UNITED STATES INTERNATIONAL TRADE COMMISSION

CERTAIN ELECTRONIC AUDIO AND RELATED EQUIPMENT

Commission Determination in Investigation No. 337-TA-7
Conducted under the Provisions of Section 337 of
Title III of the Tariff Act of 1930, as Amended

USITC Publication 768
Washington, D.C.
April 1976

UNITED STATES INTERNATIONAL TRADE COMMISSION

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Opinion of Commissioners Moore,
Bedell and Parker 1/

On July 10, 1973, District Sound, Inc. (District Sound), filed a complaint with the U.S. International Trade Commission alleging a violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337). The complaint named JVC America, Inc. (JVC, Inc.), an importer of certain electronic audio and related equipment, as engaging in the unfair methods of competition and unfair acts.

On February 10, 1976, the presiding officer assigned to this proceeding issued the attached Recommended Determination for consideration by the full Commission. Thereafter, the complainant, District Sound, and the respondent, JVC, Inc., filed exceptions thereto together with supporting briefs and alternative recommendations. Subsequently, the Federal Trade Commission and the Department of Justice submitted their advice relative to this matter pursuant to the provisions of section 337(b)(2) of the Tariff Act of 1930, as amended.

On the basis of our evaluation of the record, the attached Recommended Determination by the presiding officer, as well as the exceptions and alternative recommendations with briefs in support thereof, we adopt the findings of fact 2/, conclusions of law, and opinion in support of the recommendation, as modified herein. We, therefore, concur with the presiding officer to this proceeding in his conclusion that there has been no violation of section 337.

1/ Commissioner Ablondi concurs in the result.

2/ For support of our opinion we rely specifically on the following numbered findings of fact: Nos. 1-4, 6-9, 11-21, 24, and 26-40.

The Basis for the Commission's Exercising Jurisdiction

We adopt the presiding officer's conclusion of law and reasons in support thereof that the Commission has the statutory authority under section 337 to exercise jurisdiction in this proceeding. 1/ The allegation that the importer, JVC, Inc., committed unfair methods of competition and unfair acts in the domestic sale of imported audio electronic equipment provided the legal basis for the Commission to determine whether such unfair acts occurred.

Moreover, we note with approval the presiding officer's statement (at p. 17 of the Recommended Determination) that he was "confining [his] opinion regarding jurisdiction solely to this proceeding."

Opinion for Finding No Violation of Section 337

As stated above, we adopt the presiding officer's recommendation that there has been no violation of section 337 in this proceeding. However, to reach such a conclusion, we have limited our analysis to the issue of whether the refusal of JVC, Inc., to deal with District Sound was based upon legitimate business reasons or upon JVC's attempt to

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1/ With respect to the question of jurisdiction, Commissioner Parker notes that the presiding officer has expressly limited his determination in this regard to the present case. He agrees with such limitation, and he does not believe that the fact that jurisdiction was exercised in this case should be regarded as a precedent or controlling in future investigations, particularly in view of the fact oral argument was not permitted.

establish a fixed price at retail for its merchandise in violation of the provisions of section 337. The record and findings of fact clearly demonstrate the former.

The findings of fact reveal that the dealer franchise agreement of JVC, Inc., which was furnished to District Sound, required that certain clearly identifiable standards be met before a retailer could become enfranchised. Mr. William Kist, vice president in charge of JVC's High Fidelity Products Division, made the decision that District Sound did not have an adequate sound room or adequate sales personnel, two of the criteria necessary to become a franchised dealer for JVC, Inc. Such decision was based upon Mr. Kist's personal experiences in the audio electronics business and upon information furnished to him by Mr. Stephen Brothers, a sales representative for JVC, Inc. Accordingly, JVC, Inc., refused to sell to District Sound because it did not meet the standards which were considered necessary to effectively market JVC audio electronic equipment.

The conditions required for enfranchisement clearly contained in the dealer franchise agreement were reasonable and related to the result JVC, Inc., wished to achieve--that is, to stimulate sales of its sophisticated audio electronic equipment. Moreover, the evidence reveals that JVC, Inc., enfranchised dealers which, like District Sound, were discounters and transshippers as long as such dealers qualified in accordance with the required conditions.

We concur with the presiding officer's approach of examining by analogy the statutes and precedents arising under section 1 of the Sherman Act 1/ and section 5 of the Federal Trade Commission Act 2/ in reaching a determination that there has been no violation of section 337. 3/

We conclude that the facts developed during the course of this proceeding fully sustain the presiding officer's conclusion that JVC, Inc., unilaterally refused to deal with District Sound for legitimate business reasons and that since the evidence reveals that there has been no conspiracy, combination, or attempt to restrain trade or create or maintain a monopoly in the United States, we conclude that section 337 has not been violated.

1/ 15 U.S.C. 1.
2/ 15 U.S.C. 45.
3/ See, Tractor Parts, inv. No. 337-22, TC Publication 401, 1971.

Concurring Statement of Chairman Leonard

On the basis of (1) the entire record developed during the course of this protracted proceeding which began in July 1973, (2) the parties' exceptions and alternative recommendations to the presiding officer's Recommended Determination, and (3) the advice received pursuant to section 337(b)(2) of the Tariff Act of 1930, as amended (19 U.S.C. 1337), from the United States Department of Justice and the Federal Trade Commission, I adopt the presiding officer's findings of fact, conclusions of law, and opinion in support of the recommendation, as modified hereinafter.

The intracorporate conspiracy doctrine

As the presiding officer correctly noted, one of the basic ingredients of a conspiracy is the finding that there is a plurality of actors, that is, there are two or more persons or entities capable of entering into a conspiracy. For many years courts held that the agent of a corporation could not conspire with such corporation (his principal) on the grounds that the agent and the corporation are one and the same, and therefore two entities could not be found. The related problems dealing with the corporation and its exemption from the conspiracy laws has become known in antitrust law as the intracorporate conspiracy doctrine. It is evident that in recent years a trend has developed which has broadened this doctrine and therefore penetrated the wall of protection traditionally afforded intracorporate structures. 1/

1/ See the 1968 Supreme Court decisions, Albrecht v. Herald Co., 390 U.S. 145 (1968) and Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968) wherein the court expanded the intracorporate conspiracy doctrine.

In 1969, the Seventh Circuit handed down Tamaron Distributing Corporation v. Weiner, 418 F.2d, 137. Tamaron provided ammunition for the advocates of an expanded intracorporate conspiracy doctrine by concluding that an agent is legally capable of conspiring with his corporate-principal. Contrary to the conclusion of the presiding officer, the Tamaron doctrine appears to be applicable in this proceeding.

The evidence in this proceeding reveals that Mr. Stephen Brothers was an agent capable of conspiring with his corporate-principal, JVC, Inc. As Mr. Sam Weiner was in Tamaron, Mr. Brothers is an independent manufacturer's representative who solicits customers and transmits orders to his distributor. Again, as did Mr. Weiner, Mr. Brothers served as a sales representative for his principal, JVC, Inc., selling many products to different retail operations in a multi-State area. Mr. Brothers was not an employee of JVC, Inc., a fact which is substantiated by the terms of the contract between David H. Brothers Co., Inc., and JVC, Inc., wherein it is stated that the sales representatives were to act as independent contractors rather than employees of JVC, Inc. Moreover, David H. Brothers Co., Inc., and JVC, Inc., are totally separate corporations and clearly distinct entities.

In sum, although Mr. Brothers is an agent of JVC, Inc., they acted as separate entities and therefore the requisite plurality of actors necessary for finding a conspiracy exists. To this point, the court in Tamaron stated at page 139:

> . . . where there are distinct entities, the existence of an "agency" relationship between them does not foreclose a violation of section 1 of the [Sherman] Act.

Although I do not concur with the presiding officer's legal conclusion that Tamaron is not applicable to this proceeding, I agree with his conclusion that, in fact, no conspiracy between Mr. Brothers and representatives of JVC, Inc., took place (at pp. 25-26 of the Recommended Determination). Although a conspiracy does not have to be proved by direct evidence but may be inferred from circumstances, 1/ even an inference of a conspiracy cannot be drawn from any unity of action between Mr. Brothers and representatives of JVC, Inc.

The Colgate Doctrine

I agree with the presiding officer that the facts of this case are within the terms of United States v. Colgate & Co., 250 U.S. 300 (1919). However, it should be noted that, in accordance with Colgate, a distributor's unilateral refusal to deal with a retailer is permitted only so long as there is no evidence of a monopoly or attempt by such distributor to enter into an unlawful arrangement with others. The Colgate doctrine has not been overruled, at least not expressis verbis, but the courts, including the Supreme Court, have chipped away at its application. 2/ In short, any manufacturer or distributor which unilaterally refuses to deal with discounters and transshippers is traveling the channel between Scylla and Charybdis, a channel which is treacherous and requires careful scrutiny.

1/ E.g., United States v. General Motors Corp., 384 U.S. 127 (1966); Eastern States Retail Lumber Ass'n. v. United States, 234 U.S. 612 (1913).

2/ E.g., United States v. Parke Davis & Co., 362 U.S. 29 (1960); United States v. A. Schradder's Sons, Inc., 252 U.S. 85 (1919).

The above is particularly true since the fair trade laws have been repealed by the passage of the Consumer Goods Pricing Act of 1975 (Public Law 94-145, 89 Stat. 801). Therefore, effective March 11, 1976, agreements fixing stipulated resale prices are not exempt from illegality under the Federal antitrust laws.

District Sound meeting the dealer franchise criteria

The Commission has not received evidence to the effect that District Sound has attempted to meet the criteria set forth in JVC's dealer franchise agreement. In my opinion, if, following this determination, District Sound complies therewith by, inter alia, constructing a sound room, and JVC, Inc., continues to refuse to sell audio electronic merchandise to complainant JVC, District Sound may once again file a complaint with the Commission for an appropriate investigation under section 337 of the Tariff Act of 1930, as amended.

Concurring Statement of Vice Chairman Minchew

On February 10, 1976, as presiding officer assigned to investigation No. 337-TA-7, Certain Electronic Audio and Related Equipment, I issued the attached Recommended Determination. Thereafter, Complainant District Sound and Respondent JVC, Inc., filed exceptions, supporting briefs and alternative recommendations to the Recommended Determination. Moreover, on March 9, 1976, and March 10, 1976, the Federal Trade Commission and the United States Department of Justice, respectively, filed their advice pursuant to section 337(b)(2) of the Tariff Act of 1930, as amended (19 U.S.C. 1337).

Upon review of the record and the attached Recommended Determination and in light of the exceptions and briefs, I have determined that there is no violation of section 337 based upon the findings of fact, opinion in support of the recommendation, and conclusions of law as contained in the Recommended Determination.

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

[337-TA-7]

CERTAIN ELECTRONIC AUDIO AND RELATED EQUIPMENT

NOTICE AND ORDER

Concerning Commission Action Terminating
and Determining No Violation

Pursuant to section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), the United States International Trade Commission determines, as a result of Investigation No. 337-TA-7, Certain Electronic Audio and Related Equipment, that no unfair methods of competition and unfair acts in the importation of certain electronic audio and related equipment, or in their sale, have been found to exist within the meaning of 19 U.S.C. 1337, and accordingly, that no violation exists.

THE COMMISSION HEREBY ORDERS the termination of Investigation No. 337-TA-7, Certain Electronic Audio Related Equipment.

Copies of the Commission's Determination, Findings and Order are available to the public during official working hours at the Office of the Secretary, United States International Trade Commission, 701 E Street NW., Washington, D.C. 20436.

By order of the Commission.

KENNETH R. MASON
Secretary

ISSUED: April 2, 1976

UNITED STATES INTERNATIONAL TRADE COMMISSION

INVESTIGATION NO. 337-TA-7

IN THE MATTER OF

CERTAIN ELECTRONIC AUDIO AND
RELATED EQUIPMENT

RECOMMENDED DETERMINATION

Daniel Minchew,
Presiding Officer

February 10, 1976

PRELIMINARY STATEMENT

On July 10, 1973, District Sound, Inc. (hereinafter "District Sound"), filed a complaint with the Commission alleging a violation of section 337 of the Tariff Act of 1930, as amended (38 Stat. 2053). Specifically, District Sound alleges unfair methods of competition and unfair acts in the importation and sale of certain electronic audio and related equipment, which unfair acts have the effect or tendency to restrain or monopolize trade and commerce in the United States. The specific unfair acts were alleged to be (1) a refusal to deal with complainant, thereby effectuating illegal territorial restraints on the resale of goods, and (2) illegally maintaining a fair trade pricing program in a nonfair trade jurisdiction. The complaint named JVC America, Inc. (hereinafter "JVC, Inc."), as engaging in the unfair acts. On August 28, 1974, District Sound filed an amendment to the complaint with the Commission alleging that the alleged unfair acts took place with the knowledge of Victor Company of Japan, Ltd. (hereinafter "Victor"), a foreign corporation, and at its direction or pursuant to agreement with JVC, Inc., its agents, distributors, and dealers.

On September 28, 1973, JVC, Inc., filed its response to the complaint in the form of a memorandum in support of discontinuance of proceeding. JVC, Inc., asserted that it acted lawfully in establishing a dealer franchise system and accordingly there could be no violation of either the Federal antitrust laws or section 337 of the Tariff Act of 1930. Respondent further asserted that District Sound was terminated as a dealer by reason of a legitimate business attempt to improve the consumer image of

its audio equipment and not for the purpose of establishing fixed resale prices. Lastly, JVC, Inc., asserted that an exclusion order of JVC imports of audio equipment from the United States would not further the public interest and would have an inequitable effect upon respondent by preventing it from selling JVC audio equipment in fair trade States in which District Sound has not alleged unfair methods of competition occurred.

Because of the time which has elapsed since the complaint was filed, it is appropriate to set forth a listing of significant events and submissions which have taken place in this proceeding since July 10, 1973. Other than the July 10, 1973, September 28, 1973, and August 28, 1974, submissions as stated above, these were:

1. On November 1, 1973, a memorandum in opposition to discontinuance of proceeding was filed by counsel for District Sound.

2. On November 15, 1973, a reply memorandum in support of discontinuance of proceeding was filed by counsel for JVC, Inc.

3. On January 3, 1975, the Trade Act of 1974 became law (38 Stat. 2053). Accordingly, as of April 3, 1975, the amendments to section 337 became effective which, inter alia, required the Commission to conduct its investigations in accordance with the Administrative Procedure Act.

4. On June 4, 1975, a public notice was published in the Federal Register (40 F.R. 24056) wherein all pending preliminary inquiries and full investigations under section 337 were redesignated as investigations under section 337, as amended, by the Trade Act of 1974 (38 Stat. 2053) and wherein preliminary inquiry 337-L-65 was redesignated as Investigation No. 337-TA-7.

5. On November 19, 1975, and December 19, 1975, prehearing conferences were conducted before the Presiding Officer to the investigation. At the November 19, 1975, prehearing conference, a protective order relating to confidential documents and information was signed by all parties and the Presiding Officer stated, with consent from all parties, that the Commission's proposed rules to implement section 337 of the Tariff Act of 1930, as amended by the Trade Act of 1974, were adopted for the duration of the proceeding.

6. On January 5, 1976, counsel for JVC, Inc., filed a motion for termination or, in the alternative, for summary determination of investigation. The motion was denied by the Presiding Officer on January 8, 1976.

7. On January 12, 1976 and January 13, 1976, adjudicative hearings were held before the Presiding Officer for the purpose of taking evidence hearing argument as to whether there exists a violation of section 337 of the Tariff Act of 1930, as amended.

8. On January 26, 1976, posthearing briefs were submitted by all parties to the investigation.

The findings of fact following are based on a review of the allegations made in the complaint, respondent's responses, stipulations entered by counsel, the evidentiary record and upon a reading of the transcript record of the testimony and consideration of the demeanor of the witnesses at the hearings. In addition, the proposed findings of fact, conclusions, and orders, together with reasons and briefs in support thereof filed by both sides have been given careful consideration. To the extent not

adopted by this decision in the form proposed or in substance, they are rejected as not supported by the record or as immaterial.

For the convenience of the Commission and other readers of this recommendation, the findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony, evidence, and exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence considered in arriving at such findings. The following abbreviations have been used:

CX - Complainant's Exhibit, followed by number of exhibit being referenced.

RX - Respondents' Exhibit, followed by number of exhibit being referenced.

Tr.- Transcript preceded by the name of the witness and followed by the page number.

CB - Complainant's Brief, followed by page number being referenced.

RA - Respondent's Answer submitted as memorandum in opposition to discontinuance of proceeding.

"Findings" followed by the paragraph number being referenced, refers to those findings of fact as determined by the Presiding Officer.

FINDINGS OF FACT

Complainant's and respondent's business

1. Complainant District Sound, Inc. (hereinafter "District Sound"), is a corporation organized, existing, and doing business under and by virtue of the laws of the District of Columbia, with its principal office

and place of business located at 2316 Rhode Island Avenue, NE. (CB, par. I(a), p. 2; Stip. 4).

2. Complainant District Sound is engaged in the retail discount sale of audio and related equipment (D.S. interrog. 4; CB, par. 1(a), p. 2). Approximately one-third of its sales are made to customers in the metropolitan area of the District of Columbia (D.S. interrog. 3; Ferner Tr. 57). Its annual sales for audio and related equipment were: 1971-- 1972-- 1973-- (D.S. interrog. 7). Sales of JVC, Inc. audio and related equipment from October 1971 through February 1973 were $24,299, less than 2 percent of District Sound's total sales (D.S. interrog. 2,6).

3. Respondent JVC America, Inc. (hereinafter "JVC, Inc."), is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York (Stip. 4; CB, p. 2). Its principal office and place of business is located at 50-35 56th Road, Maspeth, N.Y.

4. JVC, Inc. is engaged in the importation and sale to retail distribution outlets throughout the United States of audio and related equipment (CB, p. 2).

5. JVC, Inc. is a wholly owned subsidiary of Victor Company of Japan, Ltd. (hereinafter "Victor") (Stipulation of Fact and Admission, par. 3). JVC, Inc. is the exclusive distributor of Victor Audio and related equipment in the United States (amend. to CB, p. 2; response of JVC, Inc. to interrog. propounded by D.S., par. 2). Technical employees of Victor and JVC, Inc. are exchanged from time-to-time, and three of the directors of Victor are also directors of JVC, Inc. (response of JVC

America, Inc. to interrogatories propounded by D.S., Inc., par. 1(h)).

The JVC franchise and fair trade programs

6. Prior to August 1, 1972, JVC audio and electronic equipment was distributed through Delmonico International Corporation (hereinafter "Delmonico"), a division of Elgin National Industries, Inc. (JVC interrog. 3; Kist Tr. 181). JVC articles, distributed through Delmonico, were sold to luggage stores, drug stores, tobacco stores, candy stores, and other stores not dealing in audio electronic equipment (Kist Tr. 182-183; Ferner Tr. 100; Kist depo. 5-6, Ferner depo. 15).

7. On August 1, 1972, JVC, Inc. purchased the assets of Delmonico and assumed its own distribution in the United States (JVC interrog. 3; Stip. 1).

8. In November 1972, Mr. William Kist joined JVC, Inc. as a vice president of the newly established High Fidelity Products Division. Mr. Kist's responsibility was to establish a new distribution policy for JVC products in the United States (Kist Tr. 180-182). Said distribution policy was intended to establish a special marketing policy for technically sophisticated equipment, and therefore, a more unified distribution pattern was attempted by JVC, Inc. (Kist Tr. 113, 180-183, 231; Kist depo. 9-10).

9. The marketing program (a franchise and fair trade program) was initiated and developed by Mr. Kist and other JVC, Inc. personnel (Kist Tr. 180-182, 185, 258, Kist depo. 8).

10. Mr. Kist visited Japan in November 1972 for the purpose of explaining the dealer franchise and fair trade programs to Victor. Victor

approved of the plan (Kist Tr. 240, 258; Kist depo., Dec. 27, 1975, pp. 8-9). Mr. Kist never submitted reports to Victor on the activities or progress of the newly established marketing plan (Kist Tr. 186).

11. In order to qualify for a dealer franchise, dealers had to have a reasonably stable credit balance and qualify in other ways as stated in the Dealer Franchise Agreement. Accordingly, the dealer had to use his best efforts to sell JVC products and to:

(a) Provide display facilities suitable for demonstrating JVC performance without physical or accoustical detraction;

(b) Employ knowledgeable and experienced sales personnel; and

(c) Carry a JVC inventory commensurate with dealers' sales potential.

(RX 6, Kist Tr. 189, Kist. depo. 12; Brothers Tr. 277, Stipulations of Fact and Admissions, par. 10).

12. In April 1973, prior to the institution of the fair trade program, JVC, Inc. distributed to all known dealers who had purchased from Delmonico a sample Fair Trade Agreement which was clearly marked at the top: "Void in Non Fair Trade States" (Kist Tr. 203; CX, 2). The Notice of Fair Trade listed nonfair trade States, including the District of Columbia and states that prices are "merely suggested prices for dealers" in nonfair trade States (RX 11).

13. JVC, Inc.'s fair trade program was designed to apply only in fair trade States (Kist Tr. 183). The JVC policy manual explicitly provided instructions to limit fair trade enforcement to fair trade States (RX 5).

14. Whether a dealer distributed JVC products in a nonfair trade State or whether a dealer transshipped JVC products were not criteria for the grant or denial of a JVC franchise (RX 5; RX 6, Kist Tr. 189, 263; Kist depo. 2; Brothers Tr. 295).

15. JVC, Inc. distinguished between enforcing its fair trade program in fair trade States and merely suggesting retail prices in nonfair trade States. JVC only monitored prices in fair trade States (RX 17, affidavit from shopping service, with accompanying letter from Mr. Kist directing that shopping be limited to fair trade States; Kist Tr. 207; Brothers Tr. 295).

16. JVC, Inc. franchised dealers in nonfair trade States which included retailers which discounted JVC, Inc.'s products. Some dealers submitted that they conformed to the Fair Trade Agreement in fair trade States but discounted in nonfair trade States (Kist Tr. 192-193, RX 7 (confidential), 14, 15, 23, and 24).

17. JVC, Inc. did not discriminate in its decision-making process whether or not to accept a retailer as a franchised dealer (RX 19, RX 20, RX 21, and RX 22). The application forms required to be filled out by JVC, Inc.'s representative do not reveal criteria discrimination (collective RX 9). An error in filling out one application form was adequately explained (Brothers Tr. 292-294).

18. All dealers selling JVC products through Delmonico were terminated. Once the franchise program was organized and implemented, the representatives of JVC, Inc. began to enter into franchise agreements as though no dealers had previously sold JVC products (Kist Tr. 272-273).

19. No evidence is on record that any retailer in a nonfair trade State ever entered into the JVC Fair Trade Agreement (Stip. 11). There is no evidence that any retailer in a nonfair trade State, other than District Sound, was requested by a JVC employee or representative to enter into the JVC Fair Trade Agreement (Stip. 12).

20. Shipping reports requested by respondent's counsel in 1975, indicate that there is substantial discounting of JVC products in the District of Columbia (RX 17; Brothers Tr. 289-290).

21. As a general rule, when a sales representative was attempting to obtain a franchise for JVC products, he would visit and inspect the dealers' premises and complete a dealer application form which in turn was sent to the branch manager and then to Mr. Kist (Kist Tr. 194, 204-205, 252; Brothers Tr. 315, 325). The basic information required to be filled out on the dealer questionnaire included, inter alia, whether the dealer had a sound room, a switching panel, number of qualified personnel, and the names of other high fidelity brands sold (Kist Tr. 195; RX 9, Brothers Tr. 278).

22. There is no evidence that JVC, Inc. policied prices in nonfair trade States through the use of warranty registration cards. Such cards did not provide a space for the customer to indicate the price at which he had purchased the JVC product. Accordingly, the customers could not have indicated such prices on the cards returned to JVC, Inc. (Kist Tr. 223; Aff. of J. Dichtenberg; Brothers Tr. 307-309; Ferner Tr. 90).

23. The warranty cards used by JVC, Inc. were for the purpose of tracing owners of JVC equipment if such equipment contained a manufacturing

defect and to be certain that the unit claiming a warranty was in fact the correct unit (Kist Tr. 224-225; Brothers Tr. 308).

The relationship between JVC, Inc. and David H. Brothers Company, Inc.

24. On March 16, 1973, a Sales Representative Agreement was executed between JVC, Inc. and David H. Brothers Co., Inc., a corporation organized, existing, and conducting its business at 6302 Lincoln Avenue, Baltimore, Maryland. (CX-12). As a result of said agreement, David H. Brothers Co., Inc. became the JVC, Inc. sales representative for Washington, D.C., Virginia, and Maryland. (Brothers Tr. 276; CX 12).

25. JVC, Inc. sells to retailers through both salesmen, who are employees of JVC, Inc., and independent sales representatives, such as David H. Brothers Co., Inc. Both take orders from customers and must follow the policies and procedures of JVC, Inc. Neither salesmen nor independent sales representatives take title to JVC products. Moreover, neither do they have an inventory of the merchandise. (Kist Tr. 187-188).

26. Mr. Stephen Brothers is a salesman with David H. Brothers Co., Inc. (Brothers Tr. 276). Mr. Brothers received the policy manual (RX 5) and other documents related to the fair trade program of JVC, Inc. (Brothers Tr. 277).

27. At the inception of the JVC franchise and fair trade programs, Mr. Brothers attempted to enfranchise quality dealers in Washington, D.C., such as Meyer Emco and Campbell Music. However, these dealers did not want to carry JVC equipment (Kist Tr. 205; Brothers Tr. 287, 324-325).

Franchised dealers in Washington, D.C.

28. Shortly after the franchise program's inception, JVC, Inc. enfranchised dealers located in Washington, D.C. Hub Furniture, for example, was given a franchise after it installed a sound room (Brothers Tr. 286-287) so that it would comply with JVC, Inc.'s franchise criteria (RX 22).

The decision to franchise and District Sound's facility

29. District Sound had purchased JVC products from Delmonico until approximately August 1972, and thereafter from JVC, Inc. (Stip. 1).

30. Mr. Ferner, District Sound's principal, transacted business with Mr. Murry Fisher, Mr. Bernard Smith, and Mr. Melvin Frye, all JVC sales representatives before Mr. Brothers. Mr. Ferner never discussed with Messrs. Fisher, Smith, or Frye discounting or transshipping (Ferner Tr. 76, 79; Ferner Depo. 26, 32-33, 39-40).

31. On March 2, 1973, District Sound placed a $50,000 order for audio electronic equipment from JVC, Inc. (Stipulations par. 6; CX 3).

32. Mr. William Kist had the order turned over to the sales representative for the District of Columbia, Mr. Stephen Brothers of David H. Brothers Co., Inc. so that the order would be properly processed in accordance with the new franchise program. At the same time, Mr. Kist contacted Mr. Brothers to determine whether District Sound met the qualifications as set forth in the dealer's franchise agreement. (Kist Tr. 228-229).

33. The ultimate decision whether or not to grant a dealer a franchise was made by Mr. Kist. Such decision was based upon information

furnished by the sales representative, the franchise criteria, credit information and, when furnished, the dealer's application form (Kist Tr. 190, 241, 253-254; Brothers 315).

34. Mr. Kist based his decision not to franchise District Sound on his familiarly with District Sound's business from his prior employment with Fisher, another audio supplier, and from information received from Stephen Brothers (Kist Tr. 180, 229, 271-272).

35. Mr. Kist considered those facilities entitled to a franchise include the following characteristics: (a) various grouping of equipment placed so as to be able to demonstrate each one; (b) speakers placed in stereo pairs; (c) carpeting; (d) walls of wood or some other sound absorbent material, and (e) switching boxes so that the salesman can switch between the various speaker systems (Kist Tr. 201-202; RX 9).

36. The ultimate decision made by Mr. Kist not to franchise District Sound was based on information received that it had inadequate demonstration facilities and not sufficiently knowledgeable sales personnel (Stipulations, par. 5; Kist Tr. 180, 272).

37. District Sound demonstration area is approximately 10 by 18 feet in area with a decorative masonary wall (cement blocks) on one side, or plaster wall on another, and the customer service counter on a third. Behind the service counter is the office administration where there are desks where phones are located for receiving mail order requests. There is also a typewriter for addressing mail envelopes. The area is not carpeted and has no multiple switching panel (Ferner Tr. 48-52, 80-81; Brothers depo. 41; Brookhart Tr. 165-167, CX 6, 7).

38. The District Sound demonstration facility contained about 40 pieces of audio equipment, two of which were JVC, Inc.'s and eight double electrical outlets (Ferner Tr. 50; Brookhart Tr. 160).

39. District Sound employed the following persons: (1) Mr. Brian Ferner, who had previously been employed as a sales representative for Estersohn Electronics Enterprises, (2) Ms. Patricia Rahill (Brookhart), whose prior audio experience was an audio hobbyist, (3) Mr. Weslie Wong, who had no prior audio sales experience (c) Ms. Mary Ann Zita, also an audio hobbyist and (4) Mr. Laurence Frank, an electronic engineering student (Ferner Tr. 45).

40. Approximately 40 percent of the time spent by District Sound's employees was occupied in over-the-counter sales, the remainder 60 percent being spent in telephone sales and administrative and shipping duties (Brookhart Tr. 163).

Mr. Stephen Brothers conversations and the controversy with District Sound

41. In the early part of April 1973, Mr. Stephen Brothers visited District Sound for the purpose of inquiring about a line of audio equipment other than JVC. Mr. Ferner, the manager of District Sound, inquired from Mr. Brothers about the March 2, 1973, $50,000 JVC, Inc. order (Brothers Tr. 296; Ferner Tr. 26, 75). On being pressed about the order and apparently uncertain about the details of the new franchise programs, Mr. Brothers indicated that he would inquire about the order and in the near future respond to Mr. Ferner's question (Ferner Tr. 36; Brookhart Tr. 156-157).

42. Approximately two weeks later, Mr. Ferner and a Mr. David Schmall (a vice president of Audio Warehouse Sales which is a Washington, D.C. discount retailer which competes with District Sound) returned to Mr. Schmall's office following a luncheon together. Mr. Brothers was waiting in Mr. Schmall's office. Again, Mr. Ferner asked Mr. Brothers about the $50,000 JVC order and the latter responded that he did not think the order would be filled because District Sound discounted and transshipped (Ferner Tr. 37; Schmall Tr. 125-126, 141, 150).

43. Shortly after the meeting between Messrs. Ferner and Brothers in Mr. Schmall's office, Mr. Brothers contacted Mr. Kist to inform him that District Sound was most disturbed about not receiving the merchandise pursuant to the $50,000 order. Mr. Kist suggested that Mr. Brothers return to District Sound in an attempt to arrive at some business agreement and to further explain the requirements and purpose of the franchise program established by JVC, Inc. (Kist Tr. 230; Brothers Tr. 301).

44. Approximately two days later, Mr. Brothers returned to District Sound. Mr. Ferner inquired again about his JVC order and was again told that the order was not going to be filled because of District Sound's discounting and transshipping. Mr. Ferner raised a question about the legality of the reason given. Mr. Brothers asked him to reconsider his discounting and transshipping policies, and Mr. Ferner indicated that he would not change them. Mr. Brothers then asked him if he would not give him something to tell Mr. Kist so that the order would be filled. Mr. Ferner again replied that he would not change his policies with respect to discounting and transshipping (Ferner Tr. 38-39; Brookhart Tr. 157-158).

45. While at District Sound, Mr. Brothers phoned Mr. Kist in the privacy of a back office. Mr. Brothers told Mr. Kist that he had again visited District Sound and the dealer was not interested in meeting the franchise requirements and, in addition, that the dealer was threatening legal action. Mr. Kist instructed Mr. Brothers not to visit District Sound on behalf of JVC, Inc. again and that any legal matters would be left to lawyers representing JVC, Inc. The telephone conversation lasted approximately five minutes and there was no mention between the parties of either discounting or transshipping (Kist Tr. 230-231; Brothers Tr. 301-302; Brookhart Tr. 158; Ferner Tr. 39).

46. Mr. Brothers reported to Mr. Ferner that the order would not be filled because he would not change his policies with respect to discounting and transshipping. Mr. Brothers then left District Sound (Ferner Tr. 39; Brookhart Tr. 158).

47. JVC, Inc. never specifically advised District Sound in writing of its reasons for not offering a dealer franchise agreement to District Sound. The decision not to sell to District Sound was made by Mr. Kist (Stip. par. 2, 5).

48. District Sound alleges that only Mr. Kist and Mr. Brothers were involved in the alleged unlawful resale price maintenance scheme (Ferner depo. 70) and District Sound admits that Mr. Ferner never spoke with Mr. Kist (Ferner depo. 69).

49. District Sound was never offered or asked to sign a fair trade agreement (Ferner Tr. 79-80). District Sound denies that it entered into any agreement with JVC, Inc. (Stip. 9; CB 4; Ferner depo. 67).

RECOMMENDED DETERMINATION

Commission jurisdiction

This proceeding has been brought by complainant District Sound, pursuant to the provisions of section 337 of the Tariff Act of 1930, as amended, the relevant portion of which provides:

> SEC. 337. UNFAIR PRACTICES IN IMPORT TRADE.
> (a) Unfair Methods of Competition Declared Unlawful.--Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.

Respondent JVC, Inc., contends that, in order for the Commission to exercise jurisdiction under section 337, there must be established a nexus between the alleged unfair acts and some foreign act or conduct. Respondent does not articulate what type of nexus is required.

I do not agree with the respondent in his submission that the Commission cannot assume jurisdiction in this proceeding. My reasons are set forth hereinafter.

It remains a general principle of statutory construction that interpretation begins with an examination of the language itself. If the language is ambiguous, the plethora of constructionary aids should be used. 1/ This principle has frequently been referred to as the plain

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1/ See Sutherland on Statutes and Statutory Construction, vol. 2A at p. 48 where it is stated: "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."

meaning rule and is adopted for purposes of interpreting section 337.

Section 337 addresses itself to "unfair methods of competition and unfair acts" which occur "in the importation of articles into the United States, or in their sale . . . ." [Emphasis added.] Moreover, the statute requires that such sale be made by an "owner, importer, consignee, or agent of either." Therefore, (1) if an article is imported into the United States and (2) if such article is sold in the United States by an owner, importer, consignee, or agent of either, and (3) such sale in the United States constitutes an unfair method of competition and unfair act, the Commission may exercise jurisdiction, and, unless there are overriding public policy considerations, issue an exclusion or cease and desist order. This construction obviates the necessity of extending the words beyond their plain meaning to arrive at the intention of the legislature. In short, the positive words of the statute, coupled with their particular construction, reflect a manifestation of intent, and such words and construction further reflect a policy which Congress intended to see implemented.

I have no intention of trying to provide in this opinion the innumerable fact situations which may arise subject to the Commission's jurisdiction under section 337. I am confining my opininion regarding jurisdiction solely to this proceeding. 1/ However, in adopting the

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1/ In the case of Convertible Game Tables and Components Thereof . . ., TC Publication 705, December 1974, at pp. 19-22, 4 Commissioners concluded that the importer of the subject merchandise, through its wholly owned subsidiary (which sold the merchandise to 6 retail outlets) "engaged in the deceptive trade practice of advertising a ficticious regular price for the imported tables . . ." which constitutes "an unfair practice under section 337." It is noted that there was no corporate relationship between the importer and the foreign manufacturers. However, the Commission sustained jurisdiction because there existed an "unfair practice in the sale by the owner, importer, consignee, or agent of either."

literal or plain meaning approach to interpreting section 337, I conclude that a nexus is not required between the time the merchandise is exported and the time the merchandise is imported into the United States. If the unfair act is committed in the sale of imported articles in the United States by an importer, for example, the Commission may take jurisdiction. In this proceeding, it is undisputed that merchandise is being imported by the respondent and that an alleged unfair act has been committed in the importer's sale of this merchandise in the United States. Therefore, a proper basis for exercising jurisdiction exists. It is further noted that the Commission's basis for exercising jurisdiction is bolstered by the following evidence:

1. JVC, Inc., is a wholly owned subsidiary of the foreign manufacturer, Victor Co. of Japan, Ltd.,

2. JVC, Inc., imports JVC electronic audio and related equipment into the United States;

3. JVC, Inc., is the foreign manufacturer's exclusive distributor of the merchandise in the United States;

4. Technical employees or JVC, Inc. and Victor Co. of Japan, Ltd., were exchanged from time-to-time; and

5. Victor Co. of Japan, Ltd., reviewed and approved of the franchise program in question.

Upon the basis of the foregoing facts one may conclude that a rather colse relationship exists between JVC, Inc., and the foreign manufacturer, Victor Co. For this reason, even if one believes that a nexus is required (which, as stated above, I do not), there is a sufficient connection between the acts of JVC, Inc. and Victor Co. for the Commission to properly exercise its jurisdiction under section 337.

Section 1 of the Sherman Act and its applicability to section 337

The major portion of this case is based upon complainant's contention that the respondent's refusal to sell to complainant in the spring of 1973 (and continuing to date) was in furtherance of an attempt by the importer-distributor to control the price at resale, in violation of section 1 of the Sherman Act (15 U.S.C. sec. 1), and, therefore, in violation of section 337 of the Tariff Act of 1930.

Complainant's contention that a violation of section 1 of the Sherman Act in this proceeding may also be adjudged a violation of section 337 must be discussed.

In essence section 337 is clearly a type of antitrust regulation, as evidenced by the following delineated portions of the statute:

> . . . unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either . . . the effect or tendency of which is . . . to restrain or monopolize trade and commerce in the United States, are declared unlawful . . ."

As noted by one commentator, the language contained in 337 echoes "the antitrust semantics of the Sherman and Clayton Acts and the unfair competition admonitions of the Federal Trade Commission Act." 1/

The inclination to refer to section 337 as an antitrust regulation has been further substantiated by the passage of the Trade Act of 1974, wherein the Commission now has the authority to issue a cease and desist order against offending parties.

1/ Fisher, Protection Against Unfair Foreign Competition: Section 337 of the Tariff Act of 1930, 13 Va. Journal of International Law 158, 160 (1972).

The Supreme Court has held that practices which are brought under the Sherman or Clayton Acts can also be proceeded against by the Federal Trade Commission as "unfair methods of competition" under section 5 of the Federal Trade Commission Act. Moreover, the High Court has held that the Federal Trade Commission "was designed to supplement and bolster the Sherman Act and the Clayton Act . . ." Federal Trade Commission v. Motion Picture Advertising Service Inc., 344 U.S. 392, 1953; FTC v. Cement Inst., 333 U.S. 683, 1953; Times Picayune Publishing Co. v. United States, 345 U.S. 594, 1953; FTC v. Brown Shoe Co., 384 U.S. 316 (1966).

I believe that section 337, not unlike section 5 of the Federal Trade Commission Act, is intended to cover certain unfair methods of competition which are deemed to be violations of other antitrust regulations; but at the same time I recognize the jurisdictional limitations in section 337, regarding imported merchandise.

Therefore, I agree with complainant's threshold submission applicable to this proceeding, that if there is found a violation of section 1 of the Sherman Act or, in fact, of section 5 of the Federal Trade Commission Act, there may also be a violation of section 337.

Accordingly, it is first necessary to determine whether respondent JVC, Inc. has violated section 1 of the Sherman Act.

Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal.

District Sound relies primarily upon that portion of section 1 which condemns "conspiracy in restraint of trade or commerce" to conclude that the antitrust laws, including section 337, have been violated.

It is a basic principal in the law of conspiracy that there must be an agreement between two or more persons or entities. Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 82 S. Ct. 486 (1961); Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U.S. 60, 34 S. Ct. 951 (1914). Whether an agreement or concerted action has taken place and whether there are in fact two entities have been the subject of considerable legal debate. As a result of such debate, the courts have wrestled with what has become known as the "intracorporate conspiracy doctrine," which resulted as an outgrowth of the legal requirement under conspiracy law that two persons or entities must be found to have agreed to conspire. A typical problem which has been raised in judicial discussions of the above doctrine is whether employees or agents of a single corporation can enter into a conspiracy to restrain trade. Accordingly, do the facts in the case at bar reveal that the necessary plurality of actors exists for a conspiracy to be found under section 1 of the Sherman Act?

According to the evidence, JVC, Inc. sells its merchandise through salesmen who are employees of JVC, Inc., and through independent sales representatives, such as David H. Brothers Co., Inc. There is not a dramatic difference between JVC, Inc.'s salesmen (employees), and its independent sales representatives. Both take orders from customers and obey the policies and procedures of JVC, Inc. Moreover, neither the salesmen nor the independent sales representatives take title to JVC products, nor do either parties maintain an inventory of such merchandise. Mr. Stephen Brothers, an independent sales representative of JVC, Inc., and an employee of David H. Brothers Co., Inc., acted as a representative of

JVC, Inc. His interests were those of JVC, and not his own. In short, I can only conclude that Mr. Stephen Brothers at all times acted as an agent of JVC, Inc., rather than out of personal motiviation and, thus, his acts, done within his apparent authority, were those of his principal.

In light of the above conclusions, an examination of the law is necessary. The overwhelming body of law provides that a corporation is not technically able to conspire with its agents or officials to violate the antitrust laws. Marion County Co-op Assn. v. Carnation Co., 114 F. Supp. 58 (1953 W.D. Ark.); Nelson Radio & Supply Co., Inc. v. Motorola, Inc., 200 F.2d., 911 (1952 5th Cir.); United States v. Lorain Journal, 92 F. Supp. 794 (1950 N.D. Ohio); Tobman v. Coltage Woodcraft Shop, 194 F. Supp. 83 (1961); Chapman v. Rudel Paint & Varnish Co., 409 F.2d 635 (1969 9th Cir.). The rationale behind such a principle is based upon the simple notion that a person cannot conspire with himself. Johnny Maddox Motor Co. v. Ford Motor Co., 200 F. Supp. 103 (1962 W.D. Tex.).

Inasmuch as the complainant relies primarily upon my finding that two or more parties are involved in a conspiracy, further legal explanation on this point is provided.

In the case of Whiteley v. Foremost Dairies, 151 F. Supp. 914 (1957 W.D. Ark.), the plaintiffs contended that a "field representative" of defendant and such defendant were engaged in a conspiracy to restrain trade in violation of section 1 of the Sherman Act. The District Judge stated at page 923, as follows:

> . . . it is well settled that a violation of the conspiracy portions of the Sherman Anti-trust Act cannot be committed by a corporation and its agents when said agents are acting for the corporation in the ordinary scope of their duties.

Moreover, in the often quoted case of Nelson Radio and Supply Co., Inc. v. Motorola, supra, the Fifth Circuit stated, at page 914, as follows:

> It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation. Here it is alleged that the conspiracy existed between the defendant corporation, its president, Calvin, its sales manager, Kelly, and its officers, employees, representatives and agents who have been actively engaged in the management, direction and control of the affairs and business of defendant. This is certainly a unique group of conspirators. The officers, agents and employees are not named as defendants and no explanation is given of their nonjoinder. Nor is it alleged affirmatively, expressly, or otherwise, that these officers, agents, and employees were actuated by any motives personal to themselves. Obviously, they were acing [sic] only for the defendant corporation. It is true that the acts of the corporate officers may bring a single corporation within section 2 of the Sherman Act, which covers an attempt to monopolize, but this is not because there exists in such circumstances, a conspiracy to which the corporation is a party . . . .
>
> In the absence of any allegation whatever to indicate that the agents of the corporation were acting in other than their normal capacities, plaintiff has failed to state a cause of action based on conspiracy under Section 1 of the Act.

Sole support for the complainant's contention that Mr. Stephen Brothers was capable of conspiring with JVC, Inc., rests in the Seventh Circuit's opinion, Tamaron Distributing Corporation v. Weiner, 418 F.2d, 137 (1969) in which the defendant, Sam Weiner, was a manufacturer's representative of the exclusive distributor. The court found that the

manufacturer's representative and the distributor were separate entities capable of conspiring under section 1 of the Sherman Act. In so holding, the court found that, even though Mr. Weiner was indeed an agent of the exclusive distributors, such parties functioned as separate entities capable of conspiring in violation of the antitrust laws. Even though this opinion apparently broadens the doctrine of intracorporate conspiracy, it is distinguishable from the facts at bar and therefore not persuasive.

The facts in Tamaron involved a resale price maintenance plan between an independent manufacturer's representative and retailers who attempted to purchase the manufacturer's merchandise. Thus, the distributor and its agent attempted to obtain agreements with retailers to fix prices at retail. The facts in Tamaron are not, therefore, comparable to the facts in this proceeding. That is, not only are no such agreements proven by the complainant to exist and can no such agreements be found, but also, unlike in Tamaron, I do not find that the independent sales representative and distributor functioned totally as distinct entities.

Furthermore, as stated in my discussion of the relationship between Mr. Brothers and JVC, Inc., it is clear that the former acted as a salesman on behalf of his principal, JVC, Inc., rather than for any personal reasons of his own. It is further noted that complainant makes no intimation that the independent sales representative in this action acted in other than his normal capacity as a party representing JVC products. Therefore, I cannot conclude that the independent sales representative is a totally separate entity from JVC, Inc., for purposes of section 1 of the Sherman Act.

The refusal to deal with District Sound by JVC, Inc.

As stated in my finding herein, I have concluded that Mr. Stephen Brother told Mr. Ferner of District Sound that said complainant's $50,000 order would not be filled because District Sound was a discounter and transshipper. Furthermore, as stated earlier in this recommendation, I have concluded that Mr. Brothers acted as an agent of JVC, Inc. and, according to my analysis of both fact and law, could not conspire with his principal, JVC, Inc. to commit an alleged act under section 1 of the Sherman Act.

Since Mr. Stephen Brothers acted as an agent for JVC, Inc., and since he told District Sound the $50,000 order would not be filled because of complainant's discounting and transshipping, it necessarily follows that JVC, Inc., refused to deal with District Sound by reason of the latter's discounting and transshipping practices. The responsibility for Mr. Stephen Brothers' conduct is assigned to JVC, Inc., by basic hornbook agency law, which provides that, generally, a principal is bound by the acts of his agent. 1/ I am constrained to conclude this even though there is no persuasive evidence in the record that JVC, Inc., had knowledge of Mr. Stephen Brothers' remarks to Mr. Ferner. In fact, as stated in my findings of fact, Mr. Kist of JVC, Inc., refused to enfranchise District Sound, because District Sound did not meet all of the qualifications as outlined in the Dealer Franchise Agreement. Moreover, there is no persuasive evidence in the nature of writings or recorded discussions between JVC, Inc.,

1/ The fundamental rule is that a principal is bound by the acts of his agent when such acts are done within his apparent authority or when a third party has reason to believe that the acts of the agent are within his authority. See, Agency 3AM Jur 2d. § 269; Restatement, Agency (2d. ed.) § 140, 159.

and employees of David H. Brothers Co., Inc., pertaining to price fixing attempts on District Sound or any other discounter and transshipper in nonfair-trade States. 1/

Therefore, even if JVC, Inc., and its independent sales representatives were legally capable of conspiring to fix the sale of JVC products in nonfair-trade States in violation of section 1 of the Sherman Act, I have not found sufficient evidence in the record to warrant the conclusion that such concerted action took place.

Thus, the issue to be resolved is whether JVC, Inc.'s unilateral refusal to sell to District Sound, because District Sound is a discounter and transshipper, is in violation of the antitrust laws, including section 337.

The antitrust law pertaining to a manufacturer's or distributor's unilateral refusal to deal begins with United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 1919. In Colgate, the Supreme Court held that a mere refusal by a manufacturer to deal with discounters is, absent an allegation of unlawful agreement, not a violation of the Sherman Act. The court stated at page 307 of 250 U.S.:

> The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce--in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.

1/ It is further noted that complainant has not proved by evidence submitted that there have been any unlawful contracts, combinations or conspiracies between JVC, Inc., and other retailers. The complainant and respondent have stipulated to the fact that no evidence exists in the record that a retailer in a nonfair trade State entered into JVC's Fair Trade Agreement or was requested by a JVC employee or representative to enter into JVC's Fair Trade Agreement, with the possible exception of District Sound as explained herein.

Thus, Colgate stands for the principal that a businessman is free to select the customers he wishes, provided only that there is no intention to create or maintain a monopoly. The Colgate doctrine remains good law.

Going beyond conduct which is described within the Colgate doctrine, courts have held that, if a distributor suggests resale prices to its dealers and the dealers acquiesce in that suggestion there is no illegality under the antitrust laws, since there is no contract, combination or conspiracy in restraint of trade. United States v. O.M. Scott & Sons, Co., 303 F. Supp. 141, 144, 153 (D.D.C. 1969); United States v. Parke, Davis & Co., 362 U.S. at 43, 45-46 (dictum); United Shoppers Exclusive v. Broadway Hale Stores, Inc. 1966 Trade Cases par. 71,727, par. 82.282 (N.D.Cal. 1965). In this regard I could not agree more with what was said in the Cream of Wheat case over 60 years ago:

> We have not reached the stage when the selection of a trader's customers is made for him by the government. Great Atlantic & Pacific Co. v. Cream of Wheat Co., 277 Fed. 2d. 46, 49 (2d Cir. 1915).

District Sound alleges that respondent has gone beyond that which the Supreme Court has stated to be permissible conduct in Colgate and its progeny cases. It is clear that complainant is correct in submitting that certain business conduct is clearly beyond what is permitted by the Colgate doctrine. Thus, one court has provided that

> a refusal to deal, brought about by agreement between competing manufacturers, or between a manufacturer and one or more distributors violated § 1 of the Sherman Act. South End Oil Co. v. Texaco, Inc., 237 F. Supp. 650, 1965, wherein the court relies upon Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 1959; A.C. Becken Co. v. Gemex Corp.; 272 F2d. 1 (1959 7th Cir.).

Complainant, however, has failed to prove that JVC, Inc., acted in concert with other audio electronic manufacturers or distributors, or with JVC, Inc.'s retailers who were competitive with District Sound. While complainant alleges a conspiracy between JVC, Inc., and David H. Brothers Co., Inc., I have determined hereinbefore that such parties were incapable of conspiring under the Sherman Act, and that, even if they were capable of concerted action, the evidence does not reveal such a conspiracy to control District Sound's retail price.

In essence, complainant further submits that, even if I do not find that there has been an agreement, expressed or implied, to maintain the price of JVC, Inc.'s products at resale, and even though JVC, Inc.'s acts are unilateral, the attempt by JVC, Inc., to prevent District Sound from discounting and transshipping is in violation of the antitrust laws.

As stated earlier in this opinion, it is recognized that, generally, section 1 of the Sherman Act requires that an agreement, either expressed or implied, be found in order for the conduct to be adjudged illegal. As noted herein no such unlawful agreement, expressed or implied, can be found in the case at bar. However, I recognize that courts have inferred that agreements exist which go beyond Colgate's "mere announcement of a policy and simple refusal to deal." Thus, in United States v. Parke, Davis & Co., supra, at page 43, the Supreme Court found as follows:

> . . . an unlawful combination is not just such as arises from a price maintenance agreement, expressed or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy. [Emphasis by the court.]

It is noted that complainant relies upon Parke, Davis & Co. in support of its conclusion that JVC, Inc.'s conduct has gone beyond Colgate. In Parke, Davis & Co., the manufacturer attempted to apply pressure on reluctant retailers through cooperation with its dealers and some of its retailers. The court found that this conduct was coercive action, beyond Colgate, from which a combination in restraint of trade could be inferred. According to the facts in the case at bar, one cannot even infer a combination between the distributor and dealers to maintain resale prices in nonfair trade States. In fact, even if I were to conclude that Mr. Stephen Brothers acted as an independent contractor and was thus able to conspire with JVC, Inc., there is no evidence of a Parke, Davis & Co. type combination not to sell to retailers because such retailers discounted and transshipped.

It is clear from the evidence that complainant has failed to prove that a policy or scheme was devised by JVC, Inc., to terminate sales to dealers who discounted and transshipped. As will be discussed hereinafter, the terms of the Dealer Franchise Agreement were reasonable since there was a central legitimate purpose for its enactment. Moreover, there is no persuasive evidence to conclude that the administration of the new marketing program was conducted under a guise of trying to maintain resale prices in nonfair-trade States. At the very most, what occurred in the facts at bar was an isolated unilateral refusal to deal with one retailer who discounted and transshipped. Unlike the facts in FTC v. Beach-Nut Packing Co., 257 U.S. 441 (1922) and United States v. Bausch and Lomb Optical Co., 321 U.S. 707 (1944), I cannot infer that JVC, Inc., has launched an "aggressive, widespread, highly organized and successful merchandising" program to fix resale prices,

United States v. Parke, Davis & Co., 362 U.S. 29 at page 56. Moreover, there is no persuasive evidence to conclude that the termination of District Sound and alleged attempt by JVC, Inc. to fix the price of JVC products sold by District Sound is "an integral part of [JVC, Inc.'s] whole distribution system." United States v. Bausch and Lomb Optical Co., 321 U.S. 707 (1944) at page 720. If there was supportive evidence in this proceeding to conclude that JVC, Inc. had a resale price maintenance policy in nonfair trade States, I would conclude that there was coercive action from which a "combination" could be inferred. To this point, my search of the law as it relates to the facts at bar has resulted in the same conclusion reached by the court in South End Oil Co. v. Texaco, supra, at page 654, where it was stated:

> We are not aware of any case in which a finding of 'unlawful conduct' rests on the isolated experiences of one business man.

District Sound further relies upon the Supreme Court's decision in Simpson v. Union Oil Co. of California, 1964, 377 U.S. 13 in which a resale price agreement was entered into between the supplier and the dealer. In Simpson, the evidence revealed that a large-scale price maintenance program was established through written consignment agreements under which the supplier fixed the resale price of gasoline. The court held that such a sophisticated resale price maintenance scheme conducted by the coercive type of consignment agreement violated § 1 of the Sherman Act. Simpson turned on the agreement and its coercive consequences to fix resale prices. Again, the facts in this case do not reveal an analogous Simpson agreement or that such coercion to achieve resale price maintenance has taken place

and, to repeat, the evidence does not support the existence of a plan or policy by JVC, Inc. to maintain resale prices in nonfair trade States.

JVC, Inc.'s fair trade programs

The fair trade programs, instituted by JVC, Inc. in 1973, clearly resulted in a restraint of trade. Many dealers who, prior to 1973, were able to purchase JVC, Inc.'s products through Delmonico International Corporation were, upon the implementation of the fair trade programs, terminated as dealers and therefore precluded from trading JVC, Inc.'s merchandise. Therefore, the issue is as follows: Is such a restraint of trade unlawful under section 337?

As mentioned, supra, § 1 of the Sherman Act, like section 337, prohibits restraints of trade. In a landmark decision handed-down in 1911, the Supreme Court clearly held that only unreasonable restraints of trade were within the reach of § 1 of the Sherman Act. U.S. v. Standard Oil, 221 U.S. 1, 31 S. Ct. 502. There is no reason to believe that the Supreme Court would hold differently if it had the opportunity to examine the comparable restraint of trade language contained in section 337. Therefore, it is my opinion that only unreasonable restraints of trade are condemned as unlawful under section 337. With this in mind, the issue is whether JVC, Inc.'s distribution program, that is, the fair trade programs, had the effect of unlawfully restraining trade within the meaning of section 337 or any other antitrust law.

Upon examination of the fair trade agreement, the Dealer Franchise Agreement and, in general, the implementation by JVC, Inc. of its new distribution plan to nonfair-trade jurisdictions, it is concluded that, other

than the isolated incident with District Sound, the marketing program was instituted for legitimate business reasons and effectuated in no other way than that which was establshed as a policy. The program was implemented as a plan to stimulate sales and thus required a completely restructured method of distribution whereby prospective dealers had to meet certain commercial conditions to qualify. Such conditions were reasonable and not unrelated to the result JVC, Inc., wished to achieve. Moreover, the program was designed to give JVC, Inc., dealers in fair trade States an opportunity to sell at prices which would insure an adequate profit margin to permit them to hire qualified personnel to sell JVC, Co.'s products.

There is no compelling evidence which indicates that the franchise program was a "sham" for attempting to control resale prices in nonfair trade States. It was reasonable for Mr. Kist of JVC, Inc., to conclude from information furnished to him by Mr. Stephen Brothers that District Sound did not have an adequate sound room or adequate sales personnel. Furthermore, JVC products have been sold to discounting retailers in the District of Columbia as well as in other nonfair trade States. In sum, I can only conclude that respondent, as a matter of policy and by means of the franchise programs, unilaterally refused to deal with retailers who did not or would not comply with its commercially reasonable attempt to improve the consumer image of JVC products and no ancillary attempt by JVC, Inc., to restrict competition in nonfair trade jurisdictions has been proved by the complainant.

There is significant judicial authority for concluding that such a franchise program is not condemned under the antitrust laws. As stated

in Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 284 F.2d. 1, 1960 at page 17, "an individual's right of refusal to deal is preserved wherever it is reasonably ancillary to effectuation of lawful marketing objectives."

As stated by the Supreme Court in United States v. Arnold, Schwinn & Co., 388 U.S. 365 at 376 (1967):

> [A] manufacturer of a product other and equivalent brands of which are readily available in the market may select his customers, and for this purpose he may "franchise" certain dealers to whom, alone, he will sell his goods. Cf. United States v. Colgate & Co., 250 U.S. 300 (1919). If the restraint stops at this point--if nothing more is involved than vertical "confinement" of the manufacturer's own sales of the merchandise to selected dealers, and if competitive products are readily available to others, the restriction, on these facts alone, would not violate the Sherman Act.

Moreover, in Ricchetti Meister Brau, Inc., 431 F.2d. 1211 (1970), an antitrust action was brought by wholesale beer distributors seeking to enjoin defendant from terminating their status as distributors. The Ninth Circuit stated that there was sufficient evidence to conclude that the distributors were terminated on the basis of their " . . . physical facilities, transportation equipment, personnel, and past sales records . . . ." (At p. 1214). With these factual conclusions, the court articulated the following principle:

> It is well established that a manufacturer or producer has the right to deal with whom he pleases and to select his customers at will, so long as there is no resultant effect which is violative of the antitrust laws. Thus, a manufacturer may discontinue a relationship . . . for business reasons which are sufficient to the manufacturer, and adverse effect on the business of the distributor is immaterial in the absence of any arrangement restraining trade or competition. (At p. 1214).

In light of the above-cited court decision, as well as many others, 1/ it is clear that courts have sustained as lawful sellers' unilateral refusals to deal with wholesalers or retailers when such resusal is based upon legitimate business reasons and which do not involve unlawful arrangements with others. On the basis of my conclusions as to the terms and effectuation of JVC, Inc.'s franchise program, and upon an examination of the law, I conclude that JVC, Inc.'s new marketing program was not an unfair practice within the meaning of section 337 or in violation of section 1 of the Sherman Act.

Violations other than under section 1 of the Sherman Act

As noted earlier in this opinion, section 5 of the Federal Trade Commission Act contains much of the same language as that found in section 337. Thus, section 5(a)(1) of the FTC Act condemns "unfair methods of competition . . . and unfair or deceptive acts or practices . . . ." As also noted, supra, the FTC may find a violation of section 5 if the unfair practices being examined constitute a violation of either the Sherman or Clayton Acts.

I have concluded hereinbefore that there has been no violation of section 1 of the Sherman Act, but the question remains of whether or not there has been a violation of section 5 of the FTC Act. My examination of opinions under section 5 reveals that a unilateral refusal to deal, absent the showing of a Sherman 1 contract, combination or conspiracy, is not

1/ Also see, D & M Distribs., Inc. v. Texaco, Inc. 1970 Trade Cases par. 73,099 (C.D. Cal. 1970), at 22; Bushie v. Stenocord Corp., 460 F2d. 116 (9th Cir. 1972).

unlawful under FTC section 5.

However, section 5 can be invoked not only against full-blown combinations which restrain trade but also "incipiency combinations which could lead . . . to trade restraints and practices deemed undesirable." Fashion Origination's Guild of America, Inc. v. FTC, 312 U.S. 457 (1941) at 466. Similarly, it is noted that section 337 makes unlawful unfair acts which have a "tendency . . . to restrain or monopolize trade" in the United States.

Although under section 5 of the FTC Act the incipiency theory has gained judicial recognition and has been expanded in recent years (FTC v. Brown Shoe Co., 384 U.S. 316 (1966)), it is still recognized that there must be a reasonable basis for concluding that the undesirable conduct will eventually blossom into a restraint of trade. This prerequisite established by the courts under section 5 "incipiency" cases is equally applicable to the "tendency" language in section 337.

In the facts at bar, the complainant has failed to prove that JVC, Inc.'s unilateral refusal to deal with District Sound will "blossom" into a developed, pernicious, anticompetitive scheme to maintain resale prices in nonfair-trade States. Accordingly, I cannot conclude that there is sufficient evidence of an incipient combination in progress within the meaning of section 5 or of a "tendency . . . to restrain trade" in the United States within the meaning of section 337.

Concluding remarks

In conclusion, I have scrutinized other antitrust provisions, particularly section 1 of the Sherman Act and section 5 of the FTC Act and found that neither the letter nor the spirit of such laws has been violated

by the respondent, JVC, Inc. My reasons for such scrutiny are founded upon the obvious semantic similarity between the above sections and section 337. Moreover, I have found no other unfair methods of competition which are unlawful under section 337.

I further note that this opinion is the first antitrust-related recommendation by a Presiding Officer or Administrative Law Judge of the U.S. International Trade Commission since the passage of the Trade Act of 1974. In order for a just determination to be made, the facts in this particular proceeding necessitated an examination of how section 337 relates to other domestic antitrust laws. However, it is believed that section 337 is a unique statute, applicable to the importation of merchandise, and therefore may reach conduct which might not apply to other antitrust laws. The case at bar does not require an exhaustive examination of the legal possibilities of section 337, and, therefore, the development of Commission jurisprudence in this regard will be left for future determinations of the Commission.

CONCLUSIONS OF LAW

1. The United States International Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent JVC., Inc.

2. Complainant District Sound has not satisfied its burden of proof to show that respondent JVC., Inc. and David H. Brother & Co., Inc. have entered into a contract, combination or conspiracy in restraint of trade or commerce in violation of Section 1 of the Sherman Act.

3. Complainant District Sound has not satisfied its burden of proof to show that respondent JVC., Inc. and David H. Brothers & Co., Inc., in the course and conduct of their business in commerce entered into a combination which had a tendency or effect in restraint of trade or commerce in violation of Section 5 of the Federal Trade Commission Act.

4. Complainant District Sound has not satisfied its burden of proof to show that respondent JVC., Inc. has committed any unfair methods of competition and unfair acts in the importation of articles into the United States or, in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to restrain or monopolize trade and commerce in the United States in violation of Section 337 of the Tariff Act of 1930.

Daniel Minchew
Presiding Officer

Date: February 10, 1976

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of February, 1976 a copy of the aforegoing Recommendation to the Commission by Presiding Officer Daniel Minchew was served on the following, in the manner indicated:

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