the conditions are disclosed.

Under the terms of the guarantee which was the subject of the Commission's opinion, the purchaser of the watch had the option to renew the original guarantee which expired at the end of three years by paying a service fee of \$5 on an annual basis. By having to pay the \$5 service fee, the Commission said, the purchaser no longer has a "lifetime guarantee" but a service or insurance policy which is renewable at his expense on an annual basis.

The Commission also ruled that it is necessary to disclose the life being referred to whenever it is claimed that the duration of the guarantee is for a "lifetime." For example, is it the life of the original purchaser, the original user, or the life of the product, etc.? Thus, even if the requesting party resolved the first objection and offered a guarantee for life rather than for three years, it would still be necessary to disclose clearly and conspicuously the life to which reference was being made.

In the opinion the Commission also objected to the term "4-Ever" because, contrary to fact, the product was not guaranteed forever.

Finally, the Commission stated that it was not ruling upon the "waterproof" claim because it currently has under consideration a possible revision of trade practice rules relating to the term "Waterproofing" as applied to watches. (File No. 683 7058, released Apr. 3, 1968.)

No. 205. Use of a computer system to collect and disseminate marketing data.

The Commission issued an advisory opinion concerning the legality of a proposal to employ computer and data processing equipment to collect and disseminate certain information in connection with marketing of ice-pack broilers. Sellers would feed into the system their asking prices and quantities available, and later report on actual sales, giving the prices and quantities sold. This information would be available to subscribers of the service, whether the subscribers are sellers, buyers, or members of the public. Subscribers would obtain the information by calling in to the central computer. Identity of all parties (sellers and buyers) would be kept secret from each other and from the public.

The Commission advised the applicant that it has no objection to the proposed plan, provided it is not used for some illegal purpose. If the plan is used as a means for fixing or tampering with the price of poultry, or for some other illegal purpose, then the Commission would of course have serious objection to the plan.

The Commission continued :

Statistical reporting plans which involve the collection and dissemination of data related to future prices are not illegal per se. However, experience in other cases indicates that a price reporting plan which involves future or advance prices, particularly when that plan invites an industrywide pricing policy, may provide the basis for an inference of an agreement or combination to fix prices in violation of Section 5 of the FTC Act. In essence, it is the potential danger inherent in the reporting plan which is related to future prices that prompts the Commission to suggest that it be used with extreme care.

Unless the Commission has previously rescinded this approval, you are directed, at the end of three years from the date of this opinion, to submit to the Commission a complete report on the actual operation of the program, describing how identity protection was maintained, and to include copies of your printed-out periodic reports and audits.

(File No. 683 7103, released April 3, 1968.)

No. 206. Marking requirements for apparel of U.S. components assembled abroad.

The Commission advised an apparel manufacturer that Section 4(b)(4) of the Textile Fiber Products Identification Act would require an affirmative disclosure of the particulars of foreign origin under the following facts:

The fabric of which the apparel will be made is entirely of domestic origin. This fabric will be cut into shapes and forms. The cut fabric, together with buttons, trimmings, threads, labels, in short all findings, also of domestic origin, will be shipped abroad to be assembled and sewn into the product. The assembled product will be returned to the United States where it will be finished, pressed, folded, and packaged.

The Commission advised the requesting party that a label or other mark denoting the particulars of foreign origin would be required in the following terms: "Assembled and sewn in [name of foreign country where assembled and sewn] of American-made materials." (File No. 673 7095, released Apr. 4, 1968.)

No. 207. "Made in U.S.A." label on answering machine composed of domestic and foreign made components.

The Commission rendered an advisory opinion today in response to a question concerning the origin of a telephone answering machine which was composed of both domestic and foreign made components.

The basic machine is manufactured in a foreign country, but modifications to be performed in the U.S., including both labor and parts,

will represent approximately 70 percent of the total cost of the finished product. Numerically, approximately half of the components are domestic and the remaining half are imported.

Concluding that such a product should not be unqualifiedly marked as "Made in U.S.A.," the Commission said:

* * * a "Made in U.S.A." mark would constitute an affirmative representation that the finished product was made in its entirety in the United States. Since the end product would in fact contain foreign made components of a substantial nature, it would be improper to describe the finished product as "Made in U.S.A." without a clear and conspicuous disclosure of the identity and foreign country of origin of the imported components.

(File No. 683 7093, released Apr. 4, 1968.)

No. 208. Disclosure of origin of golf clubs made in this country from imported parts.

The Commission was requested to render an advisory opinion concerning the proper labeling as to origin of golf clubs made in this country using imported component parts. The cost of materials and labor in this country with respect to the four clubs in question will range from a low of 63 percent to a high of 92 percent.

The opinion advised that in the absence of any affirmative representation that the products are made in the United States, or any other representation that might mislead the public as to the country of origin, and in the absence of any other facts indicating actual deception, the Commission was of the opinion that, under the facts as presented, the failure to mark the origin of these golf clubs will not be regarded by the Commission as deceptive. Accordingly, no marking is required on these clubs with references to the country of origin. (File No. 673 7109, released Apr. 4, 1968.)

No. 209. Disclosure of foreign origin of component used in drawer slide assembly.

The Commission was asked to render an advisory opinion as to the labeling requirements applicable to a slide assembly for cabinet and desk drawers which will be made in this country using an imported rail member. The imported component will make up less than half the cost of the completed assembly.

The opinion advised that in the absence of any affirmative representation that the product is made in the United States, or any other representation that might mislead customers as to the country of origin, the Commission was of the opinion that, under the facts as presented, the failure to mark the origin of the product would not be regarded as deceptive.

However, the Commission was also of the opinion that it would not be proper to describe the completed slide assembly as "Made in U.S.A."

since that would constitute an affirmative representation that the entire assembly was made in this country, which is not the fact, unless, of course, the fact is also disclosed in a clear and conspicuous manner that the rail member is imported. (File No. 683 7095, released Apr. 4, 1968.)

No. 210. Disclosure of foreign origin of imported mechanical pencil action.

The Commissioner rendered an advisory opinion in regard to the question of whether it is necessary to disclose the origin of imported mechanical pencil actions which are to be assembled with an American made barrel and clip.

In the absence of any affirmative representation that the product is made in the United States, or any other representation that might mislead the public as to the country of origin, and in the absence of other facts indicating actual deception, the Commission expressed the opinion that, under the facts as presented, the failure to mark the origin of these goods will not be regarded by the Commission as deceptive. (File No. 673 7002, released Apr. 4, 1968.)

No. 211. Disclosure of country of origin of imported FM tuners.

The Commission was requested to render an advisory opinion concerning the proper marking of small FM tuners imported from a foreign country. The tuners are disassembled in this country and a number of domestic components are installed to replace their foreign counterparts to change the tuning frequency and narrow the bandpass.

With regard to the proposal to omit any statement on the label concerning the origin of the product, and instead to include a brochure with each unit that would accurately explain its origin, the Commission believes that such proposal would not violate any of the laws administered by it. (File No. 683 7010, released Apr. 4, 1968.)

No. 212. No foreign origin disclosure required of imported shower head components.

The Commission rendered an advisory opinion concerning the proper labeling as to the origin of shower head components to be imported from a foreign country. Under the terms of the proposal the imported components will represent approximately 40 percent of the total cost of the completed unit, with American labor and material representing the remaining 60 percent.

In the absence of any affirmative representation that the product is made in the United States, or any other representation that might mislead the public as to the country of origin, the Commission ex-

pressed the opinion that, under the facts as presented, the failure to mark the origin of these goods will not be regarded by the Commission as deceptive. Accordingly, the Commission ruled that no marking is required on the imported shower head components beyond what is imposed by the Bureau of Customs. (File No. 663 7015, released Apr. 4, 1968.)

No. 213. Country of origin disclosure on bicycles assembled with some imported parts.

The Commission was requested to render an advisory opinion concerning the proper labeling as to origin of bicycles which were to be produced in the Virgin Islands using parts to be imported from a foreign country together with other parts from the United States. The value of the imported parts in relation to the total value of the finished bicycle will be around thirty-five percent.

The opinion advised that in the absence of any affirmative representation that the product is made in the United States, or any other representation that might mislead the public as to the country of origin, the Commission is of the opinion that, under the facts as presented, the failure to mark the origin of these bicycles will not be regarded by the Commission as deceptive. (File No. 673 7056, released Apr. 4, 1968.)

No. 214. Country of origin labeling on lamp containing an imported wooden base.

The Commission rendered an advisory opinion concerning the proper labeling as to the origin of lamps containing a wooden base imported from Japan, which represents approximately 20 percent of the total cost of the completed unit. The remaining components will be of American origin and the lamps will be assembled here in the United States.

Two questions were ruled upon by the Commission in the advisory opinion. First, would it be proper to label the lamps as "Made in U.S.A."? Second, if not, must the wooden base be labeled as "Made in Japan"?

In response to the first question, the Commission said that the claim, "Made in U.S.A.," would constitute an affirmative representation that the entire lamp was of domestic origin. Since a substantial portion of the lamp would be of foreign origin, the Commission ruled it would be improper to label the lamps as "Made in U.S.A." without a clear and conspicuous disclosure in the label that the wooden base is made in Japan.

In regard to the second question the Commission said that, if the lamps are not labeled as "Made in U.S.A." and no other representation

is used which might mislead the public as to the country of origin, and in the absence of other facts indicating actual deception, under the facts as presented the failure to mark the origin of the goods will not be regarded by the Commission as deceptive. Accordingly, the Commission said that no marking is required on the imported wooden base with reference to the country of origin. (File No. 673 7077, released Apr. 4, 1968.)

No. 215. Misrepresenting hoist as "Made in U.S.A."

The Commission rendered an advisory opinion today in response to a question involving the origin of a hoist which is to be made in part of both domestic and foreign made components.

Specifically presented to the Commission was the question of the percentage of domestic material which must be present in the finished product in order for it to be properly described as "Made in U.S.A."

In response to the foregoing question, the Commission said:

* * * a "Made in U.S.A." mark would constitute an affirmative representation that the product was made in its entirety in the United States. If the product was made of foreign components and assembled in the United States, it would be improper to describe the finished product as "Made in U.S.A." although a legend "Assembled in U.S.A. [name of country] components" would be proper.

(File No. 683 7091, released Apr. 4, 1968.)

No. 216. Affirmative misrepresentation as to origin of photographic accessories.

The Commission rendered an advisory opinion today in regard to the proper labeling of the origin of photographic accessories which are imported in whole or in part from a foreign country.

In the opinion the Commission ruled upon the following three questions which were presented to it. First, what percentage of foreign made components can a product contain and still be properly labeled as "Made in U.S.A."? Second, in the absence of a "Made in U.S.A." claim, when is it necessary to disclose the foreign country of origin of an imported product? Third, does the Commission have any specific regulations as to size, material and location whenever it is necessary to disclose the origin of an imported product?

In response to the first question, the Commission said:

* * * the "Made in U.S.A." mark would constitute an affirmative representation that the product was made in its entirety in the United States. If the product did in fact contain foreign made components of a substantial nature, it would be improper to label the finished product as "Made in U.S.A." without a clear and conspicuous disclosure indicating the identity of the imported components and the foreign country of origin thereof.

With respect to the second question, the Commission stated that it is somewhat hypothetical in that it does not involve a specific proposed

course of action, and therefore it is not the proper subject for an advisory opinion.

In regard to the third and final question, the Commission stated that it had no specific regulations as to the exact size, etc., of the disclosure. The Commission said that it would have to state the rule in general terms because the facts of each case may be different. The basic requirement, the Commission said, is that the disclosure must be of such conspicuousness as to be likely observed by prospective purchasers making casual inspection of the merchandise and of such degree of permanency so as to remain thereon until consummation of the consumer sale thereof. (File No. 683 7084, released Apr. 4, 1968.)

No. 217. Manufacturer may not mark "Made in U.S.A." on imported blades of cutlery finished and assembled in the United States.

The Commission issued another advisory opinion in a series concerning commodities of partial or total foreign origin.

The Commission advised a manufacturer in this country, the applicant for an advisory opinion, that he may not mark "MADE IN U.S.A." on imported blades of cutlery to be finished and assembled in the United States. The Commission noted that a blade is a significant component of cutlery. The Commission called attention to the danger that the contemplated marking might violate Section 5 of the Federal Trade Commission Act. (File No. 683 7038, released Apr. 4, 1968.)

No. 218. Country of origin labeling on food machinery containing imported components.

The Commission rendered an advisory opinion in regard to representations concerning the origin of goods which are produced domestically but which contain imported components.

Specifically, the Commission ruled that food machinery may not be represented affirmatively as being of domestic origin unless it is made in its entirety in the United States.

Under the factual situation presented to the Commission, the requesting party proposes to produce a food machine here in the United States which will contain some components imported from a foreign country. Specifically, the requesting party wanted to know what percentage of the machine must be made in the United States before it can be affirmatively represented as an American-made product.

Although the Commission ruled that such a machine could not be affirmatively represented as being of domestic origin, it further stated the ruling does not prevent the vendor from making a factual disclosure of the percentage of American-made parts as contrasted with the percentage imported, should the vendor desire to make such a representation. (File No. 683 7009, released Apr. 4, 1968.)

No. 219. Disclosure of foreign origin of contents on package bearing name suggesting domestic origin.

The Commission issued an advisory opinion dealing with the failure to disclose the foreign origin of imported switchplates. The packages containing the switchplates was labeled with a company name suggesting that the product was of domestic origin.

Under these circumstances, the Commission required that the foreign origin of the product be disclosed in conjunction with the company name. (File No. 672 3717, released Apr. 4, 1968.)

No. 220. Foreign country of origin disclosure on imported tools.

The Commission rendered an advisory opinion in regard to the proper labeling of the country of origin of certain imported tools.

Specifically, the requesting party wanted to know whether it would be necessary to disclose the country of origin on the tools and in advertising.

In the advisory opinion which was issued, the Commission concluded that it would be necessary to disclose the foreign country of origin of the tools in a clear and conspicuous manner at the point of sale. It also ruled that it would not be necessary to disclose the origin of the tools in advertising. (File No. 663 7034, released Apr. 4, 1968.)

No. 221. Foreign country of origin disclosure on imported metal spring clamps.

The Commission rendered an advisory opinion in regard to the proper marking of metal spring clamps imported from a foreign country. The clamps are to be imported in bulk, prepackaged and resold in the United States. They will be used to hold glass to the backing of frames, on cardboards and other accessories, in temporary book-bindings, office ledgers, etc.

The Commission advised the person requesting the advisory opinion that it would be necessary to mark the imported clamps with the foreign country of origin in a clear and conspicuous manner. (File No. 673 7026, released Apr. 4, 1968.)

No. 222. Disclosure of foreign origin of component part of ice cream spade assembled in this country.

The Commission was requested to render an advisory opinion with respect to the necessity for disclosing the country of origin of the imported metal portion of an ice cream spade manufactured in this country.

The opinion advised that in the Commission's view the country of origin of the imported metal portion of the ice cream spade should be disclosed wherever the name of the company appears and that it should

be disclosed in a clear and conspicuous manner on the package or the ice cream spade itself. (File No. 673 7070, released Apr. 4, 1968.)

No. 223. Necessity for disclosing foreign country of origin of imported gloves.

The Commission was requested to furnish an advisory opinion as to the necessity for disclosing the country of origin of imported gloves which will be packaged in this country.

The opinion advised that in the Commission's view it will be necessary to disclose the country of origin of the gloves in a clear and conspicuous manner at the point of sale. (File No. 683 7072, released Apr. 4, 1968.)

No. 224. Domestic origin marking for product containing foreign made components.

The Commission issued an advisory opinion dealing with the propriety of using the marking "MADE IN U.S.A." on a product, a significant component of which is in fact manufactured or produced in a foreign country.

The Commission was of the opinion that the proposed marking would constitute an affirmative claim that the product was entirely of domestic origin and such claim would be manifestly incorrect and actionable.

An article assembled or processed in the United States as above described, however, might properly be marked "MADE IN U.S.A." if the marking is accompanied by appropriate qualifying words (*e.g.* "of 'X' country components" or "of 'X' country materials") provided this additional disclosure is made as conspicuously as the claim "MADE IN U.S.A." and in close proximity thereto. (File No. 683 7013, released Apr. 4, 1968.)

No. 225. Labeling of material composed of leather fibers imported in their entirety.

The Commission rendered an advisory opinion in regard to the legality of the following five terms to label material composed of pulverized leather:

1. Pulverized Leather.
2. Reconstituted Leather.
3. Imported Bonded Leather-Fibres.
4. Bonded Leather-Fibres.
5. 100% Leather-Fibres.

Imported from Europe, the material will be sold to manufacturers of luggage, handbags and various other leather goods. The pulverized leather will be bonded with an adhesive and coated either with some type of lacquer or vinyl coating.

In its opinion, the Commission ruled that it had no objection to labels which describe the material as "Pulverized Leather" or "Bonded Leather-Fibres." It rejected, however, the term "Reconstituted Leather" since the word "Reconstituted" creates the impression that the material is leather which has been reprocessed in some manner, when in fact it is nothing more than pulverized leather held together by an adhesive.

With respect to the third proposed label, the Commission expressed the opinion that it would be deceptive to use the word "imported" without disclosing the specific country of origin of the material. Even though the word "imported" is not used, the Commission said that it would still be necessary to disclose the origin of the material since it is entirely imported.

According to its opinion, the Commission also ruled that it would be improper to represent that the material consists of "100 percent" leather fibres, since it contains a substantial amount of adhesive as well as being coated either with a lacquer or vinyl coating. The requesting party was further advised, however, that there would be no objection to using a percentage figure which factually portrays the amount of pulverized leather present in the material.

With further reference to the fifth and final proposed label, the Commission stated that the words "Leather-Fibres" either standing alone, or when coupled with the leather appearance of the material, could create the impression that the material is wholly the hide of an animal or at least something more than pulverized leather. To dispel this erroneous impression, the Commission said it would be necessary to use qualifying language, such as "Bonded Leather-Fibres." "Leather fibres and an adhesive," etc., in connection with the words "Leather-Fibres."

Finally, if the seller decided not to reveal the composition of the material, the Commission pointed out that it would be necessary to disclose that it is not leather by such language as "Not Leather," "Imitation Leather," or "Simulated Leather." The reason for this, the Commission said, is that the material has the appearance of leather, and in order to remove the potential deception inherent through its appearance it is necessary to disclose the fact that it is not leather. (File No. 683 7055, released Apr. 4, 1968.)

No. 226. Necessity for disclosing foreign country of origin of imported honing stones.

The Commission was requested to furnish an advisory opinion as to the necessity for disclosing the country of origin of imported honing stones which will be affixed to plastic handles in this country. The name of the applicant, an American company, would appear on the handle.

The opinion advised that in the Commission's view the country of origin of the honing stone must be disclosed in a clear and conspicuous manner on the product itself. (File No. 673 7046, released Apr. 4, 1968.)

No. 227. Necessity for disclosing foreign country of origin of repackaged imported nails.

The Commission was requested to furnish an advisory opinion as to the necessity for disclosing the country of origin of imported nails, which will be imported in bulk and repackaged in this country.

The opinion advised that in the Commission's view the country of origin of these nails must be disclosed in a clear and conspicuous manner on the package in which they are sold and that neither directly nor indirectly could the importer imply that the nails are made in the United States. (File No. 673 7017, released Apr. 4, 1968.)

No. 228. Country of origin labeling on bubble-packed imported switchplates.

The Commission was requested to render an advisory opinion in regard to the proper marking of the origin of imported switchplates, which are to be packaged in a plastic bubble and sealed to a display card for resale to the general public.

In the opinion the Commission advised the requesting party that it would be necessary to clearly and conspicuously disclose the foreign country of origin of the imported switchplates on the front of the display card. (File No. 673 7090, released Apr. 4, 1968.)

No. 229. Country of origin disclosure of imported braids used in production of braided rugs.

The Commission was requested to render an advisory opinion with respect to the necessity of disclosing the country of origin if imported braids which are stitched together in the United States to produce a braided rug.

The opinion advised that in the Commission's view there should be a clear and conspicuous disclosure that the rugs were assembled and sewn in the United States of imported materials. (File No. 673 7093, released Apr. 4, 1968.)

No. 230. Foreign country of origin disclosure on mounting cards displaying imported eyelashes.

The Commission was requested to render an advisory opinion concerning the proper labeling as to the foreign country of origin of imported false eyelashes. All of the other components, such as the mounting card, directions for use, plastic box, adhesive, etc., will be made and printed in the United States.

In its opinion the Commission concluded that it would be necessary to disclose the foreign country of origin of the imported eyelashes. The Commission also said that it would be acceptable for the disclosure to be made on the back of the mounting card, provided the disclosure is prominent and conspicuous. (File No. 673 7075, released Apr. 4, 1968.)

No. 231. Foreign country of origin disclosure on containers of repackaged imported chemicals.

An advisory opinion was rendered by the Federal Trade Commission in regard to the question of whether it is necessary to disclose the foreign country of origin on containers of imported chemicals which are repackaged in the U.S.

In the opinion, the Commission advised the requesting party that it would be necessary to disclose the foreign country of origin of the imported chemicals on the repackaged containers in a clear and conspicuous manner. (File No. 683 7069, released Apr. 4, 1968.)

No. 232. Foreign country of origin disclosure of imported knife blades.

The Commission rendered an advisory opinion concerning the proper marking of the origin of knife blades imported from a foreign country. The imported blades will be assembled with handles of domestic origin.

The Commission advised the party seeking the opinion that it would be necessary to make clear and conspicuous disclosure of the foreign country of origin of the imported blades. (File No. 673 7059, released Apr. 4, 1968.)

No. 233. Foreign country of origin disclosure of imported radios at point of sale.

The Commission rendered an advisory opinion in regard to the question of whether it is necessary to disclose the foreign country of origin on the container of an imported two-way radio. The equipment itself will be stamped or labeled to denote the foreign country of origin.

Citing the general rule in matters of this nature, the Commission stated that a clear and conspicuous disclosure of the foreign origin of the product must be made at the point of sale. This means, the Commission added, that it may be necessary to make the disclosure on each individual container, if the prospective purchaser does not have the opportunity to inspect the merchandise prior to purchase thereof in order to be apprised of its origin. (File No. 683 7046, released Apr. 4, 1968.)

No. 234. Labeling partially imported product as "Made in U.S.A."

The Commission rendered an advisory opinion in regard to the question of whether it would be permissible to label the container of a polishing cloth as "Made in U.S.A." if approximately 38% of the cost of the finished product is imported from a foreign country, the remainder being of domestic origin.

The polishing cloth is composed of two separate cloths sewn together, one which is impregnated and is used for polishing and the other is untreated flannel which is used as a finishing-off cloth. It is the impregnated cloth which will be imported, and the untreated flannel will be obtained from a domestic source. Because the greater portion of the cost of the finished product is of domestic origin, the requesting party seeking the opinion wanted to know whether it would be proper to label the container as "Made in U.S.A."

In its advisory opinion, the Commission said:

* * *the claim, "Made in U.S.A.," would constitute an affirmative representation that the entire polishing cloth was of domestic origin. Since a substantial portion of the finished product is of foreign manufacture, it would be improper to label the container as "Made in U.S.A." However, if you wish to do so, you may make the following claim: "Made in U.S.A. of impregnated cloth imported from * * *."

(File No. 683 7071, released Apr. 4, 1968.)

No. 235. American manufacturer may not place labels "Made in U.S.A." on garments manufactured in this country from imported cloth.

The Commission issued another advisory opinion among several recently dealing with products of foreign origin or containing significant components originating in foreign countries.

In reply to a request, the Commission advised an American manufacturer that he may not place labels "Made in U.S.A." on garments manufactured in this country from cloth produced in a foreign country. The Commission noted that the cloth is a significant component of the finished garment. The Commission stated that "Made in U.S.A." means made in the United States of America completely and accordingly cannot be applied where a significant component originated in a foreign country. The Commission suggested that such labels on the proposed garments might violate Section 5 of the Federal Trade Commission Act. (File No. 673 7102, released Apr. 4, 1968.)

No. 236. Foreign country of origin disclosure of imported picture components.

The Commission rendered an advisory opinion concerning the proper marking of the origin of various imported picture components. The opinion involved two specific factual situations.

In the first situation, the frame is imported from one foreign country, the picture is from another and the glass, mat and other finishing of the product motif is of U.S. origin. Second, all of the components are of domestic origin, except the picture motif which is imported.

In the absence of any affirmative representation that the finished product is made in the United States, or any representation that might mislead the public as to the country of origin, the Commission expressed the opinion that, under the facts as presented, the failure to mark the origin of the imported components in either of the two factual situations would not be regarded by the Commission as deceptive. Accordingly, the Commission ruled that no marking is required on the imported components beyond what is imposed by the Bureau of Customs. (File No. 663 7061, released Apr. 4, 1968.)

No. 237. Foreign disclosure on containers of repackaged toy kits.

The Commission rendered an advisory opinion in regard to the question of whether it is necessary to disclose the foreign origin on the container of various imported toys packaged therein.

Under the factual situation presented to it, the requesting party imports plastic articles in bulk which are, whenever possible, marked as to their foreign origin. Moreover, the imported articles are repackaged in the United States for resale, and sometimes domestically made components are added, and at other times components from another foreign country are also added. The imported components come principally from two foreign countries. There is no fixed percentage of imported components in each kit and the amount may vary as much as 1-75 percent, and only a few of the toy kits contain wholly imported components. The toys are sealed in the container and prospective purchasers cannot examine the goods prior to the purchase thereof in order to be apprised of the foreign origin markings thereon.

Based upon its understanding of the facts and because of the special circumstances presented by the product and the packaging thereof, the Commission expressed the opinion that it would be appropriate to mark the container in substance as follows: "Some items or components of items are made in (Name of foreign country) and (Name of foreign country)." (File No. 663 7038, released Apr. 30, 1968.)

No. 238. Clearance denied for proposed merger of substantial local independent producer of a food product and a leading national processor and distributor of the same product.

In an advisory opinion the Federal Trade Commission denied clearance to a substantial local independent producer of a particular food product to sell its assets or capital stock to a leading national processor and distributor of the same product.

The Commission noted that, while the two companies do not now sell their product in each other's markets, they appear to be potential competitors of each other. The national company appears to rank as fourth largest distributor nationally of the product involved, and first in several cities with very substantial shares of the markets. The local company ranks second among all sellers of this food product in one principal metropolitan market, first there among the independents, and has enjoyed a substantial share of the market for many years. The merger would be a (geographic) market extension for the national company, eliminating each as a potential competitor of the other and removing the local independent from competition. The proposed merger would appear to violate Section 7 of the Clayton Act and consequently the Commission must refuse to grant the premerger clearance requested. (File No. 683 7107, released Apr. 30, 1968.)

No. 239. Net weight labeling of mesquite chips.

The Commission rendered an advisory opinion to a manufacturer of mesquite chips, a product designed to flavor food cooked with charcoal.

In the advisory opinion, the Commission dealt with two questions. The first question involved Sec. 5 of the FTC Act and the propriety of such claims in labeling as whether the product will impart "real western barbeque" flavor to food and whether it may properly be labeled as mesquite chips. Second, under Sec. 4 of the Fair Packaging and Labeling Act, is it proper to state the net weight as "32 OZ. (2 LBS.)" if the weight may vary as much as 2 ounces either way after it is shipped into interstate commerce, depending upon the presence or absence of humidity, and the package in fact contains 32 ounces when it is packed?

Passing upon the first question, the Commission said that it had no objection to the proposed claims in the labeling insofar as Sec. 5 of the FTC Act is concerned.

With respect to the second question, the Commission ruled that the proposed declaration of net weight complies with Sec. 4 of the Fair Packaging and Labeling Act and comes within the variations in stated weight permitted under Sec. 500.22(b) of its regulations. This section permits:

Variations from the stated weight . . . when caused by customary and ordinary exposure, after the commodity is introduced into interstate commerce, to conditions which normally occur in good distribution practice and which unavoidably result in change of weight or measure.

In arriving at this conclusion, the Commission said that it has assumed that good distribution practices will be followed in the marketing of the product which unavoidably result in the change of weight

in a relatively small percentage of cases, and that an overage is as likely to occur as often as a loss in weight.

The Commission's opinion also advised the requesting party of certain technical requirements of its regulations, such as the location of the declaration of net weight, the exact size of the declaration in relation to the area of the principal display panel, and other information relating to the identity and location of the manufacturer of the product. (File No. 683 7111, released Apr. 30, 1968.)

No. 240. Use of symbols and names having fur-bearing animal connotations in labeling textile fiber products.

The Commission was requested to render an opinion with respect to the labeling of textile fiber products manufactured so as to simulate a fur or fur product.

The requesting party proposed to use a word closely resembling the name of a fur-bearing animal, the fur of which is commonly used in the manufacture of garments, in association with a pile fabric simulating that fur.

In the Commission's view, the use of the proposed term to describe such a fabric would be violative of that part of Section 5 of the Federal Trade Commission Act which makes deceptive acts or practices in commerce unlawful. (File No. 683 7100, released Apr. 30, 1968.)

No. 241. Proposed promotional allowance program based on pyramiding sales of customers rejected.

The Commission advised a requesting party that violation of Section 5 of the Federal Trade Commission Act would result from the adoption of a proposed sales promotion plan described in essence as follows:

A certain sum of money would be reserved from the proceeds of a sale to a first customer. That customer, if he wished to participate in the sales promotion program, would be paid up to one quarter of the reserved sum as commission on sales to ten additional customers. The first customer would also be paid up to one quarter of the reserved sum on sales made by his customers to yet another generation of customers and so through a fourth generation.

The tabulation distributed to potential purchasers of the requesting party's merchandise showed that the original participant, in theory, might benefit from the efforts of 11,100 salespersons.

This in the Commission's judgment was beyond the realm of possibility. The return to any given participant would unquestionably be a great deal less than the theoretically achievable amount set forth: more often than not it would be negligible. The initial purchaser would not surely benefit beyond that amount, if any, which he can gain

through his own efforts. Any further amount which he might receive would accrue to him sheerly through chance. (File No. 683 7116, released May 7, 1968.)

No. 242. Necessity for disclosing the country of origin of imported ink.

The Commission was requested to render an advisory opinion with regard to the necessity for disclosing the foreign origin of ink which is imported from Germany. The ink is imported in 50 liter drums and resold to the consumer in $\frac{3}{4}$ and 2 ounce bottles.

The opinion advised that in the Commission's view the country of origin of this ink must be disclosed in a clear and conspicuous manner on the bottles in which it is sold and, if the ink is packaged in separate boxes, on the boxes themselves in such a manner as to be readily seen by prospective purchasers. The opinion added that neither directly nor indirectly could it be implied that the ink is manufactured in the United States. (File No. 683 7114, released May 7, 1968.)

No. 243. Receipt of discount in lieu of brokerage by respondent wholesale food distributor.

A wholesale food distributor under order for having violated Section 2(c) of the amended Clayton Act has been advised by the Federal Trade Commission that if he received or accepted a discount offered by one of his suppliers for rendering certain "special services," he would be in violation of order entered against him.

The Commission noted that the 5 percent discount offered to the distributor was equal to commissions normally paid by the supplier to brokers; the services to be rendered by the distributor were services normally performed by brokers in connection with sales to other distributors; other circumstances and statements clearly indicated that both parties to the transaction considered the discount as compensation for elimination of brokerage expense, and the discount therefore amounted to an allowance in lieu of brokerage.

Commissioner Elman did not concur. (File No. C-1201, released May 7, 1968.) (Opinion issued under authority of Section 3.61(c) of the Commission's Rules of Practice (1967).)

No. 244. Disclosure of foreign origin of nasal cannula required.

The Commission advised a requesting party that a medical device manufactured in a foreign country from domestic designs and made on domestic machinery furnished by the U.S. seller should be marked clearly and conspicuously with the name of the foreign country. The marking could be on the device itself or on the package but in any event the disclosure must be made or attached with such perma-

nence to remain on the product or container until bought by the ultimate purchaser. (File No. 683 7104, released May 15, 1968.)

No. 245. Commission denies approval of proposed joint venture corporation composed of five competing manufacturers to bid on prime contract to furnish products of uniform specification.

The Commission issued an advisory opinion denying approval of a proposed joint venture corporation to be composed of five manufacturers to bid on a large contract that would require more extensive facilities than possessed by any one of them. The actual work on the contract would be performed by the five participating companies and by others on a subcontract basis. The five are now actual or potential competitors.

In the opinion of the Commission, the proposed joint venture corporation composed of the competing companies would appear to be illegal under Federal antitrust laws as a combination to fix prices in contract bids. (File No. 683 7118, released May 15, 1968.)

No. 246. Trade association publication recommending procedures for freight prepayment by manufacturers.

The Commission rendered an advisory opinion informing a trade association of wholesalers that it could not give its approval to a proposal to conduct a study of various policies for prepaying freight being used by manufacturers and to publish the results as a recommended procedure for prepaying freight.

The Association advised that a certain number of manufacturers who sell to its members have a "paid freight" policy whereby they will pay the freight, on one of a number of bases, on orders above a certain quantity which are shipped to the members. Many manufacturers do not have such a policy. Among those that do, there are fifteen to twenty different procedures for handling payment, most of which involve a lapse of time of from sixty days to six months before the wholesaler can collect the allowance. The Association is interested in conducting a study of these practices with the ultimate view of reducing the fifteen or twenty procedures now in effect to perhaps two or three and also to reduce the time period for the recovery of the funds to no more than sixty days, thus eliminating the long period in which capital of the members is tied up in what is supposedly prepaid freight.

The Association stated that these efforts are not in any way intended to coerce manufacturers into giving freight allowances they do not care to give, but are solely to reduce the complexity and cost of doing business. It definitely plans to publish the results as a "recommended procedure for prepaying freight," but does not plan any

efforts to enforce this recommendation or to put any pressure on the manufacturers to adopt the recommendation beyond the simple publication of the results of the study and the recommended procedure.

The Commission advised that even though the study and published recommendation may be motivated by a purpose to remove evils affecting the industry, it appears to go further than is reasonably necessary to accomplish such result. Even if unaccompanied by any intent to force the manufacturers to adopt the policies set forth in the recommendation, there is implicit in such recommendation by the wholesalers too grave a danger that it will serve as a device whereby the concerted power of the members of the Association is brought to bear to coerce the manufacturers to conform their pricing policies to the restrictive standards of the recommendation, or at the very least as an invitation to enter into agreements among themselves to do so. The Commission would, however, have no objection to the preparation by the Association of an objective study of these practices for the members of the Association provided the study did not contain any recommendations. (File No. 683 7106, released May 15, 1968.)

No. 247. Disclosure of origin of crib mattresses, etc., made in this country using imported outside covers.

The Commission was requested to render an advisory opinion concerning the proper labeling as to origin of crib mattresses, play pen pads and bumpers which will be manufactured in this country using imported outside covers. The manufacturer advised that the relative manufacturing cost of the imported part to the American parts will be from $\frac{1}{5}$ to $\frac{1}{4}$ and that a comparison of the cost of the imported sheeting to the selling price will run about $\frac{1}{4}$ to $\frac{1}{12}$.

The opinion advised that in the absence of any affirmative representation that these products are made in the United States, or any other representation that might mislead the public as to the country of origin, the Commission is of the opinion that, under the facts as presented, the failure to mark the origin of these goods will not be regarded by the Commission as deceptive. (File No. 683 7105, released May 15, 1968.)

No. 248. Validation of guarantee—time requirement.

The Commission interpreted for a requesting party one aspect of the Commission's Guides Against Deceptive Advertising of Guarantees. These Guides, in general, provide that any guarantee used in advertising shall clearly and conspicuously disclose (a) the nature and extent of the guarantee; (b) the manner in which the guarantor will perform; and (c) the identity of the guarantor.

The language proposed for the guarantee of a product sold by mail was: "If for any reason you are not satisfied with your purchase, return it to us at once" In the Commission's view the expression "at once" was too vague and accordingly the proposed guarantee did not conform to the Guides.

The Commission approved the proposed guarantee when it was modified to read: "If for any reason you are not satisfied with your purchase, return it to us within x days," "x" being a number of days certain. (File No. 683 7101, released May 15, 1968.)

No. 249. Trade association code providing that members will not advertise sales below cost.

The Commission rendered an advisory opinion informing a trade association that there could be no objection to its proposed "Guide to Ethical Advertising Practices," with the exception of one provision relating to advertising of sales below cost.

The Guide set forth a number of prohibitions of various advertising practices which the Commission deemed to be in accord with applicable law and the Commission also noted that the association did not contemplate any efforts of its own to enforce the Guide, but instead planned to publish it solely for the education and guidance of the members. The one provision questioned by the Commission provided that since below cost pricing is predicated on additional sales, members shall not advertise merchandise or services or a combination of both below their total cost.

The opinion advised that while the mere adoption and dissemination of this Guide by the association may not be considered the equivalent of an agreement not to advertise below cost prices, still if it had the effect of persuading substantial numbers of the members of the association to refrain from so advertising, it would, the opinion stated, raise a serious inference of such an agreement and hence would be of questionable propriety under the antitrust laws. Since sales below cost can be a legitimate method of competition, depending upon the circumstances, any agreement among competitors to refrain from such advertising to that extent restricts competition. Hence, it was stated that any provisions which would have a tendency to bring about that result could not meet with Commission approval.

The Commission further advised that this conclusion would not in any way be altered by the existence of the many State laws on the subject. These laws vary greatly in their coverage and application and, in any event would not provide a legal basis for an agreement among the members of an industry to refrain from the practice in question. (File No. 683 7097, released May 21, 1968.)

No. 250. Formation of local trade associations by statewide trade association.

In an advisory opinion disapproving a proposal by a State trade association desiring to establish a statewide network of local clubs or trade associations in the same industry the Commission advised that, on the basis of presented facts, it was unable to determine with any degree of accuracy their precise purpose and objectives.

The advisory opinion pointed out that the Commission does not generally disapprove the proposed formation of industry groups or trade associations for purposes which are not anticompetitive. If the purpose for such formation is the dissemination of information on local or State legislation, the improvement of individual businesses, or the establishment of sound accounting principles and bookkeeping practices or similar activity, the Commission would voice no objection.

If, however, the purpose or effect of such groups and their policies is the unlawful suppression of competition, the promotion of unlawful price stability or so-called orderly marketing practices, their formation could not be approved under any circumstances.

Since these latter effects would not be inconsistent with the general statement of purpose submitted with the factual presentation, the Commission disapproved the proposal in its present form. (File No. 683 7099, released May 21, 1968.)

No. 251. Disclosure of country of origin of imported fasteners.

The Commission was requested to render an advisory opinion with respect to the necessity for disclosing the country of origin of metal fasteners which will be imported from Japan. The fasteners will either be imported in bulk and repackaged in small cardboard cartons in this country or will be packaged in individual cartons in Japan.

The opinion advised that in the Commission's view the country of origin of these fasteners must be disclosed in a clear and conspicuous manner on the package in which they are sold and that neither directly nor indirectly could the importer imply that they were made in the United States. (File No. 683 7120, released May 21, 1968.)

No. 252. Location of foreign origin disclosure.

Responding to a request for an advisory opinion, the Commission said that the disclosure of the foreign country of origin of imported fishing reels must be made in a location where it would be readily observed by prospective purchasers.

Under the factual situation presented to it in the advisory opinion, the imported fishing reels are plainly marked as to their specific foreign country of origin. It is anticipated, however, that the reels will be packaged for resale in the United States in a vinyl zipper case and

then placed inside a cardboard carton. Information as to the exact manner in which the reels will be displayed at the point of sale was not available.

The question presented to the Commission was whether it would be necessary to make the foreign origin disclosure of the reels on the case or the outside of the cardboard carton, or on both.

After pointing out that it could not give a specific answer as to the exact location of the foreign origin disclosure because it had not been advised of the exact manner in which the reels would be displayed at the point of sale, the Commission stated:

Whenever an affirmative disclosure of origin is required in order to prevent deception, the general rule is that the marking must be legible and must be placed in a location where it would be readily observed by prospective purchasers making a casual inspection of the merchandise prior to, and not after, the purchase thereof. This means, of course, that if the reels are displayed at the point of sale in a cardboard carton, a conspicuous disclosure would have to be made on the outside of the carton. A similar disclosure would be required on the vinyl case, if the reels are displayed only in the case. On the other hand it follows that the disclosure on the reels would be sufficient, provided that the reels are displayed at the point of sale in such a manner that prospective purchasers could readily observe the disclosure thereon prior to the purchase of the merchandise. (File No. 683 7121, released May 21, 1968.)

No. 253. Extended credit terms for newly established stores in impoverished urban areas approved.

The Commission advised an apparel manufacturer that under the circumstances described his proposed plan would not likely contravene laws administered by the Commission.

The manufacturer proposes to give extended credit terms to one class of his customers, excluding other classes. Those to whom extended credit are to be given are described as follows:

(1) The business is a newly established business located within an urban, inner core, ghetto-type area,

(2) The proprietor or principal owner of the business is a resident of the urban, inner core, ghetto-type area within which the business is located,

(3) In light of its ownership, management, and location the business stands a reasonable chance of survival.

To such customers the following extended credit terms will be offered:

(1) One year's credit on orders placed during the first month of operation.

(2) Six months credit on all orders placed thereafter.

The extended credit given is to be limited to the first five years of a new store's operations. It was also proposed that such new firms be given on an introductory basis certain in-store and point-of-sale ad-

vertising materials, not to exceed in total value (*i.e.*, cost to the requesting party), the sum of \$500.

The Commission felt that there would be little, if any substantial competition between the favored and disfavored customers.

The Commission announced that it would not, currently at least, challenge the requesting party's proposal.

The Commission noted further that if changed circumstances required a change in the Commission's present views, the requesting party would be given ample opportunity, as provided by the Commission's Rules of Practice, to modify or abandon, without penalty, the presently approved proposal.

One year subsequent to the initiation of this program the requesting party was requested to submit to the Commission a report describing the details of the implementation of the plan together with any objections it may have received. (File No. 683 7115, released May 25, 1968.)

No. 254. Operation of exclusive check-cashing concessions in retail stores.

The Commission rendered an advisory opinion to the effect that it would not be illegal for a company to operate a proposed check-cashing program pursuant to which it would function as the check-cashing concessionaire within subscribing retail establishments.

Under the plan as presented, the company would charge check-cashing customers a ten cent fee for all checks drawn for sums greater than the amount of the purchase and would pay to the subscribing retailers a portion of that fee as consideration for the grant of concession rights. The company would assume the entire burden of bad-check risks and collection efforts.

The subscribing retailers and their employees would act as agents of the company by performing the actual check-cashing function, following procedures required by the company utilizing the company's information system. Money used in cashing checks for sums greater than the amount of the purchase would be the retailers' money and the retailers would deposit all checks and fees collected by them in their own banks. Out of the fees so collected and deposited, the subscribers would remit to the company seven cents per check cashed, including checks drawn in the amount of the purchase, although no fee would be charged the customer for such checks. The company would pay the subscriber the full amount of all bad checks and would assume the function and risks of attempting to collect on such checks.

The subscribing retailers would retain the difference between the amount paid the company and the aggregate fees collected as their basic consideration for granting the concession rights and could realize additional consideration from a reserve to be maintained by

the company. The company would run its own credit check of all applicants for and holders of check-cashing courtesy cards, issue cards inscribed with the retailer's name, keep the credit information up to date and operate, using moneys and employees of the subscriber and at locations within subscriber's outlets, check-cashing concessions which would be furnished with on-line telephone reports of information contained in the company's records.

The agreements to be executed with the subscribers would give the company the exclusive check-cashing concession rights within the stores for a period of twenty-four months, subject to an initial right of cancellation by the subscriber at the end of the first five months. The only cost to the subscriber in exercising this latter privilege would be the loss of the initial setup charge paid upon installation of the concession in the store. After the expiration of the twenty-four months period, the agreements would be renewable for one year periods at the option of the parties. The company also advised that to its knowledge no one else is presently engaged in operating such check-cashing concessions.

The company expressed primary concern with two legal issues created by this proposed plan. The first had to do with whether the company's separate agreements with subscribers, each providing for the collection of a ten cent fee, would be deemed a horizontal price-fixing conspiracy. Second, the company inquired as to whether the exclusive aspect of the agreements makes them objectionable under Section 5 of the Federal Trade Commission Act.

With respect to the first question, the opinion advised that in the Commission's view, based upon the facts presented, the only price involved is the company's own price for the service rendered and hence no question of a price fixing agreement should arise. With regard to the second question, the Commission was of the opinion that the time periods involved in these exclusive agreements should not result in unreasonable restraints of trade considering the fact that this is a small company seeking to establish itself in a new field of endeavor where there are no existing competitors and where a substantial outlay of capital and the assumption of considerable risk will be required. Here, the Commission was influenced by the fact that subscribers have the opportunity to terminate the arrangement at the end of the first five months and again at the expiration of the twenty-four months period and that renewals will be for one year periods only.

The Commission also cautioned that this opinion was being rendered in the light of the competitive situation which now exists and that in that light it could see no objection to the form of the agreements and the proposed manner of implementing the program. The Commission could not, of course, foresee in all particulars the impact

of this program upon future competitive conditions which might conceivably require a different view of the exclusive provisions contained therein. (File No. 683 7125, released May 30, 1968.)

No. 255. Misrepresentation as to origin of flatware.

The Commission rendered an advisory opinion today in regard to the proper marking of the origin of flatware which is imported in substantial part. Specifically, the following three questions were ruled upon by the Commission.

First, can flatware which is gold plated in the United States be marketed without disclosing the foreign origin of the imported stainless steel blanks, if it is sold under a trade name consisting of a company name suggesting domestic origin hyphenated with the word "American"? (The gold plating will cost from 30-50 percent of the total cost of the finished product.)

Second, if the trade name referred to above in the first question is not used, will it then be necessary to disclose the foreign origin of the imported stainless steel blanks?

Third, if a disclosure is required, must it be stamped on the flatware itself or can it be placed on a string tag attached to the flatware or on the container?

In response to the first question, the Commission said that the use of the proposed trade name would constitute an affirmative representation, contrary to fact, that the entire product was made in the United States. Since a substantial portion originates in a foreign country, it will then be necessary to clearly disclose the country of origin of the imported stainless steel blanks in immediate connection with the trade name wherever it is used, both in advertising and labeling.

In response to the second and third questions, the Commission said that disclosure of the origin of the imported components would be required even though the company elected not to market the flatware under the proposed trade name. The Commission also stated that the disclosure may be made on the flatware itself, or on a string attached thereto, or on the container, provided the disclosure is of that degree of conspicuity and permanency as will likely be observed by prospective purchasers making a casual inspection of the merchandise prior to, not after, the purchase thereof. (File No. 683 7109, released May 30, 1968.)

No. 256. Use of unqualified word "Diamond" to describe abrasive discs containing other materials.

The Commission was requested to render an advisory opinion concerning the legality of describing abrasive discs or laps containing diamond and other abrasives as "Diamond Discs."

The manufacturer presently produces diamond coating laps which are a single layer of diamond held in a plated nickel bond and uses only diamond as the abrasive. It now plans to produce a companion product line and add another abrasive particle as a filler. For example, it would mix aluminum oxide with the diamond, with the ratio of diamond to aluminum oxide being as low as one to ten and, in any event, the filler would be more than 50 percent.

The opinion advised that in the Commission's view such an abrasive disc or lap could not truthfully be described as simply a "Diamond Disc." The opinion further advised that nothing in the law would prevent use of the word "Diamond" as part of a truthful description of the product, but that if the manufacturer did elect to use it, considering the low percentages of diamond which were contemplated, it should only be used as a part of a full disclosure of all the abrasive materials used, including the percentages of each. (File No. 683 7122, released June 11, 1968.)

No. 257. Legality of trade association suggesting rental rate for containers in which industry products are sold.

The Commission was requested to render an advisory opinion concerning the legality of a trade association suggesting a rental rate for the containers in which the product of the industry is sold if such rate is lower than the standard charge now being made.

The members of the association are engaged in the sale of a product in returnable containers many times the value of the product itself. The practice in the industry today is to charge a daily or monthly rental for the time during which the containers are held beyond thirty days. Some of the members would now like to go to a straight rental and feel the best way to do this would be through the association.

The Commission advised that implementation of this proposal by the association would be likely to result in a violation of law without regard to the ultimate rental set, whether higher or lower than the existing rate. Even though couched in the form of a suggestion, the natural and probable result of such an action would, the opinion stated, be to persuade substantial numbers of the members to charge the rate suggested, thus leaving an almost inescapable inference of an agreement among competitors to charge a common rate. Such an agreement would be a clear restraint of trade under existing law, the Commission added.

It was the Commission's opinion that the rental rates to be charged by the members should be determined by the natural forces of competition, not by concerted activity on the part of the members acting through their trade association or otherwise. (File No. 683 7130, released June 11, 1968.)

No. 258. Promotional assistance plan limited in value to percentage of purchases.

The Commission approved, with modifications, a proposed promotional assistance plan.

The requesting party will be offering cooperative advertising allowances under the program in question for a limited period of time. The dollar value of the allowance offered is to be measured at 12 percent of the dollar value of a particular account's purchases for the calendar year 1967. Certain new accounts will also be able to participate, if they will. The 12 percent limitation for new accounts will be based on an estimate of the annual dollar volume of business reasonably to be expected from such new accounts.

The offer specifically provides for an allowance of 60 cents per unit purchased.

The requesting party will require the following performance from those accepting its offer:

1. The product must be promoted with an advertised price that is below normal shelf price.
2. The ad must be at least 3 column inches.
3. The advertisement must run in all paid circulation newspapers normally used by the Account, and in no event may those newspapers cover less than 75 percent of the Account's marketing area.
4. Eligible advertising must be an integral part of the Account's omnibus advertisement and not set apart from the regular advertisement.
5. Advertisement must run before a specified date.
6. Advertising placed under this agreement will not be accepted as performance under any other cooperative advertising program for the same period.
7. If the account is unable to utilize newspaper advertising, a representative should be contacted to arrange for an alternative proportionately equal method of performance.

Proof of performance under the offer will be required from participants.

Notwithstanding the statement of the requesting party that the offer will be made to "certain" new accounts, the Commission understands that the offer will in fact be made to all entitled customers. Furthermore all customers who in fact compete on the same functional level will be afforded an opportunity to participate whether they buy direct from the requesting party or through an intermediary.

The plan as above outlined was acceptable to the Commission provided promotional funds are not disbursed in excess of the actual cost of the advertising. Without such a limitation larger participants in the promotion, buying in larger quantity, might enjoy a cash overage not

available to smaller competitors thereby occasioning possible violation of Sections 2 (a) and (d) of the amended Clayton Act. (File No. 683 7117, released June 11, 1968.)

No. 259. Commission has no objection to proposed merger of two noncompeting quarry and building materials companies.

The Commission issued an advisory opinion telling applicants it has no objection to their proposed merger.

According to the information submitted in connection with the application for an advisory opinion, the two companies do not sell to the same customers nor do they sell in the same geographic markets in their distribution of certain building materials. Both companies are of modest size. (File No. 683 7126, released June 25, 1968.)

No. 260. Synthetic emeralds.

Responding to a request for an advisory opinion, the Commission took the position that it would be improper to use the term "X Grown Emeralds" as descriptive of synthetic stones.

In expressing the opinion that the proposed phrase would not constitute a proper disclosure of the nature of the product and the fact that it is not a natural stone, the Commission said:

The conclusion is based upon the belief that most consumers would probably ascribe to the word "grown" its more commonly accepted meaning, namely, one of natural growth, and thus conclude, contrary to fact, that the product is a cultured stone. Under these circumstances, therefore, the Commission is of the opinion that use of the proposed term would not be in compliance with Sec. 5 of the FTC Act because the stones are synthetic, not cultured.

(File No. 683, 7128, released June 25, 1968.)

