

FEDERAL TRADE COMMISSION DECISIONS

FINDINGS, OPINIONS, AND ORDERS, JANUARY 1, 1965, TO JUNE 30, 1965

IN THE MATTER OF

ALUMINUM INDUSTRIES, INC., ET AL. DOING BUSINESS AS
SOUTHERN PATIO COMPANY, ETC.

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

Docket 8634. Complaint, Aug. 4, 1964—Decision, Jan. 7, 1965

Order requiring a corporation located in Columbia, S.C., to cease using bait advertising to sell aluminum carports, siding, and patio covers, by such practices as advertising special prices in newspapers which were not bona fide offers for sale, but were made to obtain leads to prospective purchasers who were pressured to buy higher priced merchandise than was advertised.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Aluminum Industries, Inc., a corporation, and William N. Bostic, individually and as an officer of said corporation, and as a sole proprietor doing business as Southern Patio Company and as Southern Aluminum Sales, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Aluminum Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of South Carolina, with its principal office and place of business located at 1002 Drake Street, in the city of Columbia, State of South Carolina.

Respondent William N. Bostic is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent. Respondent William N. Bostic also is a sole proprietor

Complaint

67 F.T.C.

doing business as Southern Patio Company and as Southern Aluminum Sales, both located at 1002 Drake Street, in the city of Columbia, State of South Carolina.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of aluminum carports, aluminum patio covers and aluminum siding to the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of South Carolina to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents have made statements and representations with respect thereto in advertisements inserted in newspapers, of which the following are typical and illustrative, but not all inclusive:

FIRST OF YEAR CLEARANCE
TREMENDOUS SAVINGS ON THIS
GIANT SIZE ALUMINUM CARPORT
or patio cover
COMPLETELY INSTALLED!

8 FOOT x 10 FOOT..... \$79. 00
Big! Big! 8 x 16 Foot..... 89. 00
And Giant 8 x 20 Foot..... 99. 00

* * * * *

THIS OFFER GOOD ANYWHERE IN NORTH
OR SOUTH CAROLINA
ALUMINUM INDUSTRIES, INC., P.O. Box 5056, Charlotte, N.C.

* * * * *

LOOK LADIES
FIRST-OF-YEAR CLEARANCE
ALUMINUM SIDING
COMPLETELY INSTALLED
ANY 5-ROOM HOUSE—\$379
Up to 1,000 Sq. Ft.—Includes Labor and Materials—No Extras

* * * * *

This offer good anywhere in North or South Carolina
SOUTHERN ALUMINUM SALES, P.O. Box 5056, Charlotte, N.C.

* * * * *

1

Complaint

1st OF THE YEAR CLEARANCE
 Aluminum CARPORT or Patio
 ANY SIZE UP TO GIANT 8 Ft. x 20 Ft.
 Buy Now At This Special Price!
 Completely Installed—\$99
 Large enough to accommodate your car!

* * * * *

This Offer Good ANYWHERE IN NORTH OR SOUTH CAROLINA
 SOUTHERN PATIO CO., P.O. Box 5056, Charlotte, N.C.

PAR. 5. By and through the use of the aforesaid statements and representations and others of similar import not specifically set out herein, respondents represented that they were making a bona fide offer to sell the products advertised at the prices specified in the advertising.

PAR. 6. In truth and in fact, respondents' offers were not bona fide offers to sell the products advertised at the advertised prices but were made for the purpose of obtaining leads and information as to persons interested in the purchase of respondents' products. After obtaining leads through response to said advertisements, respondents' salesmen called upon such persons but made no effort to sell the advertised products at the advertised prices. Instead, they disparaged the advertised products in such a manner as to discourage their purchase and attempted to and frequently did sell much higher priced products. Therefore, the statements and representations as set forth in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of home improvement products and services of the same general kind and nature as those sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and decep-

Initial Decision

67 F.T.C.

tive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Sheldon Feldman, Mr. William D. Perry supporting the complaint.

Mr. W. Ray Berry, Fulmer, Barnes and Berry, Columbia, S.C., for respondents.

INITIAL DECISION BY ELDON P. SCHRUP, HEARING EXAMINER

NOVEMBER 24, 1964

STATEMENT OF PROCEEDINGS

The Federal Trade Commission on August 4, 1964 issued its complaint charging the above-named respondents with violation of Section 5 of the Federal Trade Commission Act in the interstate advertising, offering for sale, sale and distribution to the public of aluminum carports, aluminum patio covers and aluminum siding.

The complaint alleges respondents' newspaper advertisements not to be bona fide offers of sale of the products at specified prices as therein represented, but instead they were caused to have been published by the respondents solely to obtain information and leads to prospective purchasers of such products. Respondents' salesmen, calling on persons answering said advertisements, are alleged to have disparaged the advertised products in such a manner as to discourage their purchase, and in lieu thereof, to have attempted to and frequently sold respondents' much higher priced products. Said alleged false representations and statements by the respondents are charged to be acts and practices to the prejudice and injury of the public and of respondents' competitors and to have constituted and now constitute unfair methods of competition in commerce and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Respondents filed answer to the complaint on September 3, 1964. Following a prehearing conference held pursuant to Section 3.8 of the Rules of Practice for Adjudicative Proceedings on October 5, 1964, and the granting by the Commission on October 13, 1964 of a certificate of necessity to hold a non-continuous hearing in more than one place, a hearing for the purpose of taking testimony and other evidence in support of the allegations of the complaint and in opposition thereto was set to commence in Charlotte, North Carolina on November 3, 1964 and in Columbia, South Carolina on

1

Initial Decision

November 10, 1964. Order cancelling the above hearing was entered on October 30, 1964 upon the joint request of counsel that an agreement containing a stipulation of facts and agreed order in settlement of the case was being submitted pursuant to Section 2.4(d) of the above Rules of Practice.

Under date of November 12, 1964, this agreement was executed by the parties and subsequently submitted to the Hearing Examiner. The agreement parallels in form the various paragraphs of the complaint, stipulates certain facts, and the agreed order to cease and desist follows the form of order proposed as appropriate of entry herein in the notice appended to the complaint served upon the respondents.

The agreement between the parties provides that the record on which the decisions of the Hearing Examiner and the Federal Trade Commission are to be based shall consist solely of the complaint and said agreement, and respondents waive:

(a) any further procedural steps before the Hearing Examiner and the Commission;

(b) the making of findings of fact and conclusions of law; and

(c) all rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

Order directing the filing of record of the aforesaid Agreement Containing Stipulation of Facts and Agreed Order and closing the record in this proceeding issued November 16, 1964. Based on the foregoing agreed record, the following Findings of Fact and Conclusions therefrom are made, and the following order is issued.

FINDINGS OF FACT

1. Respondent Aluminum Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of South Carolina, with its principal office and place of business located at 1002 Drake Street, in the city of Columbia, State of South Carolina.¹

2. Respondent William N. Bostic is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices charged in the complaint. His address is the same as that of the corporate respondent. Respondent William N. Bostic also was a sole proprietor doing business as Southern Patio Company and as Southern Alumi-

¹ Paragraph 1, page 2 of Agreement Containing Stipulation of Facts and Agreed Order filed of record herein under order of the Hearing Examiner dated November 16, 1964.

Initial Decision

67 F.T.C.

num Sales, both located at 1002 Drake Street, in the city of Columbia, State of South Carolina.²

3. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of aluminum carports, aluminum patio covers and aluminum siding to the public.³

4. In the course and conduct of their business, respondents have in the past caused their said products, when sold, to be shipped from their place of business in the State of South Carolina to purchasers thereof located in the State of North Carolina, and maintained a substantial course of trade in said products in interstate commerce.⁴

5. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents have made statements and representations with respect thereto in advertisements inserted in newspapers, of which the following are typical and illustrative, but not all inclusive:

FIRST OF YEAR CLEARANCE
TREMENDOUS SAVINGS ON THIS
GIANT SIZE ALUMINUM CARPORT
or patio cover
COMPLETELY INSTALLED!

8 FOOT x 10 FOOT.....	\$79. 00
Big! Big! 8 x 16 Foot.....	89. 00
And Giant 8 x 20 Foot.....	99. 00

* * * * *

THIS OFFER GOOD ANYWHERE IN NORTH
OR SOUTH CAROLINA

ALUMINUM INDUSTRIES, INC., P.O. Box 5056, Charlotte, N.C.

* * * * *

LOOK LADIES
FIRST-OF-YEAR CLEARANCE
ALUMINUM SIDING
COMPLETELY INSTALLED
ANY 5-ROOM HOUSE—\$379

Up to 1,000 Sq. Ft.—Includes Labor And Materials—No Extras

* * * * *

This offer good anywhere in North or South Carolina
SOUTHERN ALUMINUM SALES, P.O. Box 5056, Charlotte, N.C.

* * * * *

² Paragraph 2, page 2 of Agreement, *supra*.

³ Paragraph 3, page 2 of Agreement, *supra*.

⁴ Paragraph 4, page 2 of Agreement, *supra*.

1

Initial Decision

1st OF THE YEAR CLEARANCE
 Aluminum CARPORT or Patio
 ANY SIZE UP TO GIANT 8 Ft. x 20 Ft.
 Buy Now At This Special Price!
 Completely Installed—\$99
 Large enough to accommodate your car!

* * * * *

This Offer Good ANYWHERE IN NORTH OR SOUTH CAROLINA

SOUTHERN PATIO CO., P.O. Box 5056, Charlotte, N.C.⁵

6. By and through the use of the quoted statements and representations set forth in Paragraph 5 herein, and others of similar import not specifically set out herein, respondents represented that they were making a bona fide offer to sell the products advertised at the prices specified in the advertising.⁶

7. If twenty North Carolina residents who were contacted there by respondents and who are available to testify, and also twenty South Carolina residents who were contacted there by respondents and who are available to testify were called as witnesses in this proceeding, they would testify as follows:

Respondents' offers were not bona fide offers to sell the products advertised at the advertised prices but were made for the purpose of obtaining leads and information as to persons interested in the purchase of respondents' products. After obtaining leads through response to said advertisements, respondents' salesmen called upon such persons but made no effort to sell the advertised products at the advertised prices. Instead, they disparaged the advertised products in such a manner as to discourage their purchase and attempted to and frequently did sell much higher priced products.⁷

8. In the conduct of their business, at all times mentioned herein, respondents have in the past been in substantial competition, in commerce, with corporations, firms and individuals in the sale of home improvement products and services of the same general kind and nature as those sold by respondents.⁸

9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of sub-

⁵ Paragraph 5, pages 2-4 of Agreement, *supra*.

⁶ Paragraph 6, page 4 of Agreement, *supra*.

⁷ Paragraph 7, pages 4-5 of Agreement, *supra*.

⁸ Paragraph 9, page 5 of Agreement, *supra*.

stantial quantities of respondents' products by reason of said erroneous and mistaken belief.⁹

10. The foregoing stipulated testimony and evidence in this proceeding amply and unequivocally support the allegations and charge of the complaint, that respondents' newspaper-advertised product and price representations and the actions and statements made by the respondents through their salesmen, as hereinbefore related, were and are false, misleading and deceptive acts and practices to the prejudice and injury of the public and of respondents' competitors, and as such, constituted unfair methods of competition in commerce and unfair acts and practices in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

11. If respondent William N. Bostic were called to testify in this proceeding, he would state that none of the respondents are presently engaged in the advertising or sale of their home improvement products outside of the State of South Carolina. Commission counsel have no information to indicate that this statement is not true.¹⁰

The foregoing stipulated testimony by respondent William N. Bostic makes no claim and the record in this proceeding contains no showing of any discontinuance or abandonment by the respondents of the acts and practices set forth in various of the preceding findings herein made.¹¹ Mr. Bostic states only that none of the respondents are presently engaged in the advertising or sale of their home improvement products outside of the State of South Carolina, and the stipulated testimony of the twenty South Carolina witnesses set forth in preceding finding No. 7 would preclude any discontinuance or abandonment in such State by the respondents of the said acts and practices.

12. Discontinuance by the respondents of advertising and sales outside the State of South Carolina does not deprive the Commission of its jurisdiction to effectively prevent the resumption of such acts and practices in commerce, and in the absence of an order to cease and desist herein, there would be nothing to prevent their resumption by the respondents. No assurance has been herein given or is in sight that respondents, if they could shake the Commission's hand from their shoulders, would not continue their former course.

CONCLUSIONS

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

⁹ Findings Nos. 4 and 7, *supra*.

¹⁰ Paragraph 8, page 5 of Agreement, *supra*.

¹¹ Findings Nos. 7 and 9, *supra*.

1

Final Order

2. The complaint herein states a cause of action and this proceeding is in the public interest.

3. The acts and practices of the respondents, as found and related in the foregoing Findings of Fact Nos. 1 through 10 were unfair methods of competition in commerce and unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act, and the following agreed order to cease and desist¹² is appropriate in form and should issue in this proceeding.

ORDER

It is ordered, That respondents Aluminum Industries, Inc., a corporation, and its officers, and William N. Bostic, individually and as an officer of said corporation, and doing business as Southern Patio Company, Southern Aluminum Sales, or under any other trade name, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of aluminum carports, aluminum patio covers, aluminum siding, or any other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, any advertising, sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of products or services.

2. Discouraging the purchase of, or disparaging, any products or services which are advertised or offered for sale.

3. Representing, directly or by implication, that any products or services are offered for sale when such offer is not a bona fide offer to sell such products or services.

FINAL ORDER

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

It is ordered, That the initial decision of the hearing examiner shall, on the 7th day of January 1965, become the decision of the Commission.

¹² Agreed Order, page 5 of Agreement Containing Stipulation of Facts and Agreed Order, *supra*.

Complaint

67 F.T.C.

It is further ordered, That Aluminum Industries, Inc., a corporation, and William N. Bostic, individually and as an officer of said corporation, and as a sole proprietor doing business as Southern Patio Company, and as Southern Aluminum Sales, shall, within sixty (60) days after service of this order upon them, file with the Commission a report in writing, signed by each respondent named in this order, setting forth in detail the manner and form of their compliance with the order to cease and desist.

IN THE MATTER OF
WORCESTER DUSTING MILLS, INC., 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-874. Complaint, Jan. 8, 1965—Decision, Jan. 8, 1965

Consent order requiring Worcester, Mass., affiliated yarn manufacturers to cease violating the Textile Fiber Products Identification Act by falsely labeling, invoicing, and advertising the fiber content of certain yarns, such as labeling "100% Nylon" when in fact the product contained substantial amounts of other fibers, by failing to set forth on labels the true generic names of fibers and percentages thereof; and failing to maintain proper records showing the fiber content of their textile fiber products.

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 Worcester Dusting Mills, Inc., Whittaker Nylon Fibres Corp., Whittaker Fibres, Inc., corporations, and Louis P. Pemstein and Bernard L. Pemstein, individually and as officers of said corporations, and Prescott Textile Co., Inc., a corporation, and Bernard L. Pemstein, individually and as an officer of said corporation, 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. Respondents Worcester Dusting Mills, Inc., Whittaker Nylon Fibres Corp., Whittaker Fibres, Inc., and Prescott Tex-

10

Complaint

tile Co., Inc., are corporations organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts. Respondents Louis P. Pemstein and Bernard L. Pemstein are officers of corporate respondents, Worcester Dusting Mills, Inc., Whittaker Nylon Fibres Corp., and Whittaker Fibres, Inc. They formulate, direct and control the acts, practices and policies of said corporate respondents, including the acts and practices hereinafter set forth.

Respondent Bernard L. Pemstein is an officer of Prescott Textile Co., Inc. He formulates, directs and controls the acts, practices and policies of said corporate respondent, including the acts and practices hereinafter set forth.

The respondents are engaged in the manufacture and sale of yarn with their principal office and place of business located at 91 Prescott Street, Worcester, Massachusetts.

PAR. 2. Subsequent to the effective date of the Textile Fiber Products Identification Act on March 3, 1960, respondents have been and are now engaged in the introduction, delivery for 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 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 constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products with labels which set forth the fiber content as "Nylon," and invoices which set forth the fiber content of textile fiber products as "100% nylon," whereas in truth and in fact, said products contained substantially different amounts of fibers than represented.

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

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 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.

PAR. 5. Respondents have failed to maintain proper records showing the fiber content of the textile fiber products manufactured by them, in violation of Section 6(a) of the Textile Fiber Products Identification Act and Rule 39 of the Regulations promulgated thereunder.

PAR. 6. 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 Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondents Worcester Dusting Mills, Inc., Whittaker Nylon Fibres Corp., Whittaker Fibres, Inc., and Prescott Textile Co., Inc., are corporations organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts.

Respondents Louis P. Pemstein and Bernard L. Pemstein are officers of Worcester Dusting Mills, Inc., Whittaker Nylon Fibres Corp., and Whittaker Fibres, Inc.

Respondent Bernard L. Pemstein is also an officer of Prescott Textile Co., Inc.

The office and principal place of business of all respondents is located at 91 Prescott Street, in the city of Worcester, State of Massachusetts.

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 Worcester Dusting Mills, Inc., Whittaker Nylon Fibres Corp., and Whittaker Fibres, Inc., corporations, and Louis P. Pemstein and Bernard L. Pemstein individually and as officers of said corporations and Prescott Textile Co., Inc., a corporation, and Bernard L. Pemstein, individually and as an officer 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 transportation or causing to be transported 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:

A. 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 constituent fibers contained therein.

2. Failing to affix labels to such textile fiber products showing each element of information required to be disclosed by Section 4(b) of the Textile Fiber Products Identification Act.

It is further ordered, That respondents Worcester Dusting Mills, Inc., Whittaker Nylon Fibres Corp., and Whittaker Fibres, Inc., corporations, and Louis P. Pemstein and Bernard L. Pemstein, individually and as officers of said corporations, and Prescott Textile Co., Inc., a corporation, and Bernard L. Pemstein, individually and as an officer of said corporation, 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 transportation or causing to be transported in commerce, or the importation into the United States of textile fiber products; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, textile fiber products, which have been advertised or offered for sale in commerce: or in the connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of textile fiber products, whether 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, do forthwith cease and desist from failing to maintain records of fiber content of textile fiber products manufactured by them, as required by Section 6(a) of the Textile Fiber Products Identification Act and Rule 39 of the Regulations promulgated thereunder.

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.

Dissenting Opinion

IN THE MATTER OF

THE NEW AMERICAN LIBRARY OF
WORLD LITERATURE, INC., ET AL.

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

Docket 5811. Complaint, Sept. 19, 1950—Decision, Jan. 11, 1965

Order modifying an earlier modified order dated Jan. 13, 1955, 51 F.T.C. 583, which prohibited a New York City publisher from issuing abridgements of or retitlings of previously published books without conspicuous notice of such changes on the title page and jacket of the book, by (1) making more explicit the locations where the disclosure must be printed, and (2) excepting from the prohibition any book originally published outside the United States in a language other than English.

DISSENTING OPINION*

By MACINTYRE, *Commissioner*.

I dissent from the action of the Commission in granting the petitions for modification of the orders in these cases, because this step was taken on the basis of data which has not been adequately verified. These modifications substantially relax respondents' obligations to disclose that the titles of their reprints have been changed or that the texts have been abridged. Whatever the merits of the changes, the procedure followed in making them is objectionable. Significant alterations have been made in these orders in reliance on the self-serving statements of respondents on industry conditions and these statements have not been confirmed in the course of public hearings. The only other data available at the Commission bearing on industry conditions pertinent to these modifications, of which I am aware, was secured on the basis of rather informal contacts from a representative of the industry being regulated.

Even if the changes effectuated in these orders were desirable, the procedural precedent afforded by the Majority's action cannot but further erode the Commission's adjudicatory processes. Presumably, when the Commission issues a cease and desist order it believes that the provisions in that order are necessary to prevent recurrence of the unlawful practices documented by the record. This Agency's cease and desist orders are based on formal public proceedings. Such orders should not, therefore, be modified on the basis of respondents'

*Consolidated opinion in two cases: *The New American Library of World Literature, Inc., et al.*, Docket No. 5811 and *A. A. Wyn, Inc., et al.*, Docket No. 6792, p. 19 herein.

contentions on industry conditions, unless those assertions are corroborated by evidence adduced in an equally public hearing. Otherwise, there is a very real danger that the Commission's perspective in taking these actions is narrowed to that of those being regulated. Our responsibilities, of course, go further than the mere convenience of the respondents under order. It is the function of this agency to protect the consumer from false and misleading and unfair practices on the part of those subject to such orders. I regret that the Commission, in its desire to achieve what it believes to be the just result in two cases, has, in effect, set a precedent, placing in jeopardy the integrity of many other cease and desist orders.

Furthermore, it seems to me that, since the Commission has a number of publishers under similar orders,¹ the issues raised by these modifications have industry-wide implications. The Commission, therefore, should have handled the issues raised by these petitions for review on an industry-wide basis, rather than with an *ad hoc* piecemeal approach. Had the Commission initiated a trade regulation rule proceeding with respect to the compliance problems raised by orders requiring disclosure of substitutions of titles and abridgements, then a public record could have been made as to the actual conditions in the publishing industry bearing on these issues and whether in fact changes in these orders are really necessary. The precedent of our handling of disclosure requirements relating to re-refined oil in a trade regulation rule proceeding is applicable here.² This certainly would be the more orderly procedure. As it is, the action of the Majority may well breed confusion in one area, in which at least hitherto our course has been reasonably clear. Further, the rule-making proceeding would have permitted us to consult all interested parties, namely, consumers, librarians, and book retailers, and not merely those being regulated here, the publishers.

As to the modifications themselves, there is insufficient information at hand to discern the significance of these changes in all their ramifications. Certain of the problems arising out of these changes are, however, readily apparent.

The provisions in both orders requiring disclosure of substitutions of titles have been modified to exclude:

* * * any book originally published outside of the United States of America in a language other than English * * *

¹ It is my understanding that at least 9 orders of this nature are outstanding.

² See *Double Eagle Lubricants, Inc.*, Docket No. 8589 (1964) [66 F.T.C. 1039].

I assume that the Commission intended to exclude reprints of books originally published in a foreign language on the ground that only a minority of the people would be likely to purchase a book either overseas or here in a foreign language and then repurchase the same book in an American edition because of a covert change in title. Has the Commission here in effect decided that a minority does not deserve protection from deception? Be that as it may, I for one am not in possession of sufficient facts to support the determination that those consumers conversant with a foreign language should in effect be penalized for that talent.

The order in *New American Library* has been modified so that in the case of "hardcover" books the respondents are required to disclose the substitution of a title or abridgement of the text in these reprints:

* * * upon the front flap of the jacket or dust cover and upon the title page of hardcover book * * *.

In the case of paperbacks, however, this disclosure is unequivocally required on both the front cover and the title page. The modification is puzzling for a number of reasons. For example, if the respondents were to publish a "hardcover" book without a jacket or dust cover, then apparently no disclosure would be required on the front cover of the reprint. The Commission does not enlighten us with its reasons for drawing this distinction between "hardcover" books and paperbacks. Further, since the order requires the disclosure on the jacket of a book or on its dust cover, I see no reason why the requirement should not be enforced with respect to the front cover of a "hardcover" book not endowed with either a jacket or a dust cover. Logically there seems no reason for this distinction. At least the Commission has not articulated any reason. The modification raises other questions. Is the purchaser of the presumably more expensive "hardcover" edition in less need of protection than the purchaser of the presumably cheaper paperback reprint? If so, why?

In addition, it is conceivable that the order as modified may for other reasons be a source of perplexity to businessmen and the Commission's staff alike. It is certainly conceivable that books cheaply bound with a stiff cardboard binding in fact have a close affinity to the paperback books from which they are now apparently distinguished by the modification in the order. If that is the case, there seems no valid reason for distinguishing between "hardcover" books of this nature and paperbacks. On the other hand, the order also lends itself to the contrary construction that a book with a stiff

Order

67 F.T.C.

cardboard cover or binding is in fact a paperback as opposed to a "hardcover" edition with a cloth binding. The Commission's order nowhere contains a definition of "hardcover" books in the light of which its provisions could be construed. To summarize, the order in certain important respects is ambiguous and gives rise to the suspicion that the Commission may not have thought the problem through when it embarked on the course of modifying these orders. This, of course, is understandable, since we are without a record from which findings of fact could be made to give us some insight into the implications of these changes.

In short, these orders have been modified on the basis of inadequate data; the Commission has failed to articulate its reasons for making the changes, and, further, the changes are in some respects ambiguous. For the foregoing reasons I dissent.

ORDER MODIFYING ORDER TO CEASE AND DESIST

The Commission having issued on January 13, 1955 [51 F.T.C. 583], its decision and order to cease and desist in this matter; and

Respondents having petitioned the Commission for clarification or modification of the aforesaid order of January 13, 1955:

It is ordered, That this proceeding be, and it hereby is, reopened.

It is further ordered, That the Commission's order to cease and desist issued in this matter on January 13, 1955, be, and hereby is, modified by substituting for paragraphs numbered one and two of said order the following:

1. Offering for sale or selling any abridged copy of a book unless one of the following words, namely: "abridged," "abridgment," "condensed," or "condensation," or any other words or phrases stating with equal clarity that said book is abridged, appears in clear, conspicuous type upon the front cover and upon the title page of paperback books and upon the front flap of the jacket or dust cover and upon the title page of hard cover books, either in immediate connection with the title or in another position adapted readily to attract the attention of a prospective purchaser.

2. Using or substituting a new title for, or in place of, the original title of a reprinted book, except any book originally published outside of the United States of America in a language other than English, unless a statement which reveals the original title of the book and that it has been published previously thereunder appears in clear, conspicuous type upon the front

15

Order

cover and upon the title page of a paperback book and upon the front flap of the jacket or dust cover and upon the title page of hard cover books, either in immediate connection with the new title or in another position adapted readily to attract the attention of a prospective purchaser: *Provided, however,* That any book, although originally published in a foreign language, if it has been previously published in an English language edition, shall comply with the disclosure requirements of this proviso. Commissioner MacIntyre dissenting.

IN THE MATTER OF
A. A. WYN, INC., ET AL.*

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

Docket 6792. Complaint, May 13, 1957—Decision, Jan. 11, 1965

Order modifying an earlier order dated November 9, 1957, 54 F.T.C. 545, which prohibited New York City publishers from issuing retitled reprints of existing books without disclosing their original titles, by excepting from the order books published outside the United States in language other than English.

ORDER MODIFYING ORDER TO CEASE AND DESIST

The Commission having issued on November 9, 1957 [54 F.T.C. 545], its decision adopting as its own the initial decision of the hearing examiner in this matter accepting an agreement containing a consent order to cease and desist; and

Respondents having petitioned the Commission for clarification or modification of the aforesaid order of November 9, 1957, and for oral argument before the Commission with regard to such clarification or modification:

It is ordered, That this proceeding be, and it hereby is, reopened.

It is further ordered, That respondents' request for oral argument is denied.

It is further ordered, That the Commission's order to cease and desist issued in this matter on November 9, 1957, be, and hereby is, modified so as to provide in the prohibitory paragraph that respondents shall cease and desist from:

* For opinion in this case, see consolidated opinion *In the Matter of The New American Library of World Literature, Inc., et al.*, Docket No. 5811, p. 15 herein.

Complaint

67 F.T.C.

“Using or substituting a new title for, or in place of, the original title of a reprinted book, except any book originally published outside of the United States of America in a language other than English, unless a statement which reveals the original title of the book and that it has been previously published thereunder appears in clear, conspicuous type upon the front cover and upon the title page of the book, either in immediate connection with the new title or in another position adapted readily to attract the attention of a prospective purchaser; *Provided, however,* That any book, although originally published in a foreign language, if it has been previously published in an English language edition, shall comply with the disclosure requirements of this proviso.”

Commissioner MacIntyre dissenting.

IN THE MATTER OF
SUNBEAM CORPORATION

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

Docket 7409. Complaint, May 27, 1959—Decision, Jan. 11, 1965

Order dismissing complaint charging a Chicago, Ill., manufacturer of electric household appliances, electric shavers, electric tools, and lawn mowers and garden equipment with making payments for cooperative advertising to certain retailers who purchased large quantities of its merchandise through its “Local Promotion Advertising Plans,” without making such payments available on proportionally equal terms to competing retailers.

COMPLAINT

The Federal Trade Commission, having reason to believe that Sunbeam Corporation has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13), hereby issues its complaint charging as follows:

PARAGRAPH 1. Respondent named herein is Sunbeam Corporation. Respondent is a corporation organized and existing under and by virtue of the laws of the State of Illinois. Respondent’s principal office and place of business is located at 5600 West Roosevelt Road, Chicago 50, Illinois.

PAR. 2. Respondent is one of the major manufacturers, sellers and distributors in the United States of electric household appliances, electric shavers, electric tools, and lawn mower and garden equipment. For 1957 net sales of respondent for all products amounted to \$121,840,449.

PAR. 3. Respondent sells its said products to a large number of customers located throughout the United States for use, consumption, or resale therein.

Respondent's main factory is located in Chicago, Illinois, at which respondent manufactures the products hereinabove enumerated, except that respondent manufactures some of its ladies' electric shavers at San Juan, Puerto Rico, from which State and place respondent ships said products or causes them to be shipped and transported to customers located throughout the United States.

PAR. 4. In the course and conduct of its business respondent is now and for many years past has been shipping its said products from the state, states or places where manufactured, or stored in anticipation of sale and shipment, to purchasers located in other states and in the District of Columbia in a constant current of commerce as "commerce" is defined in the Clayton Act, as amended.

PAR. 5. There are approximately 250,000 retail dealers in the United States selling respondent's products to consumers. These include jewelers, department stores, hardware dealers, electric appliance dealers, mail order houses and chain store concerns.

Respondent has two principal methods of sale and distribution of its said products to retail dealers. By the first of these methods, respondent sells its products to wholesale distributors who resell to retailers. By the second method respondent sells directly to retailers. Respondent's direct sales to retailers are principally to about 81 large retail concerns, including chainstores and mail order houses. For brevity, respondent's direct retail purchasers will hereinafter be referred to as "the 81 retailers."

Notwithstanding the fact that one of respondent's two methods of sale and distribution of its products to retail dealers is through wholesale distributors, respondent, in the administration of its local promotion advertising plans hereinafter to be referred to, and in the carrying out and execution of its policies as expressed therein, deals directly with retail dealers, both with those buying from respondent direct and with those buying from respondent through wholesale distributors. Under the terms, provisions and limitations of its said advertising plans, respondent exercises a direct control

over retail dealers, regardless of the source of purchase, insofar as the advertisement of respondent's products for resale to consumers is concerned. It is, therefore, alleged that all such retailers are customers of respondent within the meaning of Section 2(d) of the Clayton Act, as amended.

PAR. 6. In the course and conduct of its business in commerce, as aforesaid, respondent has paid or contracted for the payment of money, goods, or other things of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished or agreed to be furnished by or through such customers in connection with the handling, sale, or offering for sale of respondent's said products and respondent has not made or contracted to make such payments, allowances, or considerations available on proportionally equal terms to all of its other customers competing in the sale and distribution of such products.

Respondent has executed, carried out, and put into effect its various discriminatory and disproportional advertising practices in a variety of ways. Included among these are the following practices:

On or about January 1, 1957, respondent promulgated and put into effect four "Local Promotion Advertising Plans" providing for the advertisement and promotion of its products by retail dealers, as follows:

- A. Electric Household Appliance Assortment Plan.
- B. Electric Shaver Plan.
- C. Electric Tool Advertising Plan.
- D. Lawn Mower and Garden Equipment Advertising Plan.

Pursuant to the terms and conditions of these four advertising plans, respondent has provided for the payment of preferred advertising allowances to "the 81 retailers" hereinbefore referred to who buy direct from respondent, and to other retailers who place orders with respondent through wholesale distributors in specified minimum quantities and amounts for direct shipment from respondent's factory to the ordering retailer.

This preferred advertising consists of acceptable local newspaper, radio, television and catalog advertising. Under respondent's "Electric Household Appliance Assortment Plan" the minimum direct shipment order is \$750 worth of respondent's products as specified in said plan. Upon receipt and shipment by respondent of such an order, respondent sets up on its books 12% of the amount of such order "calculated at current suggested dealer cost" as a credit to the account of the ordering retailer which may be used only for approved local newspaper, radio, television or catalog advertisements of re-

spondent's products. Since the sale of many of respondent's products are seasonal, respondent permits the accumulation of such credits until January 31 of the next calendar year. With these accumulated credits, respondent pays to the dealer up to 75% of his advertising costs computed upon the basis of the local open rate which, by reason of discounts, amounts to 100% reimbursement to most advertisers.

In addition to the preferred advertising allowances hereinbefore described paid by respondent on direct shipments, "the 81 retailers" receive an additional 10% from respondent for such advertising which is deducted from the total of respondent's invoices to such customers. This enables "the 81 retailers" to advertise and sell respondent's products at respondent's "current suggested dealer cost" and make a profit. Many dealers who place orders with respondent through wholesale distributors and receive from respondent a 12% allowance "calculated at current suggested dealer cost" for newspaper, radio, television, or catalog advertising, are in competition with "the 81 retailers" in the resale of respondent's products to consumers.

PAR. 7. There are many dealers selling respondent's products who are unable to purchase at one time the amount of respondent's products specified as the minimum order for direct shipment by respondent's "Electric Household Appliance Assortment Plan." These dealers have to order in lesser quantities from respondent's wholesale distributors and take delivery from the stocks on hand in distributors' warehouses. By the terms, provisions and conditions of respondent's said advertising plan, dealers who order and take delivery of respondent's products from a distributor's warehouse cannot earn or receive from respondent any allowances or payments of any kind for newspaper, radio, television, or catalog advertisement of respondent's products.

Many dealers who buy and take delivery of respondent's products from the warehouses of respondent's distributors during the period of a year, buy, in the aggregate, substantial quantities of respondent's products; and if allowed to accumulate credits by respondent for newspaper, radio, television, or catalog advertising, as respondent allows and pays to their favored competitors, could accumulate sufficient credits to place substantial amounts of this type of advertising. Instead, respondent allows these customers a display type of advertising only for their stores which is much less effective than newspaper, radio, television and catalog advertising which respondent allows and pays to its favored customers. In many instances this

Initial Decision

67 F.T.C.

display type of advertising is not even suitable to the needs of a customer.

Many of the respondent's said customers buying from and taking delivery of respondent's said products from the warehouses of respondent's distributors were and are in competition with many of respondent's customers ordering and taking delivery from respondent on the "Direct Shipment" basis, and with "the 81 retailers" as hereinbefore described, in the resale of respondent's products to consumers.

With the exception of differences in the amounts of the minimum orders to qualify for direct shipment, and differences in percentages earned for the preferred advertising allowances paid, all of respondent's said advertising plans, hereinbefore referred to, are identical.

PAR. 8. The acts and practices as hereinabove alleged are in violation of subsection (d) of Section 2 of the aforesaid Clayton Act as amended.

Mr. William H. Smith supporting the complaint.

Mr. David C. Murchison and *Mr. Richard L. Perry*, of *Howrey, Simon, Baker and Murchison*, Washington, D.C., and *Mr. Stephen R. Smith*, Chicago, Ill., for respondent.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER

JUNE 15, 1964

Preliminary Statement

The complaint herein, issued on March 27, 1959, charges respondent with violating Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, by reason of alleged discriminatory payments under an advertising program instituted by respondent on or about April 1, 1957.

The respondent answered and denied the alleged violation. Hearings have been held for the receipt of oral testimony and documentary evidence in support of and in opposition to the allegations of the complaint. Proposed findings of fact, conclusions of law and order have been filed by counsel for the parties and oral argument had thereon. The matter is now before the hearing examiner for initial decision. All proposed findings of fact and conclusions of law not found or concluded herein are denied.

Upon consideration of the entire record, the hearing examiner makes the following findings of fact and conclusions of law, and issues the following order:

FINDINGS OF FACT

1. The respondent Sunbeam Corporation is a corporation organized and doing business under the laws of the State of Illinois, with its principal place of business located at 5600 West Roosevelt Road, Chicago 5, Illinois. Respondent manufactures electric shavers, electric household appliances, electric tools, lawn mowers and garden equipment. For the year 1957, respondent's net sales for all products amounted to \$121,840,449.

2. Respondent sells its products principally to wholesale distributors. Respondent sells its electric shaver products to about 400 wholesale distributors and its electric household appliance products to approximately 800 wholesale distributors located throughout the United States. Such wholesale distributors resell respondent's said products to retail dealers. For this reason, generally speaking, respondent Sunbeam does not know who the retail dealers in Sunbeam products are. However, for competitive reasons, during the years 1957, 1958 and 1959, respondent sold its electric shavers direct to 81 large retailers located in various cities of the United States, including Baltimore, Maryland.¹ In October 1959, respondent's products were sold by approximately 100,000 retail dealers located throughout the United States. Retail dealers who resell respondent's electric shavers and electric household appliances are department stores, utility companies, appliance dealers, furniture stores, hardware stores, jewelry stores, drug stores, tobacco and liquor stores and catalog or mail-order firms.

3. In the course and conduct of its business respondent is now and for many years has been shipping its said products from the State of Illinois, where manufactured, and, in the case of some of its ladies' electric shavers, from San Juan, Puerto Rico, where some of them are manufactured, to purchasers located in other states and in the District of Columbia, in commerce, as "commerce" is defined in the Clayton Act, as amended.

4. On or about April 1, 1957, respondent promulgated and offered to the trade, through its wholesale distributors, four "LOCAL Promotion Advertising Plans" to be used by retail dealers in advertising and promoting Sunbeam products on a local basis as a tie-in to

¹ CX 44 is a list of the names and addresses of the 81 large retailers, including chain stores and mail-order houses, to whom, for competitive reasons, respondent sold electric shavers "direct" in 1957, 1958 and 1959. For the purposes of this decision, shavers were the only product which respondent sold "direct".

Sunbeam's national advertising of its Sunbeam products.² These plans were designated by Sunbeam as its "Electric Shaver Plan" (CX 2), "Electric Household Appliance Assortment Plan" (CX 3), "Lawn Mower and Garden Equipment Plan" (CX 4), and its "Electric Tool Advertising Plan" (CX 5), sometimes hereinafter referred to as LPAP plan or plans. At the initial hearing held in this proceeding, copies of each of the plans were received in evidence without objection. However, the only evidence in the record concerning the latter two plans was that the Lawn Mower and Garden Equipment Advertising Plan (CX 4) was rescinded and abandoned in March 1958, and the Electric Tool Advertising Plan (CX 5) was abandoned in September 1957, more than one year prior to the issuance of the complaint herein. (Tr. 35) No evidence was offered by counsel supporting the complaint that respondent ever made any payments for advertising promotion pursuant to these two plans. Therefore, only respondent's alleged discriminatory practices in the administration of its Electric Shaver Plan (CX 2) and the Electric Household Appliance Assortment Plan (CX 3) remain to be considered in this initial decision.

5. The provisions of the four advertising plans as originally issued to Sunbeam's wholesale distributors on April 1, 1957, were similar in most respects, except for the products covered and the minimum purchase requirements for reimbursement for newspaper, radio, television or catalog advertising under the plans. Each plan provided for a choice by the retail dealer of six separate forms of local promotional advertising, to wit: newspaper advertising, radio advertising, television advertising, or catalog advertising on the one hand, and point-of-purchase banners and displays or direct mailing pieces on the other. (CX 2 and 3; Ploner, Tr. 519; Mendler, Tr. 950; Bohmbach, Tr. 1007-08, 1017-20; Scott, Tr. 1296-97; Dodge, Tr. 1559; Mee, Tr. 1806-07.)

6. For example, the Electric Shaver Plan (CX 2) provided for the setting up of credits on Sunbeam's books for newspaper, radio, television, or catalog advertising to any dealer who placed an order for a minimum of \$440 worth of Sunbeam men's or women's Shave-masters with an authorized Sunbeam wholesale distributor of his choice for shipment at one time direct from the Sunbeam factory to a single shipping address of the dealer. The credit set up on respond-

²The four plans were issued simultaneously by Sunbeam to each of its wholesale distributors, who, in turn offered the plans to each of its retail dealer customers. Indeed, each retail dealer who testified at the hearings stated that he was familiar with the plans (CX 2 and 3), and that they had been made known and offered to him by a wholesale distributor.

ent's books equaled 14 percent of such order, calculated at current "suggested dealer cost" which appear in respondent's price lists and invoices in evidence (CX 19, 20, 21, 22).³ Such credits could be accumulated over a period extending to January 31 of the next calendar year. To those dealers who did not wish to order from wholesale distributors in the \$440 minimum quantity amount specified for direct shipment at one time from the Sunbeam factory and did not wish to use newspaper, radio, television, or catalog advertising, the Shaver Plan (CX 2) provided, as an alternative, a proportionate reimbursement credit of 14 percent of each purchase of Sunbeam shavers from a wholesale distributor, which credit could be used to obtain the "point-of-purchase" display or direct mail advertising promotion material listed in Appendix B of the Shaver Plan (CX 2G). This material consisted of Catalog Pages, Circulars, Displays, Banners, and/or Post Cards and was usually delivered to the dealer by the wholesale distributor at the time of delivery of the shavers, based upon 14 percent of the amount of the purchase calculated at "suggested dealer cost". Thus, under each type of alternative advertising promotion, newspaper, broadcast, or catalog advertising, and the display or direct mail advertising promotion material, the reimbursement credit was at a uniform rate of 14 percent. Credits for display material on purchases of less than the \$440 minimum specified for so-called "direct" shipments could be accumulated for a period extending to January 31 of the next calendar year. However, the Electric Shaver Plan (CX 2) was in effect for only one year. It was permanently abandoned in April, 1958, when respondent discontinued so-called Fair Trade. (Tr. 533; 1989; 952-53; 1066-67; 1131.)

7. The other plan remaining to be considered is respondent's Small Electric Appliance Plan (CX 3). This plan was offered simultaneously with the Shaver Plan and was similar to the Shaver Plan. The Small Electric Appliance Plan (CX 3) covered Sunbeam Mixmasters, Toasters, Cookers and Deep Freezers, Electric Blankets, Electric Sheets, Electric Irons, Waffle Bakers and Grills, Coffeemakers, Fry-

³ "Suggested dealer cost" is the same as the suggested "wholesale selling price" and the "suggested resale net price" which appear in Sunbeam's price lists. "Suggested dealer cost" was an accounting figure used to compute the amount of the allowance owing to the dealer. It was necessary to use "suggested dealer cost" for the purpose of calculating the allowance to each dealer because Sunbeam did not know the actual price which the dealer paid to his distributor for the merchandise. Based on the number of units purchased by the dealer and the "suggested dealer cost" as shown by the price lists, it was a simple matter for the wholesale distributor to calculate the amount of the credit owing to the dealer under LPAP. (Bohmbach, Tr. 1958-62; Lee, Tr. 1116; 1121-23; Ploner, Tr. 1925-34.) The terms "distributor cost" and "suggested resale net price" as used in the shaver price lists (CX 21 and 22) are the equivalents of "distributor net price" and "wholesale selling price", as used in the appliance price lists (CX 19 and 20).

pans, Egg Cookers, Baby Bottle Warmers, Saucepans and Hair Dryers.⁴ The Appliance Plan (CX 3) provided in substance that, when a dealer placed an order for \$750⁵ or more worth of any of the Sunbeam appliances listed above with a wholesale distributor of his choice for shipment at one time, freight prepaid by Sunbeam from its factory in Chicago to a single shipping address of dealer, Sunbeam would set up an advertising allowance credit on its books equal to 12 percent of such order (reduced in 1958 to 10 percent), calculated at current "suggested dealer cost", such credit or credits to be cumulative during the year until January 31 of the following year, to be used according to the terms of the plan to reimburse the dealer for newspaper, radio, television, or catalog advertising. For dealers who did not wish to use newspaper, radio, television, or catalog advertising and did not choose to purchase as much as \$750 worth of respondent's small appliances in one order and take advantage of the quantity direct shipment provision of the Appliance Plan (CX 3) so as to obtain a reimbursement credit for newspaper, broadcast or catalog advertising, the Appliance Plan (CX 3) offered an alternate proportionate advertising credit at the same percentage, 12 percent (reduced in 1958 to 10 percent), of the amount of the purchase of Sunbeam small appliances from a wholesale distributor, calculated at "suggested dealer cost", to be used as a credit toward the purchase of "point-of-purchase" display or "direct" mail promotion advertising material listed in Appendix B of the Appliance Plan (CX 3). Thus, under the Appliance Plan, as under the Shaver Plan, reimbursement for each type of promotional assistance was at a uniform rate of 12 percent (reduced in 1958 to 10 percent).

8. The Small Electric Appliance Plan was amended in April 1958, when respondent abandoned so-called "Fair Trade", and all references to "Fair Trade" were deleted. The reimbursement credit of 12 percent was reduced to 10 percent. Also, the provision in the plan for the accumulation of credits for the point-of-purchase display and direct mail advertising promotion material listed in Appendix B of

⁴The word "Shavemaster" was included in the first issuance of the Small Electric Appliance Plan (CX 3) through inadvertence but, along with Hair Dryers, was eliminated from the plan in April, 1958, when respondent abandoned Fair Trade. (Tr. 32) No credits earned under the appliance plan were used for the reimbursement of advertising and promotion of shavers and no credits earned under the shaver plan were used for the reimbursement of advertising and promotion of appliances. (Bohmbach, Tr. 1065-66; Lee, Tr. 1129-30, 1132; Ploner, Tr. 1998-99.)

⁵The \$440 and \$750 minimums specified under the Shaver and Appliance Plans for "direct" shipment and reimbursement credits for newspaper, broadcast or catalog advertising did not represent the actual cost to dealers. These figures were based upon "suggested dealer cost" which was an accounting figure used to calculate the amount of credit to which the dealer was entitled under each of the plans.

the plan beyond January 31, 1958, was deleted, since there would be no real purpose in continuing this provision in effect. This was so for the following reasons: When the LPAP plans were put into effect in April 1957, they were made effective as of January 1, 1957, so that those dealers who had made purchases of Sunbeam products from their wholesale distributors during the period intervening between January 1, 1957, and April 1, 1957, when the plans were formally announced and presented to the trade, and had not received the Appendix B material, could then obtain it under the plans. On purchases of Sunbeam products by dealers from their wholesale distributors after April 1957, the wholesale distributor ordinarily delivered the Appendix B material to the dealer along with the merchandise, upon the basis of the 14 percent of the order on electric shavers and 12 percent on the small electric appliances. Therefore, since the Appendix B material was delivered to the dealer by the wholesale distributor along with the merchandise, there was no good purpose in continuing the accumulation of credit provision in effect. The Small Electric Appliance Plan (CX 3) was republished effective January 2, 1959, and remained in effect until April 1960, when it was discontinued and abandoned and has not since been resumed. (Tr. 656)

9. The complaint alleges, among other things, that the Electric Shaver Plan (CX 2) and the Small Electric Appliance Plan (CX 3), previously described, authorized the payment of "preferred advertising allowances" to the 81 large retailers who bought electric shavers direct from respondent and to the other retail dealers who purchased Sunbeam shavers or small appliances from wholesale distributors "in specified minimum quantities and amounts for direct shipment from respondent's factory to the ordering retailer" and that "this preferred advertising consists of acceptable local newspaper, radio, television, and catalog advertising;" that there were "many dealers who were unable to purchase at one time the amount of respondent's products specified as the minimum order for direct shipment;" and that said dealers were offered "a display type of advertising only for their stores which is much less effective than newspaper, radio, television and catalog advertising which respondent allows and pays to its favored customers. In many instances, this display type of advertising is not even suitable to the needs of a customer (the dealer)."

10. On first impression, and more especially to one inexperienced in retail selling and promotion, it would seem that "newspaper, radio, television" and, to a lesser extent, "catalog" advertising would be superior to, and, therefore, "preferred" to a "display type of adver-

tising only" for use in stores. It would also seem to follow that this "display" type of advertising would be "less effective" than newspaper, radio, television and catalog advertising. However, after hearing the testimony of all the witnesses, the hearing examiner finds that the overwhelming weight of the testimony is to the contrary. The record affirmatively shows that newspaper, radio, television, and catalog advertising was unsuitable for the overwhelming majority of dealers who purchased and sold electric shavers and small electric appliances during 1957, 1958, and 1959, the years in question, and further, that the point-of-purchase display and direct mail advertising promotion material offered in Appendix B of the Shaver Plan (CX 2) and the Small Electric Appliance Plan (CX 3), respectively, as an alternative to newspaper, broadcast and catalog advertising to those dealers who purchased in smaller quantities than the \$440 and \$750 minimums specified in the plans were, for most dealers, far more "effective" and suitable methods of advertising and promotion than newspaper, radio, television, and catalog advertising.

11. Counsel supporting the complaint selected four metropolitan market areas from which to call witnesses in support of the allegations of the complaint: Milwaukee, Wisconsin; Richmond, Virginia; Washington, D.C.; and Baltimore, Maryland. Counsel supporting the complaint called twelve witnesses, two of these being employees of the Federal Trade Commission and one, Mr. E. K. Ploner, a vice president of respondent. The remaining witnesses called by counsel supporting the complaint were two employees of Graybar Electric Company, a wholesale distributor, two retailers in Milwaukee, four employees of three retail concerns in Richmond, and an employee of Richmond Newspapers, Inc., Richmond, Virginia. Complaint counsel did not call any witnesses from the Washington, D.C., or Baltimore market areas although he had originally stated that these areas constituted two of the four market areas in which he proposed to offer evidence in support of the allegations of the complaint. The testimony of the witnesses offered by complaint counsel do not support the allegations of the complaint.

12. One of the witnesses called by complaint counsel at the hearing held in Milwaukee on October 14, 1959, was Mr. Art Anderson, a retail jewelry dealer doing business in a room on the second floor of an office building located at 125 West Wells Street, Milwaukee, Wisconsin. (Tr. 241) Mr. Anderson testified that, in 1957, he sold Sunbeam electric shavers and small appliances which he had purchased from three wholesale distributors in Milwaukee (Tr. 242); that he purchased approximately \$1800 worth of Sunbeam shavers and appli-

ances from Edward M. Wells and Son, Inc., approximately \$4500 worth from H. P. Johnson Company, and approximately \$300 worth from Standard Electric and Supply Company. Each of these amounts were totals purchased from each wholesaler and most of his purchases of Sunbeam products from the wholesale distributors were in small amounts but that on one occasion he received an advertising allowance on an order of 24, 36, or 48 electric shavers and frying pans which he had purchased from one of the three wholesale distributors named above and drop-shipped to him from the Sunbeam factory. (Tr. 243-44) Although not positive, he believed that he advertised Sunbeam shavers and frying pans in the *Brookfield News* and the *Elm Grove Leaves*, weekly newspapers published in two Milwaukee suburbs during 1957, 1958, and 1959. (Tr. 262, 287) He stated that he would obtain copies of the advertisements and send them to complaint counsel. (Tr. 263, 287-88) If Mr. Anderson ever transmitted such advertisements to complaint counsel, they were not produced nor offered at any subsequent hearing held in this proceeding. On the other hand, during the presentment of respondent's defense at a subsequent hearing, respondent offered affirmative evidence to show that Mr. Anderson did not advertise any Sunbeam shavers or small electric appliances in the *Elm Grove Leaves* and *Brookfield News* in either of the years 1957, 1958, or 1959, as Mr. Anderson had testified. Mr. Edward K. Ploner, Vice President of Sunbeam, testified that, on August 24, 1961, he visited the office of the publisher of the *Elm Grove Leaves* and the *Brookfield News*, where he examined each issue of these papers for the years 1957 through 1959 and ascertained that there were no advertisements in these newspapers of Sunbeam products by Mr. Anderson. The only advertisement placed by Mr. Anderson in these newspapers was a small signature advertisement, identical to RX 4 and 5, which appeared in every consecutive issue for the period January 8, 1957 through April 16, 1959. The only products mentioned in these advertisements were diamonds, watches and rings. (Tr. 1152-1153) Mr. Anderson's testimony that he had received advertising allowances from Sunbeam on shavers and appliances which he had purchased in quantities of 24, 36, or 48 from wholesale distributors was also discredited by the testimony of Mr. Ploner who testified that he checked the records of Sunbeam Corporation and these records did not disclose any direct shipment of Sunbeam products to Mr. Anderson in 1957, 1958, or 1959, and that Mr. Anderson had not requested reimbursement from Sunbeam for any advertising. (Tr. 1155) Also, none of the exhibits offered in evidence by complaint counsel purporting to show the total orders, allowances and payments

to all dealers in Milwaukee who had received direct shipments under LPAP during the years 1957-1959 list the name of Mr. Anderson or his business. On the whole, Mr. Anderson's testimony added nothing of material substance to support the allegations of the complaint. In published advertising pieces (RX 1 and 2), Mr. Anderson represented himself as a "wholesale" jeweler but admitted he was not. (Tr. 288) In several instances, Mr. Anderson was evasive in his testimony on cross-examination. Apparently, he withheld information from representatives of the Federal Trade Commission regarding a contempt order entered against him in the Circuit Court of Waukesha County, Wisconsin. (RX 6) On cross examination he was asked whether he had informed counsel supporting the complaint of the contempt order:

Q. Did you tell Mr. Smith today, two weeks ago, or at any time?

A. (No response).

Q. Answer the question.

A. No (Tr. 267-268).

Mr. Anderson could not even remember if he had previously discussed the subject matter of this proceeding with representatives of the Commission. (Tr. 265-266) From a preponderance of the evidence, it is found that Mr. Anderson did not ever advertise nor claim or receive reimbursement from respondent for advertising Sunbeam shavers or appliances in any newspaper under respondent's LPAP Plans.

13. The next witness called by complaint counsel was Mr. Howard M. Steller, President of Steller's, Incorporated, retail jewelers in Milwaukee. Steller's operated a jewelry store at 2740 North Teutonia Street in Milwaukee and, in October 1956, opened a second store in the Capital Court Shopping Center in Milwaukee. (Tr. 289-299; 1752-1778) Prior to 1956, Mr. Steller promoted the sale of Sunbeam shavers and small appliances by newspaper advertising three times each year, in May and June, for graduation, brides, Mother's and Father's Day, and anniversaries, another promotion on lay-away, which came in September and October, and the third, for Christmas. Steller's paid for this advertising and did not receive reimbursement from Sunbeam. This was prior to the offering of the LPAP Plans in April 1957. However, in 1956, the discount and department stores in Milwaukee began cutting prices on electric shavers and appliances to the point where Steller's was not making any profit on their sale. Therefore, during 1957, 1958 and 1959, the years involved in this proceeding, Steller's only handled electric shavers and small appliances as an accommodation to customers and did not advertise them in

newspapers. His only newspaper advertising in 1957, 1958, and 1959 was on jewelry and diamonds. Mr. Steller was familiar with respondent's LPAP Plans, CX 2 and 3, and the \$440 and \$750 minimum purchase requirements on shavers and appliances would not have prevented him from participating in the plans if he had wanted to because, if he had run a newspaper advertisement promotion of Sunbeam shavers or appliances, he would have first purchased a supply of Sunbeam shavers and appliances in quantities in excess of the \$440 and \$750 minimums specified in the plans in order to back up the newspaper advertising. The third witness called by complaint counsel at the hearing in Milwaukee was Mr. Frank Russo, a salesman for Graybar Electric Company, a wholesale distributor of electric supplies, including Sunbeam electric shavers and appliances, in Milwaukee, Wisconsin. Mr. Russo testified that he was familiar with Sunbeam's shaver and small electric appliance plans (CX 2 and 3) and gave estimates of yearly purchases by certain retail dealers in Milwaukee of Sunbeam shavers and appliances, accessories, etc., from Graybar and stated that, in his opinion, these named dealers were in competition with certain department stores in Milwaukee in the sale of Sunbeam shavers and appliances.

14. At the hearing held in Richmond, Virginia, on January 28, 1960, complaint counsel called representatives of three retail dealers in Richmond who had received reimbursement from respondent for newspaper advertising promotion of Sunbeam shavers and appliances under respondent's LPAP plans (CX 2 and 3). These dealers were Sears, Roebuck & Co., Standard Drug Company and Thalhimer Brothers, a department store in Richmond. Complaint counsel also called a representative of Richmond Newspapers, Incorporated, owner of two Richmond newspapers, the *Times Dispatch* and *News Leader*, who identified CX 38, 39, and 40 as rates for advertising in the two newspapers effective during the years involved in this proceeding, and CX 41, 42, and 43 as being photostatic copies of newspaper advertisements run by Sears on April 17, 1958, by People's Drug Stores on April 10, 1958, and April 17, 1958, respectively. Counsel also called a representative of Graybar Electric Company, a wholesale distributor in Richmond.

15. Mr. Ernest P. Duke, Advertising Display Manager for Sears, Roebuck & Co., in Richmond, called as a witness by complaint counsel, testified that he used six of the point-of-purchase display material items listed in Appendix B of respondent's appliance plan (CX 3) in the promotion of Sunbeam appliances listed in the advertisement by Sears in the Richmond *News Leader* of April 17, 1958 (CX 41). The

Appendix B point-of-purchase items which Mr. Duke used in the Sears store display were the Hand Mixer Display, Coffeemaster Display, Waffle Baker Display, Ironmaster Display, Toaster Display and the Cooker and Fryer Display. (Tr. 332) However, there is no evidence in the record to show that these Appendix B display materials were received by Sears on the same purchase on which it purportedly received reimbursement for the newspaper advertisement above referred to (CX 41). These point-of-purchase items utilized by Mr. Duke were already in the possession of Sears at the time the newspaper advertisement referred to above appeared. These six Appendix B displays were already on hand in the drawer of a display table which Mr. Duke removed therefrom to set up the display of Sunbeam appliances. (Tr. 332-333) Prior to the publication of the newspaper advertisement (CX 41) on April 17, 1958, Sears had made purchases of Sunbeam appliances from local wholesale distributors. (Tr. 335) It may well be that the six Appendix B display items which Mr. Duke used had been received by Sears in reimbursement credits on purchases of Sunbeam appliances from wholesale distributors prior to April 1958, under the LPAP Plan. Under the plans, a dealer could receive reimbursement in the form of Appendix B display material from his wholesale distributor on purchases of less than the \$440 and \$750 minimums specified under the LPAP Plan and, on purchases in amounts approximating or exceeding the specified \$440 and \$750 minimums, receive reimbursement for newspaper, broadcast or catalog advertising. However, the evidence shows and it is found, that under the plans, the dealer did not and could not receive both the Appendix B promotion material and also reimbursement for newspaper, broadcast or catalog advertising on the same purchase. Nor could a dealer receive reimbursement in the form of Appendix B display or direct mail advertising material which he was not entitled to and had not earned under the plans. In other words, the Appendix B material was not distributed indiscriminately; only to those who had earned and requested it under the plans. (Ploner, Tr. 40-41; Siegel, Tr. 1403-04; Moldenhauer, Tr. 1453-55; Russo, Tr. 1488-89; Pitt, Tr. 1543; Dodge, Tr. 1564; Weingroff, Tr. 1666; Mitchell, Tr. 1699; Manning, Tr. 351.) So, from this evidence it is found that Sears, Roebuck & Co., advertised Sunbeam small appliances under respondent's LPAP Plan in 1958 and that the \$750 minimum specified in the Appliance Plan (CX 3) was not beyond its reach. It is further found that, prior to April 17, 1958, the date of the advertisement of Sunbeam small appliances by Sears, Roebuck & Co., in the *Richmond News Leader* (CX 41) referred to above, Sears had previously made purchases of Sun-

beam small appliances from Richmond wholesale distributors on which Sears was eligible to receive credits toward point-of-purchase display or direct mail material listed under Appendix B of respondent's Appliance Plan (CX 3).

16. The next witness called by counsel supporting the complaint was Mr. L. K. Manning, District Plant Sales Manager for Graybar Electric Company, Richmond, Virginia, a wholesale distributor of electrical products. During 1957, 1958, and 1959 Graybar sold and distributed Sunbeam shavers and appliances to approximately 100 retail dealer customers in Richmond. Mr. Manning was familiar with respondent's Shaver Plan (CX 2) and Appliance Plan (CX 3). Graybar had several customers in Richmond who placed orders with it for Sunbeam shavers and appliances and took delivery on a direct shipment basis from the Sunbeam factory, thus entitling these retail dealers to receive reimbursement from respondent for newspaper, broadcast or catalog advertising of Sunbeam shavers or appliances under respondent's LPAP Plans. These dealers included Thalhimer's Dept. Store, Cowardin Jewelry, Sears, Roebuck & Co., Lowe's Jewelry and Standard Drug Company. However, the majority of Graybar's retail customers did not buy on a drop-shipment basis but bought from Graybar in quantities less than the \$440 and \$750 minimums specified in the plans. In fact, according to Mr. Manning, none of Graybar's retail dealer customers bought exclusively on a drop-shipment basis. As an example, counsel supporting the complaint inquired if Thalhimer's bought Sunbeam shavers and appliances from Graybar both ways, that is, orders equaling or exceeding the \$440 and \$750 minimums specified for drop-shipment and reimbursement for newspaper, broadcast, and catalog advertising and orders in amounts less than the above minimums, where the dealer would take delivery of the Sunbeam shavers or appliances direct from Graybar's Richmond warehouse and thus be entitled to receive the point-of-purchase display or direct mail promotion material listed in Appendix B of the plans, and Mr. Manning replied Thalhimer bought both ways. Mr. Manning testified that Thalhimer bought 50 percent on a drop-shipment basis and 50 percent on a fill-in basis from the warehouse stocks of Graybar in Richmond. Commission counsel pressed Mr. Manning to find out if, on a purchase by Thalhimer from Graybar on the drop-shipment basis under the plans, Thalhimer was entitled to receive reimbursement for newspaper advertising and also to receive the point-of-purchase material listed in Appendix B on the same drop-shipment purchase. In other words, could Thalhimer receive the Appendix B material on a drop-shipment purchase and also

receive reimbursement for newspaper advertising. Mr. Manning made it clear that Graybar did not give Thalhimer any Appendix B material on a drop-shipment purchase. Under the terms of the plans and the instructions by Sunbeam in its letter to all of its wholesale distributors embodied in CX 24, Thalhimer's was not entitled to receive any Appendix B material on a drop-shipment purchase which approximated the \$440 and \$750 minimums, where Thalhimer's was entitled to receive reimbursement for newspaper, broadcast, or catalog advertising.

17. Both inside and outside Graybar salesmen were given copies of respondent's LPAP Plans, CX 2 and 3, at the time of their issuance in April 1957, and their salesmen offered both plans to their customers. There are approximately 150 to 175 electric appliance retailers in Richmond and of this number, only approximately 12 to 15 promote the sale of appliances by newspaper advertising. The great majority of dealers promote their sale through point-of-purchase material. (Tr. 367-368) There are various types and classifications of retail dealers who may sell electric appliances, such as department, drug, hardware, furniture, variety, gift, grocery, and appliance stores. Some of the large volume stores, like department stores, use promotion advertising in newspapers and some radio and television advertising. Some stores use direct mail. The vast majority prefer and use point-of-purchase advertising promotion material. Mr. Manning did not know of any type of advertising at the retail level not covered by Sunbeams' plans. (Tr. 369) A retailer who intends to promote the sale of shavers or appliances by newspaper advertising must first purchase and have on hand at least \$440 worth of shavers or \$750 worth of appliances before running the newspaper advertising. (Tr. 383) He must have the shavers or appliances on hand to "back-up" the newspaper advertising. Newspaper advertising is relatively expensive and it must be regular and repetitive in order to be effective. Therefore, most retail dealers prefer point-of-purchase advertising. (Tr. 370-371) Mr. Manning also testified that Sunbeam's LPAP Plans are "the greatest contributor toward retail stores advertising programs of any lines that we handle * * *." (Tr. 380-381) For a retailer to buy just one each of Sunbeam's small appliances from Graybar would aggregate a cost of more than \$1,000. (Tr. 371)

18. Mr. Gilbert Rosenthal, Merchandise Manager for Standard Drug Company, a retail drug chain with headquarters in Richmond, Virginia, was the next witness called by counsel supporting the complaint. (Tr. 386-404) Standard operates 13 retail drug stores in Virginia and the District of Columbia. Mr. Rosenthal was familiar with

respondent's Shaver and Appliance Plans (CX 2 and 3). In the fall of the year, Standard advertises shavers and appliances in newspapers including the *Times Dispatch* and *News Leader* in Richmond and the *Washington Post* and *Star* in Washington, D.C. November and December is the best selling season for shavers and appliances according to Mr. Rosenthal. Standard purchases most of its Sunbeam shavers and appliances from local wholesale distributors in Richmond, including Graybar Electric Company, and also Norfolk Distributing Co., in Norfolk, Virginia. Standard buys shavers direct from Sunbeam at the wholesale distributor's price. Before running a newspaper advertisement of Sunbeam shavers or appliances, Standard would purchase several thousand dollars worth of these products from a local wholesale distributor to be delivered on a drop-shipment basis. Seven hundred fifty dollars worth would be the very minimum purchase before running a newspaper advertisement for the three stores in Richmond. On drop-shipments under the LPAP Plans, Standard places the order with the local wholesale distributor of its choice and the distributor transmits the order to Sunbeam in Chicago. Sunbeam then ships the merchandise to the Standard warehouse in Richmond. The wholesale distributor then bills Standard for the merchandise. The price which Standard pays the wholesale distributor for the merchandise is determined or set by the distributor. There are about 10 or 12 retail dealers in Richmond who advertise Sunbeam shavers and appliances in newspapers. The remainder of the Richmond dealers use point-of-purchase or direct mail advertising. Standard uses very little point-of-purchase display material in its stores and never has used or requested any of the Appendix B display material from Sunbeam or any wholesale distributor.

19. Mr. Milton Kirtley, Divisional Merchandising Manager of Home Furnishings at Thalhimers, a department store in Richmond, was the next witness called by complaint counsel. Mr. Kirtley was not familiar with respondent's Appliance Plan (CX 3) although he testified that Thalhimers sold Sunbeam shavers and appliances. Mr. Kirtley testified that he did not buy merchandise for Thalhimers and, for this reason, he was excused. Mr. Herbert Lebar, Houseware Buyer for Thalhimers, was then called by complaint counsel. (Tr. 410-424) At the time of the hearing, January 28, 1960, Mr. Lebar had held his then position with Thalhimers since June 1959. Mr. Lebar's predecessor, Mr. Frank Carpen, was then operating a retail store in Newport News, Virginia. Mr. Lebar was not familiar with respondent's Shaver and Appliance Plans (CX 2 and 3). Since Mr. Lebar began with Thalhimers in June 1959, Thalhimers has handled

Sunbeam products which he characterized as "traffic" appliances, irons, toasters, frypans, etc. Shavers are not carried in Mr. Lebar's department of the store. Thalhimier buys Sunbeam appliances from local wholesale distributors, such as Graybar Electric Co., and Goldberg-Tiller, both on fill-in orders of less than \$750 and also on orders of \$750 or more on a drop-shipment basis, varying, depending on the time of year. They buy on a drop-shipment basis before running a newspaper advertising promotion of Sunbeam appliances. Mr. Lebar testified that Thalhimier's was "in competition with every other appliance dealer who sells Sunbeam in the city of Richmond." Since Mr. Lebar has been with Thalhimier, they have not used any of the point-of-purchase promotional materials listed in Appendix B of CX 3G, except a frypan display that was "there" before he came to the store and was "still there". On purchases of Sunbeam appliances by Lebar on behalf of Thalhimier from the wholesale distributor, the price is determined by the distributor and Lebar, both on fill-in purchases and those for drop-shipment. Before running a newspaper advertisement of Sunbeam appliances, a minimum of \$750 worth of Sunbeam appliances is ordered so as to have the merchandise on hand to "back-up" the advertisement. Thalhimier has its own art and display department and, for this reason, uses very little of the sales promotion display material offered by manufacturers, including Sunbeam.

20. The next witness called by counsel supporting the complaint was Mr. Edward K. Ploner, a Vice-President of Sunbeam Corporation, at a hearing held in Chicago, Illinois, on October 17, 1961. Complaint counsel had previously called Mr. Ploner as a witness at the first hearing held in this proceeding in Chicago on October 12, 1959. At the hearing on October 17, 1961, Mr. Ploner was used by complaint counsel, to a large degree, to identify certain documents, including advertising requisitions and certain documents prepared by respondent at the request of complaint counsel, such as CX 46. This exhibit purports to show the accrued credits earned under the LPAP Plan by Smith Williams Jewelry Company, Richmond, Virginia, on purchases of appliances in 1957 and shavers in 1958, including the amounts paid in reimbursement for newspaper advertising, and the name of the newspaper which carried the advertising. The product categories or classifications covered by CX 46 and similar ones, such as CX 48, 77, 79, and 81, are listed therein as "Shaver" and "Appliance". On cross examination, Mr. Ploner explained that, under the category of "Shaver", there are four Sunbeam products: two of them being "Men's Shavers", each basically different from each other, different as to the type of mechanism and blades, different in shape,

configuration, and color, but all classified as shavers. Then there are two types of "Ladies' Shavers". A lady's shaver differs from a man's shaver in construction, mechanism, and appearance. The purpose is different. With respect to the word "Appliance", that term includes all of the small appliances manufactured by respondent and listed in CX 3, such as Sunbeam Mixmaster, Toasters, Cookers and Deep Fryers, Waffle Bakers and Grills, Coffeemakers, Frypans, Electric Irons, etc. Each of these items has a different use. So, on CX 46 and similar exhibits, the newspaper advertisement referred to in the exhibit does not show the actual product advertised, but only refers to it as "Shaver" or "Appliance". Mr. Ploner testified that Smith Williams Jewelry Company was not a customer of Sunbeam Corporation and that CX 46 and other similar exhibits are not official records of Sunbeam Corporation kept in the regular course of business but were prepared by employees of respondent in the manner and form requested by counsel supporting the complaint in response to a Subpoena Duces Tecum.

21. The next witness was Mr. Seth MacDonald, a Senior Accountant with the Federal Trade Commission, called by complaint counsel to identify and explain some written tabulations in the form of exhibits which Mr. MacDonald had prepared by copying from some of respondent's records made available to Mr. MacDonald and complaint counsel under a Subpoena Duces Tecum. CX 56 is an example of one of the tabulations which Mr. MacDonald stated that he had prepared in his own handwriting, with the following heading at the top of the page of the exhibit: "Sunbeam Corp. Advertising Reimbursements to Lee's Appliance & Furniture Co., Richmond, Va." This exhibit purports to list the numbers of five checks totaling \$213.04 paid by Sunbeam Corp. in 1957 and 1958 as reimbursement to Lee's Appliance & Furniture Co. for newspaper advertisements of "shaver" in the *Richmond Times Dispatch* and *News Leader* and \$1,273.66 paid in 1957 and 1958 for advertisements of "app." in these newspapers. The exhibits prepared by Mr. MacDonald do not identify the Sunbeam products advertised in the newspaper for which Sunbeam is supposed to have issued checks to various payee dealers as reimbursements for such advertising other than as "shaver" or "app.", whether the shavers advertised were men's or ladies' the exhibits do not disclose. In the case of "app.", the exhibits prepared by Mr. MacDonald do not identify the appliance, whether it was a Mixmaster, Toaster, Iron, or any of the other eight or ten types of "appliances" manufactured by Sunbeam. On cross-examination, several errors were

disclosed in the tabulations contained in the exhibits prepared by Mr. MacDonald.

22. Following Mr. MacDonald, complaint counsel re-recalled Mr. Ploner to identify certain additional exhibits, including CX 314 A-G, which purports to be a list of dealers in various cities who purchased Sunbeam shavers and/or appliances direct from respondent. This list was compiled by respondent in the manner and form as that specified in response to a Subpoena Duces Tecum issued at the behest of complaint counsel. This exhibit lists Sears, Roebuck & Co., Chicago, Illinois, as being a direct purchaser of shavers and appliances in 1958 and 1959. Mr. Ploner also identified other exhibits, including CX 316, an invoice dated September 26, 1958, from respondent to Graybar Electric Co., Richmond, Va., for Electric Irons drop-shipped to Sears, Roebuck & Co., in Richmond under respondent's Appliance Plan (CX 3), and CX 317, an order from Graybar on which the invoice was based. Complaint counsel offered and there were received in evidence, over respondent's objection, several additional exhibits, CX 318 through CX 324, purporting to show drop-shipments of shavers and appliances from respondent to Sears, Roebuck & Co., under respondent's LPAP Plans on orders placed by Sears with Graybar Electric Co., Inc., and Goldberg-Tiller Corp., Richmond wholesale distributors. Complaint counsel offered these exhibits with the stated purpose to show that respondent, under its LPAP Plans, did not treat its "direct" customer dealers, such as Sears, Roebuck, any differently from those dealers who purchased from wholesale distributors, insofar as advertising treatment was concerned. An examination of these invoice exhibits shows that CX 316, CX 319, CX 320, CX 321, and CX 322 each represented drop-shipments to Sears, Roebuck & Co., during the months of September and October 1958, after respondent discontinued selling appliances direct to Sears in July 1958. (Tr. 28, 77, 185, 689) CX 323 and CX 324 are dated December 1957, and purport to represent drop-shipments of shavers purchased from Goldberg-Tiller Corp., a Richmond wholesale distributor. Even CX 314G does not list Sears, Roebuck & Co., as a direct customer of respondent for shavers in 1957. So, upon the basis of the evidence, it is found that respondent was not selling Sears, Roebuck & Co., electric shavers on a direct basis in 1957, and that respondent discontinued sales of electric appliances to Sears, Roebuck & Co., on a direct basis on or about July 1958.

23. Upon concluding the examination of Mr. Ploner at the hearing in Chicago on October 18, 1961, complaint counsel announced that,

since respondent was not willing to admit "competition"⁶ between dealers in Sunbeam shavers and appliances in the four market areas, as required by Section 2(d) of the Clayton Act, it would be necessary to hold hearings in Milwaukee, Wisconsin; Washington, D.C.; Baltimore, Maryland; and Richmond, Virginia. This was despite the fact that, upon complaint counsel's request, hearings had already been held in Milwaukee and Richmond where complaint counsel had an opportunity to adduce testimony on this facet of his affirmative case. The competition between dealers referred to by complaint counsel was that competition, if any, between those dealers who purchase from Sunbeam Corporation on a direct basis and those dealers who purchase Sunbeam products from wholesale distributors. Of course, respondent takes the position that those dealers who do not purchase from respondent on a direct basis, but purchase Sunbeam products from wholesale distributors, are not customers of respondent. Respondent takes the position that it does not even know who many of these dealers are (those who purchase Sunbeam products solely from wholesale distributors), and, respondent could not admit competition with respect to dealers wholly unknown to it. Respondent counsel stated that they would have to know who the dealers were, the product involved, and the time period involved.

24. At the next session of the hearing held in this proceeding in Washington, D.C., on July 23, 1963, complaint counsel called Mrs. Agnes Simpson, a statistical clerk with the Federal Trade Commission, for the evident purpose of proving the existence of competition between dealers in Milwaukee, Richmond, Baltimore, and Washington who bought direct from respondent and dealers in the same cities who bought from wholesale distributors. This proof of "competition" was sought to be established through certain exhibits produced and identified by Mrs. Simpson. The principal exhibits which Mrs. Simpson prepared and sponsored for the purpose of showing "competition" were CX 325, CX 326, CX 327, and CX 329, maps of the cities of Richmond, Virginia; Milwaukee, Wisconsin; Baltimore, Maryland; and Washington, D.C., respectively. Mrs. Simpson testified that, on each of these maps, she had spotted the approximate location of the dealers in the four cities whose names were shown on other exhibits which had been received in evidence at previous hearings. For example, CX 45, designated as an Advertising Requisition previously

⁶ Of course, there is testimony in the record by certain dealers that they considered themselves to be in general competition with all other dealers located in the same city, selling Sunbeam products, but this type of testimony has been held to be insufficient to establish "competition" within the contemplation of Section 2(d) of the Clayton Act.

received in evidence, directs the shipment of 250 Hair Dryer Circulars under Appendix B of respondent's LPAP (Appliance Plan CX 3) Plan to Smith Williams Jewelers, 731 E. Main A, Richmond, Virginia. Mrs. Simpson stated that, on CX 325, the Map of the city of Richmond, with stated marks and symbols, she indicated the approximate location of Smith Williams Jewelers from the address shown on CX 45. From CX 47, another Advertising Requisition, she obtained the name and address of N. F. Jacobs Sons, 815 E. Broad Street, Richmond, and indicated the approximate location of this dealer's store on the map of Richmond, CX 325. She then went on to CX 49, which lists Cowardin Jewelry, 1707 E. Main Street, Richmond, Virginia, as another dealer who had obtained Appendix B Material in the form of circulars, and indicated with symbols the approximate location of this dealer on the Richmond Map. (CX 325) She followed the same procedure by indicating the approximate locations on the maps of Milwaukee (CX 326), Baltimore (CX 327) and Washington (CX 329), the names and addresses of those dealers listed on the face of exhibits in the record. In cases where the address of the dealer was not shown on the exhibit, Mrs. Simpson consulted the telephone directory of the appropriate city and selected an address for that dealer from that directory. The city maps used by Mrs. Simpson, CX 325, 326, 327, and 329 did not purport to be maps of Richmond, Milwaukee, Baltimore, and Washington during 1957, 1958 or 1959, the years involved in this proceeding. The locations of the dealers which Mrs. Simpson purported to show on the city maps were only approximations, at best, and, on cross-examination, many wide errors were brought out in these approximations. Mrs. Simpson testified that she did not have personal knowledge that the maps which she prepared and sponsored accurately reflected store locations during the relevant years. As stated above, the purpose of these maps was to show the geographic proximity of store locations from which an inference of competition could be drawn. Mrs. Simpson stated that she did not have personal knowledge of what products may have been stocked and resold by any of the stores shown on the maps. (Tr. 707-848)

25. At the conclusion of the cross-examination of Mrs. Simpson, complaint counsel rested his affirmative case. Counsel for respondent then moved to (1) dismiss the complaint on the ground that counsel for the complaint had failed to prove that allegedly favored and disfavored dealers were engaged in competition at or about the same time in the distribution of products of like grade and quality; (2) to dismiss the charge in Paragraph Six of the complaint to the effect

that respondent had granted an "additional 10%" allowance to "81 retailers" for advertising purposes, for the reason that, during the course of testimony at hearings in support of the Commission's case-in-chief, complaint counsel agreed that this charge should be disregarded because he had "misinterpreted" respondent's billing system, and (3) that the charge in Paragraph Six of the complaint with respect to respondent's Lawn Mower and Garden Equipment Assortment Plan (CX 4) and its Electric Tool Assortment Plan (CX 5) be dismissed for failure of proof. By order dated October 15, 1963, this hearing examiner denied respondent's motion to dismiss the complaint by reason of the Commission's views that, on a motion to dismiss made at the close of the Commission's case-in-chief, all evidence adduced in support of the case-in-chief should be viewed in the light most favorable to the complaint. The hearing examiner stated that action with respect to points (2) and (3) of respondent's motion would be taken in his initial decision to be issued after the closing of the record.

26. Defense hearings were held in Chicago, Illinois, on November 25, 26, and 27, 1963, and Washington, D.C., on January 27, 28, 29, 30, 31, and February 1, 1964. The respondent called twenty-one witnesses. Five were present or former officers and employees of Sunbeam Corporation at the time of the preparation, issuance and operation of the LPAP Plans during the years 1957, 1958, and 1959. The respondent also called six dealer witnesses, four distributor witnesses, four executives of trade associations familiar with the advertising and promotion of shavers and small appliances by retail dealers, and two of the leading authorities on advertising and marketing in the United States, Dr. James Scott, Professor of Advertising, Graduate School of Business Administration, University of Michigan, and Mr. William W. Mee, President, Point-of-Purchase Advertising Institute, New York, New York. The testimony of each witness will not be reviewed in detail. References to some of the testimony will be referred to where appropriate.

27. The record shows conclusively, and it is found, that newspaper, broadcast, and catalog advertising were unsuitable for 90 to 95 percent of the dealers who sold Sunbeam electric shavers and small appliances. Every dealer who made purchases of shavers and small appliances in quantities below the minimums specified in respondent's LPAP Plans who appeared at hearings testified that newspaper, broadcast, and catalog advertising were, for them, unsuitable forms of advertising and promotion. Although the theory of the complaint and the theory on which complaint counsel presented his case-in-chief

was that the \$440 and \$750 minimums specified in the plans prevented some dealers from using newspaper, broadcast, or catalog advertising and forced them to use the Appendix B advertising material which the complaint alleged was "less effective" and "not even suitable" to their needs, not one dealer testified that he was prevented from using newspaper or broadcast advertising by reason of the \$440 and \$750 minimums specified in the plans. The testimony of both dealers and distributors was that those dealers who used newspaper, broadcast, or catalog advertising customarily purchased at least \$500 to \$2,000 worth of shavers and appliances, respectively, before running an advertisement in the newspaper. This was necessary so as to "back-up" the advertisement. For those dealers who did not choose to use newspaper, broadcast or catalog advertising, and those dealers constituted 90 to 95 percent of the dealers who sold Sunbeam shavers and small appliances, respondent's LPAP Plans did not prescribe any purchase minimums for those dealers to be entitled to receive the Appendix B point-of-purchase or direct mail advertising material. Messrs. Mitchell and Moldenhauer, dealers in Baltimore, Maryland, and Milwaukee, Wisconsin, respectively, each of whom had purchased in much greater quantities than the minimums specified in the two plans for newspaper, broadcast, or catalog advertising, testified that newspaper, broadcast, and catalog advertising were unsuitable for their promotional needs. Since complaint counsel laid so much stress on this theory to establish the violation of Section 2(d) as alleged in the complaint, it is significant that complaint counsel has not requested a specific finding of fact on this allegation of the complaint. It may be that counsel agrees with the hearing examiner that the evidence does not establish the allegations of the complaint in these respects.

28. Since the closing of the testimony, complaint counsel has abandoned the theory of the Section 2(d) violation alleged in the complaint to the effect that "newspaper" advertising is "preferred" advertising, and that "point-of-purchase" advertising is much less "effective" than newspaper advertising. Complaint counsel now requests the hearing examiner to find that newspaper, radio, and television advertising are wholly ineffective and "functionally unavailable to 95 percent of dealers". In his proposed findings of fact, complaint counsel has proposed a new and different theory from that alleged in the complaint on which he proposes that it be found that respondent's LPAP Plans violated Section 2(d) of the Act. Complaint counsel now contends that the point-of-purchase Appendix B display or direct mail advertising offered as an alternative to newspaper, broadcast, or catalog advertising in respondent's plans was not a reason-

able and genuine alternative to those dealers who did not choose to use newspaper, radio, television or catalog advertising. His reasons for this contention are (1) that the Appendix B point-of-purchase advertising material was suitable for dealers who also advertise in newspapers, on radio, or television, and (2) the record shows that some dealers did use the Appendix B material in addition to newspaper advertising. In other words, counsel urges that, since the alternative Appendix B materials were suitable for and were actually used by some dealers who, on occasion, also used newspaper advertising, this dual use prevented the Appendix B material from being an alternative to newspaper, radio, television or catalog advertising.

29. In support of this contention, complaint counsel quotes from the decision of the Commission in *Exquisite Form Brassiere, Inc.*,⁷ Docket 6966, issued January 20, 1964, as follows:

Exquisite's additional contention that its furnishing of display materials constituted a reasonable alternative was also correctly rejected, since these materials were offered and could be obtained by any customer irrespective of his participation in cooperative advertising.

The undisputed facts of record in the present case with respect to the availability of the Appendix B advertising promotion material under respondent's plans were quite different from the facts in the *Exquisite Brassiere* case. In the present case, under respondent's plans, the Appendix B material *could not be obtained by any dealer irrespective of his participation in respondent's LPAP Plans* (italics mine). Under respondent's plans, the Appendix B advertising materials were an alternative to those dealers who did not choose to use newspaper, radio, television, or catalog advertising and could only be obtained by the dealer on the basis of purchases and to the extent that credits had actually been earned. The Appendix B materials were not distributed to all dealers indiscriminately, but only on earned credits on purchases from wholesalers under the plans. Under respondent's plans, the dealer did not receive both reimbursement credits for newspaper advertising and also credits toward Appendix B materials on the same purchase. This is made clear by the evidence of record. In the *Exquisite* case, the distribution of the display material was not based solely on credits earned on purchases by the dealer on a proportionate basis under the advertising plans, but was given and distributed indiscriminately to any and all customers, irrespective of their participation in an advertising plan.

⁷The amended complaint charged Exquisite with violating subsections (d) and (e) of the Clayton Act, as amended by the Robinson-Patman Act.

30. Of course, it is also undisputed in the present record that some dealers received reimbursement for newspaper advertising on some purchases from a wholesale distributor on a drop-shipment basis under respondent's plans, and, on a fill-in purchase from the same or a different wholesale distributor, received the Appendix B display material. This dual use by a dealer of two of the alternatives under respondent's plans, each alternative form of advertising being earned by the dealer under the plans on separate purchases, does not render respondent's plans any less alternative. The fact that some dealers used both alternative forms offered in the plans indicates that these dealers considered both newspaper and the Appendix B advertising materials useful and valuable to them. This was one of the stated purposes of the plans, to make available to all types of dealers, large and small, a variety of alternative forms of advertising. Some dealers used newspaper advertising on a seasonal basis under respondent's plans. At other times of the year, under respondent's plans, these dealers did not choose to run newspaper advertisements and made purchases from their wholesale distributor in amounts less than \$440 and \$750 minimums specified for reimbursement for newspaper advertising and received their choice of the Appendix B advertising material (Bohmbach, Tr. 1033-34; Ploner, Tr. 1959) which they used in their stores. Try as he did, complaint counsel was not able to show in this record that any dealer received both a reimbursement for newspaper advertising and also the Appendix B material on the same purchase under respondent's plans. This is one of the significant provisions in respondent's plans that made the Appendix B advertising materials an alternative to newspaper, broadcast, or catalog advertising; the dealer had the choice of the Appendix B materials or the alternative newspaper, broadcast, or catalog advertising—but he could not have both the Appendix B materials and also reimbursement for newspaper, broadcast, or catalog advertising on the same purchase.

31. Complaint counsel now urges that the Appendix B advertising material offered in respondent's plans is not a genuine alternative for dealers who do not choose to use newspaper, broadcast, or catalog advertising for still another reason. Complaint counsel contends that respondent's furnishing of services or facilities to customers in the form of Appendix B material does not constitute an alternative to payments for services or facilities to be provided by competing customers. As authority for this position, complaint counsel, on Page 13 of his proposed findings of fact, quotes from the initial

decision of the hearing examiner in the *Exquisite* case, Docket 6966, dated January 27, 1960, filed on January 28, 1960, wherein it is stated:

* * * Section 2(d)⁸ encompasses paying for services furnished by a customer, whereas Section 2(e) encompasses services furnished by the seller to the customer, which would include the furnishing of store dispensers and display material. Section 2(d) expressly provides that such payments for services furnished by a customer are illegal, unless *such payment* is available on proportionally equal terms to all other customers competing. This means what it says: an alternative must be the payment for services furnished and not the furnishing of services by the seller to the customers. Such payment, not something else, must be available on proportionally equal terms.

In his citation to this initial decision, complaint counsel states that this initial decision of the hearing examiner was "Adopted as the decision of the Commission, October 31, 1960; Remanded on other grounds, 301 F. 2d 499 (C.A.D.C. 1961)." This statement is misleading. While it is technically correct to say that the Commission in its order stated that the initial decision of the hearing examiner was "Adopted as the decision of the Commission," nevertheless, the Commission, in its opinion by Secrest, Commissioner, declined to adopt the statements of the hearing examiner quoted above from his initial decision. After agreeing with the hearing examiner that *Exquisite's* advertising plans were not offered or made known to some customers competing with others who received payments under the plan, and, for this reason in violation of Section 2(d), the opinion stated:

* * * Consequently, we do not reach the question of whether the various plans could be legitimate components of a comprehensive plan or whether the terms of one plan were or could be proportionally equal to those of another.

32. The Commission's decision in the *Exquisite* case was taken by that respondent to the United States Court of Appeals for the District of Columbia for review. Since the Commission, in its decision, had expressly stated that it did not consider it necessary to reach the question passed upon by the hearing examiner in his initial decision to the effect that "an alternative must be the payment for services furnished and not the furnishing of services by the seller to the customers," this question was not involved in the review by the Court of Appeals. One of the questions which were involved was

⁸Section 2(d) provides: "That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

whether the so-called Subsection (b) defense was available against the charge under Subsection (d). The Commission had held it was not available. The Court of Appeals stated, among other things:

The economic evil sought to be outlawed by it is the same whether the services and facilities are furnished to the customer or by the customer with reimbursement, so long as discrimination is practiced * * *. It is impossible to believe it meant to treat one process of discrimination one way and to treat in another way another process equally effective as discrimination * * *. The Commission makes the flat statement in its brief here that Subsection (d) does not proscribe discriminations in services or facilities. We are wholly unable to agree with that view.

Thus, the Court, noting that "the thrust of the Robinson-Patman Act is against discrimination", considered all Subsections of the Act together, each Subsection as component parts of the whole. The Court held that the Subsection (b) defense was available against the Subsection (d) charge. This hearing examiner is of the opinion, and it is found, that the Appendix B advertising promotion material offered in respondent's LPAP Plans was a reasonable alternative to those dealers who did not choose to use newspaper, radio, television or catalog advertising.

33. The provision in Subsection 2(d) that payments or allowances must be made available on proportionally equal terms "to all other customers competing in the distribution of such products or commodities" means only customers who compete in the resale or distribution of products "of like grade and quality." *Atlanta Trading Corp. v. FTC.*, 258 F. 2d 365-70. Although alleged in the complaint, there is no evidence in the record that dealers who purchased Sunbeam shavers and appliances exclusively from wholesale distributors were customers of respondent. Under the evidence, the only dealer customers of respondent were the 81 large dealers who purchased shavers direct from respondent. Under the theory of the complaint, these 81 large dealers were the favored customers, and those dealers who purchased exclusively from wholesale distributors in amounts less than the \$440 and \$750 minimums specified in the LPAP Plans were the disfavored dealers. Counsel for respondent contends that the evidence of record does not establish that competition exists "in the distribution of such products or commodities" because the evidence does not show that (1) the allegedly favored and disfavored dealers were located in reasonably close geographic proximity to one another; (2) that they were engaged in the resale or distribution of goods "of like grade and quality"; and (3) the purchase and resale of such goods were not shown to have occurred "at or about the same time."

34. Counsel supporting the complaint has attempted to show only the first of the above factors, "geographic proximity." This was through the testimony of Mrs. Simpson and the exhibit maps of Richmond, Milwaukee, Baltimore, and Washington prepared by her. In *J. Weingarten, Inc.*, Docket No. 7714, evidence to the effect that the stores of allegedly disfavored customers were "located in sufficiently close proximity to Weingarten stores that competition between them is a certainty" was held to be insufficient under Section 2(d). The Commission held that complaint counsel must show:

* * * that the stores shown to compete with (the favored customer) were actually stocking and selling an allegedly discriminating supplier's goods at approximately the same time when (the favored customer) induced and received the promotional allowances.

In that case the Commission rejected as insufficient the testimony of the manager of two drug stores in Houston that he purchased the products of Max Factor & Co., and Shulton, Inc., two of Weingarten's suppliers. The Commission said:

The only specific product identified in the testimony as purchased from the two suppliers is Shulton's "Desert Flower Creme Deodorant". This, then, is the only product which we know that both Weingarten and the witness purchased and resold in 1958 and 1959. We have no idea how extensive the witnesses' purchases of this item were; whether it was stocked in both stores; and whether it was stocked and resold at or during the time when the respondent was soliciting and receiving an allegedly discriminatory allowance from Shulton * * *. The wholesaler testimony adduced in the record is defective in another respect in that it fails to identify the particular stores serviced which are in competition with Weingarten or, in the instance where stores are shown to compete, there is no showing that these stores handled and sold items similar in grade and quality to those purchased by Weingarten from suppliers who granted it an allegedly discriminatory promotional allowance * * *. Antitrust cases and, in particular, Robinson-Patman cases, require a meticulous attention to minute details. When dealing with prices, allowances and goods of like grade and quality, the Commission may not indulge in assumptions or presumptions, for these matters are susceptible of exact proof and this is the type of showing which must be made.

General statements by dealers that they consider themselves to be in competition with all other dealers in the same city are not sufficient. *International Milling Co.*, Docket No. 7136. The evidence of record is undisputed that respondent's electric shavers were not of like grade and quality nor were respondent's appliances of like grade and quality. There were at least two different types of men's shavers and two different types of ladies' shavers. There were eight or ten different types of appliances. Complaint counsel stated that he could not "break the thing down product by product. I would be as

aged as Methusela on that basis" (Tr. 702). Upon the basis of the evidence, it is found that complaint counsel has not established that competition exists "in the distribution of such products or commodities" as required by Section 2(d) and the cases decided thereunder.

35. One of the cases relied upon by both complaint counsel and counsel for respondent is *Lever Brothers Company*, 50 F.T.C. 494 (1953), commonly referred to as one of the soap cases. Lever Brothers offered two advertising promotion plans. Under the first plan, Lever offered payments for services based upon the number of cases of each product purchased by the customer during the contract period. The amount paid, which varied according to the product and with the type of advertising, ranged from 12½ cents to 20 cents per case for newspaper advertising and from 8 to 9 cents per case for handbill or radio advertising. Customers who did not use the first plan were entitled, under the second plan, to payments of 6 cents per case if they furnished a feature sale supported by in-store display. Customers using the second plan had the option of promoting their sales through newspaper, radio, or handbill advertising and receiving payment therefor, at the per case rates specified in the first plan. In that case (*Lever Brothers*), counsel supporting the complaint argued, as he does in the present case, that advertising allowances "were not available" to all of *Lever Brothers'* customers, because they were not suitable for, or usable by, certain customers. The Commission held that, although some customers failed to earn payments for newspaper advertising because their volume of purchases of *Lever* products did not warrant such payments, the plan offered alternative forms of participation which were effective and suitable, and, therefore, available as a practical matter, to customers who did not participate in the plans' newspaper advertising alternative. In his initial decision, the hearing examiner found that:

No witness has appeared in this proceeding who testified that he wished to participate in the advertising allowances but could not do so because of the expense. Furthermore, any customer, who for any reason does not wish to advertise, can avail himself of the promotional allowances at the rates provided by using handbills, radio or television or by conducting feature sales with display only (510).

The Commission adopted this decision and said:

In other words, the newspaper advertising allowances is a part of the comprehensive plan of payment for promotional services offered by respondents to their several hundred thousand customers throughout the country. The conditions under which these customers operate, of course, vary. Although it appears that the use of advertising by means of newspaper, handbills, or

store displays is general throughout the country, we will assume that among these many customers will be found some who do not find newspaper advertising practical. There is no proof, however, that either handbills or store displays are not reasonably practical for all (50 F.T.C. at 510).

36. In the Commission's Guides For Advertising Allowances and Other Merchandising Payments and Services For Compliance With Section 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act, adopted May 19, 1960, the following example is given by the Commission as a guide "to businessmen who want to avoid violating the laws against giving or receiving improper promotional allowances, including advertising or special services, for promoting products":

Example: The seller's plan provides for furnishing demonstrators to large department store customers. He must provide usable alternatives to his customers who run other types of stores and compete with these customers but cannot use demonstrators. The alternatives might be services of equivalent value that the competing customers could use, or payments of like value for advertising or displays furnished by the customers.

The above example suggested by the Commission as a guide to businessmen indicates that the Commission considers that both "payments" and "services" may be used and considered as reasonable "alternatives" in an advertising plan or plans.

37. The advertising plan involved in *Atlantic Products Corporation, et al.*, Docket No. 8513, opinion of the Commission, dated December 13, 1963, was quite different from the plans here under consideration. In that case, Atlantic was charged with violating Section 2(d) by failing to make advertising and promotional allowances available to all competing customers on proportionally equal terms. The complaint was directed against that provision of respondent's five percent advertising allowance on "regular line" luggage, whereby minimum purchases of \$1500 over specified six-month periods were required in order for the customer to qualify for the allowance. The evidence disclosed that the \$1500 minimum purchase requirement had the effect of excluding from 85 to 90 percent of Atlantic's customers from any participation in the plan. The Commission held that the inclusion of a minimum-purchase requirement in an advertising allowance plan, while not *per se* a violation of 2(d), had the effect of rendering Atlantic's plan illegal because 85 to 90 percent of Atlantic's customers did not purchase in sufficient amounts to qualify for the allowance and because it was not demonstrated that a lower minimum, under which many more customers could qualify, would be impractical or burdensome for the seller.

Unlike the Atlantic plan, Sunbeam's LPAP Plans offered an alternative to those dealers who did not choose to buy in the \$440 and \$750 minimums specified in respondent's plans for newspaper, radio, television, or catalog advertising. For these dealers, respondent's plans offered the Appendix B display or direct mail advertising material with no minimum-purchase requirement. Sunbeam's LPAP Plans provided a comprehensive choice of qualitatively equivalent forms of advertising and promotion which were suitable to the needs of all types of dealers, large or small. Under respondent's LPAP Plans, and unlike those in Atlantic, no purchase minimums of any kind were required of 90 to 95 per cent of the dealers who purchased in small quantities and preferred to use the Appendix B display or direct mail advertising offered as an alternative to newspaper, broadcast, or catalog advertising.

38. There is no evidence in this record of a dealer to whom proportional and qualitatively equivalent promotional allowances were not available in theory and in practice under respondent's plans. There is no evidence that any dealer preferred one of the alternatives in respondent's plans but found it beyond his reach. What are the standards to be used in assessing the requirements of Section 2(d) with respect to an advertising plan? The Commission stated in its decision in *Lever Brothers*,⁹ *supra*, that the intent of Congress in passing Section 2(d) was to eliminate discrimination in the payments for services and facilities rendered, particularly in the advertising field. In passing on the legality of payments for services and facilities rendered under Section 2(d) and whether a promotional plan conformed to the express Congressional intent, the Commission stated that: "It must be honest in its purpose and fair and reasonable in its application." One of the most recent expressions of opinion by the Commission as to that type of advertising program which will meet the tests of Section 2(d) is stated by the Commission in its latest decision in the *Exquisite Form Brassiere*¹⁰ case, issued on January 20, 1964, as follows:

* * * we emphasize that the manufacturer engaging in advertising must do so through a comprehensive, nondiscriminatory program containing reasonable alternatives for those small retailers unable to participate in cooperative newspaper advertising. Such a program must not favor the large retailer and should provide for the small retailer some sort of financial aid in methods of advertising economically available to him. Further, the plan, with its alternatives, must be uniformly offered in its entirety to all competing retail customers.

⁹ *Lever Brothers Co.*, Docket No. 5585. 50 F.T.C. at 512.

¹⁰ *Exquisite Form Brassiere, Inc.*, Docket No. 6966. January 20, 1964.

39. This hearing examiner is of the opinion that respondent's LPAP Plans contain reasonable alternatives for those small dealers who may not be able to or do not choose to participate in newspaper, broadcast, or catalog advertising. Respondent's plans, with their alternatives, were offered in their entirety to all dealers in Sunbeam shavers and appliances,¹¹ did not favor the large dealer and provided the small dealer an alternative form of promotional advertising which was useful and suitable to his needs. In sum, this hearing examiner is of the opinion that respondent's LPAP Plans meet the tests outlined by the Commission in the *Lever* and *Exquisite* cases for compliance with Section 2(d).

40. Respondent's counsel requests that the complaint should be dismissed because:

1. The allegations of the complaint have not been established by the evidence;

2. The Shaver Plan was abandoned on April 7, 1958, more than one year prior to the issuance of the complaint herein, and will not be resumed; and

3. The Appliance Plan was abandoned in April 1960, and, under the decision of the Commission in *Bearings, Inc., et al.*, Docket No. 7134, January 22, 1964, the evidence with respect to all plans has become stale and no useful purpose would be served in making an adjudication on such a cold record.

After carefully considering the entire record, the hearing examiner is of the opinion that the allegations of the complaint have not been established and that the complaint should be dismissed. Accordingly,

ORDER

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

OPINION OF THE COMMISSION

By Elman, *Commissioner*:

The complaint, issued on February 13, 1959, charges respondent with violation of Section 2(d) of the Clayton Act, as amended. Respondent is alleged to have made payments for cooperative advertising to certain retailers who purchased its merchandise in large quantities, without making such payments available on proportionally equal terms to competing retailers. After full evidentiary hear-

¹¹ The Electric Tool (CX 4) and Lawn Mower (CX 5) Plans were offered simultaneously with the Shaver (CX 2) and Appliance (CX 3) Plans.

ings, the hearing examiner filed an initial decision dismissing the complaint.

At issue in this case is the legality of certain "Local Promotion Advertising Plans" established by respondent early in 1957. There were four such plans, but evidence was presented only as to two, involving small appliances and electric shavers. Since they are basically similar, a description of the electric-shaver plan will provide an adequate basis for understanding the operation of both.

Respondent distributed its shavers directly to some 81 large retailers, and indirectly (through appliance and drug wholesalers) to thousands of smaller retailers. Under respondent's plan, which was offered uniformly to all competing retailers, any retailer, whether he bought directly or through a wholesaler, who made a single purchase for shavers in the amount of \$440 or more earned a credit on respondent's books equal to 14% of the "suggested dealer cost" (i.e., estimated wholesale price) of the merchandise. Such credits, which could be accumulated and used at any time prior to January 31 of the year following the one in which they were earned, would entitle the retailer to be reimbursed by respondent for local newspaper, radio, television, or catalog advertising of respondent's shavers.

Any retailer who ordered less than \$440 worth of shavers did not earn such a credit, but was offered his choice from a wide variety of point-of-sale display material and direct-mail advertising material, including catalog pages, circulars, in-store displays, banners, and postcards. Respondent assigned a price to each item of promotional material equal to its own direct cost in producing it, and the retailer was permitted to select so much of this material as he wished within the 14% limit. The purchaser of an order larger than \$440 could choose to receive these promotional materials instead of the cooperative advertising credit, but he could select only one or the other.

The hearing examiner, purporting to apply standards laid down in *J. Weingarten, Inc.*, F.T.C. Docket 7714 (decided March 25, 1963) [62 F.T.C. 1521], resolved certain threshold issues in favor of respondent. These issues are basically two: proof of competition between favored and disfavored customers, and whether the disfavored customers were customers of respondent.

1. Section 2(d) requires that a seller who pays any of his customers for services in connection with the resale of his products or commodities make such payments available on proportionally equal terms, not to all of his other customers, but only to those customers "competing in the distribution of such products or commodities"

with the favored customers. This limitation on the requirement of proportionalization has been interpreted to mean, for example, that a seller is not, "without any time limitation whatsoever * * *, irrevocably committed upon making the first sale to hold open the same promotional allowance to all other prospective purchasers or to refuse to deal with them." *Atalanta Trading Corp. v. F.T.C.*, 258 F. 2d 365, 372 (2d Cir. 1958). Nor is he obliged to "give advertising allowances on all his products if he elects to accord them on one or more articles." *Id.*, at 369. And he need not make such allowances available except to competitors of the favored customers.

In the present case, respondent established a plan under which its customers received payments for promoting a particular line of products, electric shavers. This line consists of only two articles, men's and women's Shavemasters, of which the latter accounts for a relatively small volume of sales. Complaint counsel showed, further, that some customers received payments under the plan while it was in effect and that some of the favored and disfavored customers were located in the same local trade area. At this point, we think, the burden shifted to respondent of producing evidence that such customers were not, in fact, competing in the distribution of articles covered by the plan; and that burden was not met here. Such a distribution between complaint counsel and respondent of the burden of coming forward with evidence in a Section 2(d) case is required in the interest of fairness and of effective statutory enforcement.

2. Section 2(d) is not violated unless the disfavored customers are customers of the supplier charged with violating the statute (see, e.g., *American News Co. v. F.T.C.*, 300 F. 2d 104, 109 (2d Cir. 1962)); and here the allegedly disfavored customers actually purchased from intermediate distributors, not—as the allegedly favored customers did—directly from respondent.

In limiting the prohibitions of Section 2(a) of the Clayton Act to price discrimination between purchasers from the seller charged with violating the statute, Congress recognized that the grant of a discriminatory price by the seller's customer to *his* customer is not properly chargeable to the original seller, unless, of course, the intermediary is a sham or dummy, so that the original seller is, in practical effect, the grantor of the discrimination. See, e.g., *Champion Spark Plug Co.*, 50 F.T.C. 30. Similarly, the grant of a discriminatory allowance by a wholesaler to some of his retailer customers does not make the wholesaler's supplier liable under Section 2(d).

In the present case, however, respondent itself, not its wholesalers, granted the advertising and promotional allowances in question, and granted them directly to the allegedly disfavored retailers. Even though the latter purchased respondent's merchandise from wholesalers, the wholesalers played no significant part in the transactions alleged to violate Section 2(d). As the direct and intended recipients of payments by respondent for the promotion of respondent's goods under a plan devised and implemented by respondent, these retailers were, we think, "customers" of respondent within the meaning of the statute. Any other construction would defeat the plain intent of Congress in enacting Section 2(d)—to prevent sellers from discriminating between competing resellers in the granting of advertising and other promotional allowances.

The main issue in this case is whether respondent's plan for granting advertising and promotional payments to its customers, as described earlier, satisfies the requirement of Section 2(d) that such payments be "available on proportionally equal terms" to competing customers. Like other provisions of the price discrimination law, this requirement "does not place an impossible burden upon sellers." *F.T.C. v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 759. Mathematically exact proportionality is not required, and a plan is lawful so long as it is "honest in its purpose and fair and reasonable in its application." *Lever Brothers Co.*, 50 F.T.C. 494, 512. Cf. *F.T.C. v. Simplicity Pattern Co.*, 360 U.S. 55, 61, n. 6. The thrust of the statute is prevention of discrimination by sellers in granting advertising or other promotional payments to their customers, especially discrimination favoring large buyers over small. See *F.T.C. v. Simplicity Pattern Co.*, *supra*, at 69; H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15-16 (1936). A common method of such discrimination is to restrict payments to large-volume or other selected accounts, thereby excluding, arbitrarily and unjustifiably, some customers from enjoyment of the benefits of the seller's advertising or promotional payments. See, e.g., *Atlantic Products Corp.*, F.T.C. Docket 8513 (decided December 13, 1963) [63 F.T.C. 2237].

The theory underlying the complaint in the present case was that the minimum-purchases requirement for receiving cooperative advertising credits from respondent (\$440 in the electric-shaver plan) unlawfully denied some of the respondent's customers the benefits of the cooperative advertising assistance provided by respondent to competing customers. The evidence, however, is to the contrary, as complaint counsel has tacitly conceded in abandoning the original theory of the complaint on this appeal. The record shows that if any

retailer of respondent's products desired to engage in newspaper, television, or radio advertising, the \$440 minimum would not be a practical obstacle, since he would have to stock at least that amount of merchandise to satisfy the demand that the advertisement would be expected to generate. As the Commission has observed, "the inclusion of a minimum-purchases requirement in an advertising allowance plan is not *per se* a violation of 2(d)". *Atlantic Products Corp., supra*, p. 2 [63 F.T.C. 2237]. Clearly, on the particular facts of record here, respondent's minimum-purchases requirement, which was not shown to exclude any customer who might have wished to participate in cooperative advertising, was not discriminatory and hence not unlawful.

During the trial of this case before the hearing examiner, complaint counsel injected another theory of Section 2(d) liability, which he concedes (Appeal Brief, pp. 6, 31) was not in the contemplation of the Commission when it decided to issue the complaint. The theory is that cooperative advertising is not usable by many of respondent's customers, whether or not any minimum-purchases requirement is imposed, and that respondent has failed to afford such customers alternative forms of promotional assistance of equal value, thereby violating the proportionalization requirement of the statute. Since the examiner found, we think correctly, that the point-of-sale and other promotional materials made available by respondent to retailers in lieu of cooperative advertising credits were equivalent in value to such credits, complaint counsel's theory has no merit as applied to the facts of this case.

Complaint counsel further contends that, in view of the unique effectiveness of newspaper advertising as a method of sales promotion, no provision for alternative forms of promotional assistance to retailers who cannot or do not desire to utilize cooperative advertising in their business can satisfy the requirements of Section 2(d). The argument is far-reaching in its implications; if accepted, the consequence would be that no cooperative advertising plan would pass muster under the statute since inevitably there will be some retailers whose nature or scale of operation precludes their participation in cooperative advertising. Such retailers will prefer other kinds of promotional activity and benefits. Cooperative advertising, where conducted under a fair, reasonable, and non-discriminatory plan, has been recognized as a means whereby the competitive ability of small business is enhanced since the supplier undertakes to assume advertising costs which many retailers could not defray unaided. To hold every such plan inherently discriminatory and unlawful merely

Complaint

67 F.T.C.

because not every retailer can or wants to take advantage of the plan would destroy cooperative advertising and thereby seriously harm the very class, small independent retailers, which Section 2(d) was enacted to protect.

In view of our disposition of the issues raised by complaint counsel's appeal, we are setting aside the initial decision of the hearing examiner and dismissing the complaint.

Commissioner MacIntyre concurred in the result.

FINAL ORDER

Upon consideration of the appeal of complaint counsel from the initial decision of the hearing examiner, and for the reasons stated in the accompanying opinion,

It is ordered, That the initial decision be, and it hereby is, set aside, and that the complaint against respondent be, and it hereby is, dismissed.

Commissioner MacIntyre concurring in the result.

IN THE MATTER OF

JOYCE SPORTSWEAR CO. ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE WOOL PRODUCTS LABELING ACTS

Docket C-875. Complaint, Jan. 12, 1965—Decision, Jan. 12, 1965

Consent order requiring Gary, Ind., importers and manufacturers of wool products to cease violating the Wool Products Labeling Act by labeling sweaters as "60% wool, 30% mohair and 10% nylon" when they contained substantially different amounts of fibers, and to cease using the term "mohair" in lieu of "wool" on labels without designating the correct percentage of mohair.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939 and by virtue of the authority vested in it by said Acts, the Federal Trade Commission having reason to believe that Joyce Sportswear Co., a corporation and Jack Goodman, Willard Wolf and Florence Goodman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of the said Acts and the Rules and Regulations promulgated under the Wool Products Label-

ing Act of 1939, 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 Joyce Sportswear Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois.

Individual respondents, Jack Goodman, Willard Wolf and Florence Goodman are officers of said corporation. They cooperate in formulating, directing and controlling the acts, policies and practices of the corporate respondent including the acts and practices hereinafter referred to.

Respondents are importers and manufacturers of wool products with their office and principal place of business located at 925 Adams Street, Gary, Indiana.

PAR. 2. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents have manufactured for introduction into commerce, introduced into commerce, sold, transported, distributed, delivered for shipment, shipped and offered for sale in commerce as "commerce" is defined in said Act, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were sweaters stamped, tagged, labeled or otherwise identified as containing 60% wool, 30% mohair and 10% nylon, whereas in truth and in fact, said sweaters contained substantially different amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were certain sweaters with labels on or affixed thereto which failed to disclose the percentage of the total fiber weight of the wool product, exclusive of ornamentation, but not exceeding 5 per centum of said total fiber weight of: (1) woolen fibers; (2) each fiber other

Decision and Order

67 F.T.C.

than wool if said percentage by weight of said fiber is 5 per centum or more; (3) the aggregate of all other fibers.

PAR. 5. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939, in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder, in that the term "mohair" was used in lieu of the word "wool" in setting forth the required fiber content information on labels affixed to wool products without setting forth the correct percentage of the mohair, in violation of Rule 19 of the Rules and Regulations under the Wool Products Labeling Act of 1939.

PAR. 6. The acts and practices of the respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act and the Wool Products Labeling Act of 1939, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Joyce Sportswear Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 925 Adams Street, in the city of Gary, State of Indiana.

Respondents Jack Goodman, Willard Wolf and Florence Goodman are officers of said corporation and their address is the same as that of said corporation.

58

Syllabus

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 Joyce Sportswear Co., a corporation and its officers, and Jack Goodman, Willard Wolf and Florence Goodman, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction or manufacture for introduction into commerce, or the offering for sale, sale, transportation, distribution or delivery for shipment, or shipment in commerce, of sweaters or other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from:

Misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products as to the character or amount of constituent fibers contained therein.

2. Failing to securely affix to, or place on, each such product, a stamp, tag, label or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

3. Using the term "mohair" in lieu of the word "wool" in setting forth the required fiber content information on labels affixed to wool products without setting forth the correct percentage of the mohair present.

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

IN THE MATTER OF

VINCENT RUILOVA TRADING AS VINCENT CIGAR COMPANY
ET AL.

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

Docket C-802. Complaint, Aug. 3, 1964—Decision, Jan. 14, 1965

Order modifying an earlier order dated Aug. 3, 1964, 66 F.T.C. 416, which prohibited a Tampa, Fla., cigar manufacturer from misrepresenting that

Complaint

67 F.T.C.

its cigars were made in Cuba or from Cuban tobacco by striking those sections of the order which required respondent to disclose the countries of origin of non-Cuban tobacco used in its cigars.

ORDER MODIFYING DECISION AND ORDER

The Commission having issued its decision and order on August 3, 1964 [66 F.T.C. 416], in disposition of this proceeding and having on October 14, 1964, issued and caused to be served its order reopening the proceeding for the purpose of modifying the order contained in the Commission's aforesaid decision and order solely by striking prohibitions numbered 2, 3 and 4 thereof; and

Such order of reopening, having also duly granted the respondents thirty days after service thereof within which to file memorandum stating any objections they might have to such modification and no memorandum having been timely filed by the respondents objecting in that respect or otherwise showing cause why the order to cease and desist should not be so modified:

Wherefore, it is ordered, That the order contained in the decision and order issued by the Commission on August 3, 1964, be, and it hereby is, modified by striking prohibitions numbered 2, 3 and 4.

IN THE MATTERS OF

BRANFORD CO., INC. (Docket 8625)
BROWNIE KNITTING MILLS, INC. (Docket 8626)
BARCLAY KNITWEAR CO., INC. (Docket 8632)

CONSENT ORDERS, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d)
OF THE CLAYTON ACT

Complaints, June 30, 1964¹—Decisions, Jan. 18, 1965²

Consent orders requiring three New York City manufacturers of wearing apparel to cease violating Sec. 2(d) of the Clayton Act by paying advertising or promotional allowances to favored retailers of their products, while not making such payments available on proportionally equal terms to all their customers competing with favored retailers, and postponing effective date of the orders until further order of the Commission.

COMPLAINTS

The Federal Trade Commission, having reason to believe that the party respondents named in the caption hereof, and hereinafter more

¹ Similar complaints are combined.

² These orders were made effective on Aug. 9, 1965, see *Abby Kent Co., Inc., et al.*, Docket No. C-328, et al., Aug. 9, 1965, 68 F.T.C. 393.

particularly described, have violated and are now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Sec. 13), hereby issues its complaints, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Branford Co., 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 1410 Broadway, New York 18, New York.

Respondent, Brownie Knitting Mills, 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 120 East 23 Street, New York, New York.

Respondent, Barclay Knitwear Co., 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 1239 Broadway, New York, New York. Respondent maintains and operates a warehouse and manufacturing plant in Port Ewen and Kingston, New York, respectively.

PAR. 2. Respondent, Branford Co., Inc., Docket No. 8625, is now and has been engaged in the manufacture, sale, and distribution of women's knitted sweaters. Its sales, which are substantial, are made to a large number of customers, including retail specialty and department stores located throughout the United States.

Respondent, Brownie Knitting Mills, Inc., Docket No. 8626, is now and has been engaged in the manufacture, sale and distribution of ladies' sweaters, skirts, pants and coordinates, under the following trade names: Maid O'Fur; College Board; Kara-lon; Cara-mia; Crepe-lene, and Semester. Respondent sells its products to a large number of retail specialty and department stores located throughout the United States. Respondent's sales of its products are substantial, having exceeded \$2,865,000 for the calendar year ending December 31, 1960.

Respondent, Barclay Knitwear Co., Inc., Docket No. 8632, and four operating, wholly owned subsidiaries are now and have been, engaged in the sale and distribution of men's and boys' knitted sweaters, shirts, outerwear and other items of wearing apparel which are manufactured by respondent and its wholly owned subsidiary, Barclay Sales Corporation. Respondent sells its products, under its own and customer labels, to a large number of independent and chain retailers and department stores located throughout the United States. Respondent's sales of its products are substantial, having exceeded \$8,320,000 for the fiscal year ending April 30, 1961.

PAR. 3. In the course and conduct of their business, respondents have engaged and are now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondents sell and cause their products to be transported from their principal place of business located in the State of New York, to customers located in other States of the United States and in the District of Columbia. There has been at all times mentioned herein a continuous course of trade in commerce in said products across State lines between said respondents and their customers.

PAR. 4. In the course and conduct of their business in commerce, respondents paid or contracted for the payment of something of value to or for the benefit of some of their customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondents, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondents' products.

PAR. 5. Included among the payments alleged in Paragraph Four were credits or sums of money paid either directly or indirectly by way of discounts, allowances, rebates or deductions as compensation or in consideration for promotional services or facilities furnished by customers in connection with the offering for sale or sale of respondents' products, including advertising in various forms, such as newspapers and catalogs, sometimes hereinafter referred to as promotional allowances.

For example, during the period 1961 through 1962, respondent, Branford Co., Inc., Docket No. 8625, made payments and allowances to various customers in various cities, including Philadelphia, Pennsylvania and Washington, D.C., for advertising its products in newspapers and catalogs. In Philadelphia, during the year 1961, respondent paid Lit Brothers and Strawbridge & Clothier promotional allowances in the amount of \$150 and \$275 respectively, and during the year 1962 paid Lit Brothers, Strawbridge & Clothier and John Wanamaker the sums of \$500, \$430 and \$400, respectively. In Washington, during the year 1961, respondent paid Woodward & Lothrop and The Hecht Co. promotional allowances of \$495 and \$250, respectively, and during the year 1962, paid Woodward & Lothrop and Lansburgh's the sums of \$400 and \$50, respectively.

Respondent did not make, or offer to make, or otherwise make available such allowances on proportionally equal, or any, terms to all other customers in Philadelphia and Washington, D.C., competing with those who received such allowances.

For example, during the period 1960 through 1961, respondent, Brownie Knitting Mills, Inc., Docket No. 8626, made payments and allowances to various customers in various cities including Dallas, Texas, and San Antonio, Texas, for advertising its products in newspapers. During the year 1961, respondent paid Sanger-Harris and E. M. Kahn & Co. of Dallas, Texas promotional allowances in the amounts of \$425 and \$110.88, respectively. In San Antonio, Texas, during the year 1960, respondent paid Frost Bros. and Siegel's promotional allowances in the amounts of \$435.75 and \$50, respectively, and during the year 1961 paid the same customers \$607.12 and \$104, respectively.

Respondent did not make, or offer to make, or otherwise make available such allowances on proportionally equal, or any, terms to all other customers in Dallas and San Antonio competing with those who received such allowances.

For example, during the period 1959 through 1961, respondent, Barclay Knitwear Co., Inc., Docket No. 8632, made payments and allowances to various customers in various cities, including Washington, D.C., Chicago, Illinois and Boston, Massachusetts for advertising its products in newspapers and catalogs. During the year 1959, respondent paid The Hecht Company of Washington, D.C. promotional allowances in the amount of \$345; and during the year 1960, paid the same customer \$400. During the year 1959, respondent paid Annes Department Store and Mages Sporting Goods Company, both of Chicago, Illinois, promotional allowances in the amount of \$40 and \$100 respectively, and during the year 1960, paid Meyers Department Store of Chicago the amount of \$60; and in 1961 respondent paid Annes Department Store of Chicago, the amount of \$38. In Boston, Massachusetts, for the years 1959 and 1960, respondent paid Jordan Marsh \$250 per year. In 1961 respondent paid Jordan Marsh \$175.

Respondent did not make, or offer to make, or otherwise make available such promotional allowances on proportionally equal, or any, terms to all other customers in Washington, D.C., Chicago, Illinois and Boston, Massachusetts, competing with those who received such allowances.

PAR. 6. The acts and practices of respondents, as alleged above, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C., Title 15, Section 13).

DECISIONS AND ORDERS

The Commission having issued its complaints on June 30, 1964, charging respondents with violation of Section 2(d) of the Clayton

Act, as amended, and respondents having been served with a copy of complaint; and

The Commission having determined upon respondents' request, that the circumstances are such that the public interest would be served by waiver here of the provision of § 2.4(d) of its Rules that the consent order procedure shall not be available after issuance of complaint; and

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

The Commission having considered the aforesaid agreements and having determined that they provide an adequate basis for appropriate disposition of these proceedings, the agreements are hereby accepted, the following jurisdictional findings are made, and the following orders are entered:

1. Respondent Branford Co., Inc., is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business located at 1410 Broadway, New York, New York.

Respondent Brownie Knitting Mills, Inc., is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business located at 120 East 23rd Street, New York, New York.

Respondent Barclay Knitwear Co., Inc., is a corporation organized and existing under the laws of the State of New York, with its office and principal place of business located at 1239 Broadway, New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of these proceedings and of respondents, and the proceedings are in the public interest.

ORDER

It is ordered, That each respondent named in the above-captioned proceedings, and its officers, directors, agents, representatives and employees, directly or through any corporate or other device, in the course of its business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of the respondent as compensation or in consideration for advertising or promotional services, or any other service or facility, furnished by or through such customer in connection with the handling, sale or offering for sale of wearing apparel products manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

It is further ordered, That the effective date of the order to cease and desist be, and it hereby is, postponed until further order of the Commission.

IN THE MATTER OF
LONE STAR CEMENT CORPORATION

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7
OF THE CLAYTON ACT

Docket 8585. Complaint, July 15, 1963—Decision, Jan. 19, 1965

Consent order requiring one of the Nation's three largest producers of portland cement, an essential ingredient of ready-mixed concrete, to divest itself absolutely within one year of 25 of the 31 ready-mixed concrete plants in the States of Virginia, Florida, and Washington which it acquired as a result of its acquisitions of Pioneer Sand and Gravel Co. in December 1959, and Southern Materials Co., Inc., in August 1962; and requiring respondent for a period of 3 years from the date of divestiture of each of the ready-mixed concrete plants, make available to purchasers of plants a quantity of mineral aggregates for use in the manufacture of ready-mixed concrete equivalent to the quantity consumed by each plant in the calendar year 1963, at prevailing market prices, terms and conditions; and requiring respondent to refrain from acquiring any other ready-mixed concrete plants in the States of Virginia, Florida and Washington for 2 years or until the issuance by the Federal Trade Commission of a trade regulation rule or report concerning mergers or acquisitions in the cement industry.

COMPLAINT

The Federal Trade Commission has reason to believe that the above-named respondent has acquired the assets and stock of other corporations in violation of Section 7 of the Clayton Act (U.S.C., Title 15, Section 18), as amended; and, therefore, pursuant to Sec-

Complaint

67 F.T.C.

tion 11 of said Act, it issues this complaint, stating its charges in that respect as follows:

PARAGRAPH 1. (A) Lone Star Cement Corporation, respondent herein, is a corporation organized and existing under the laws of the State of Maine, with its principal office located at 100 Park Avenue, New York 17, New York.

(B) Respondent, including its subsidiaries (Lone Star), is and for many years has been engaged in the business of manufacturing and selling portland cement, one of the two lines of commerce relevant herein.

(C) In the course and conduct of its business, Lone Star was engaged in commerce (as commerce is defined in the Clayton Act, as amended), having sold and shipped portland cement, or having caused it to be sold and shipped, from the state in which it was manufactured to purchasers located in other states.

PAR. 2. (A) For many years prior to and until about December 1, 1959, Pioneer Sand and Gravel Company (Pioneer) was a corporation organized and existing under the laws of the State of Washington, with its principal office located at 901 Fairview Avenue North, Seattle 11, Washington.

(B) Pioneer was engaged in the business of manufacturing and selling ready-mixed concrete, the other line of commerce relevant herein. In addition, Pioneer produced sand and gravel for its use in the manufacture of ready-mixed concrete as well as for sale. It was also engaged in the business of selling other building materials.

(C) In the course and conduct of its business, Pioneer was engaged in commerce (as commerce is defined in the Clayton Act, as amended), having sold or shipped some of its products other than ready-mixed concrete, or having caused them to be sold and shipped, from the State of Washington to purchasers located in territories or other states.

(D) On or about December 1, 1959, respondent acquired Pioneer by purchasing all of its outstanding capital stock, paying therefor the sum of approximately \$3,920,000.

PAR. 3. (A) For many years prior to and until about August 15, 1962, Southern Materials Company, Incorporated, was a corporation organized and existing under the laws of the Commonwealth of Virginia, with its principal office located at 2125 Kimball Terrace, Norfolk, Virginia.

(B) Southern Materials Company, Incorporated, including its subsidiaries (Southern Materials), was engaged in the business of manufacturing and selling ready-mixed concrete. It was also engaged in the business of manufacturing and selling concrete products. In

addition, Southern Materials produced sand and gravel for its use in the manufacture of ready-mixed concrete and concrete products as well as for sale.

(C) In the course and conduct of its business, Southern Materials was engaged in commerce (as commerce is defined in the Clayton Act, as amended), having sold or shipped some of its products, or having caused them to be sold or shipped, from the state in which they were produced or manufactured to customers located in other states.

(D) On or about August 15, 1962, respondent acquired Southern Materials by exchanging for all of its assets about 751,842 shares of respondent's common stock, which stock was then selling for approximately \$19 per share. Respondent caused such assets to be transferred to a new wholly owned subsidiary, Southern Materials Incorporated of Norfolk.

PAR. 4. (A) Ninety-five percent, more or less, of all cement produced in the United States is portland cement. Portland cement is an essential ingredient in the manufacture of ready-mixed concrete and concrete products.

(B) Ready-mixed concrete is so called because it is mixed either fully or partially at a central plant and then delivered by mixer trucks to the job site ready to pour. Except for occasional highway and other large construction projects, substantially all concrete poured for construction purposes is ready-mixed concrete. In many geographic areas, ready-mixed concrete producers account for more than fifty percent of all portland cement consumed.

(C) Some manufacturers of ready-mixed concrete, such as Southern Materials, are also engaged in the manufacture of concrete products, for example, concrete block or pipe. Producers of concrete products, in some sections of the country, purchase as much as ten to twenty percent, more or less, of all portland cement sold therein.

PAR. 5. Four sections of the country are relevant herein, namely, the Seattle Area, with respect to respondent's acquisition of Pioneer, and the Norfolk, Richmond, and Jacksonville Areas, with respect to respondent's acquisition of Southern Materials.

A general description of each of these areas is as follows:

The Seattle Area is located in the State of Washington, and is comprised of the city of Seattle and its metropolitan area, which is situated in the counties of King and Snohomish.

The Norfolk Area is located in the Commonwealth of Virginia and, at the time of the acquisition of Southern Materials, was comprised of the independent cities of Norfolk, Newport News, Hampton, Portsmouth, Williamsburg, Suffolk, South Norfolk and Virginia

Complaint

67 F.T.C.

Beach, and of the counties of James City, Nansemond, Norfolk, Princess Anne and York.

The Richmond Area is located in the Commonwealth of Virginia, and is comprised of the independent cities of Richmond, Petersburg, Hopewell, and Colonial Heights, and of the counties of Chesterfield, Dinwiddie, Henrico, Hanover, and Prince George.

The Jacksonville Area is located in the State of Florida, and is comprised of the county of Duval.

PAR. 6. (A) Lone Star is one of the three largest producers and sellers of portland cement in the United States. It has twenty cement manufacturing plants, five located in South America and fifteen in this country. The domestic plants of respondent are located in New York, Pennsylvania, Virginia, Alabama, Louisiana, Texas, Indiana, Kansas and Washington.

(B) For calendar years 1957 through 1961, the sales and net income of respondent and its domestic subsidiaries, and their assets, stated in millions of dollars, were approximately as follows:

Year	Sales	Income	Assets
1961.....	\$98.9	\$12.9	\$173.3
1960.....	97.8	11.8	169.5
1959.....	104.3	14.2	169.0
1958.....	97.2	13.7	*171.6
1957.....	87.3	13.8	*177.2

*Includes foreign subsidiaries.

PAR. 7. (A) Lone Star, at all times mentioned herein, was a principal supplier of portland cement, in competition with other firms, to the Seattle Area from mills located in Seattle and Concrete, Washington. At the time of the acquisition of Pioneer, one of respondent's competitors in the Seattle Area was integrated with a ready-mixed concrete producer located in this Area who was one of the leading consumers of portland cement therein.

(B)(1) In the Seattle Area, prior to and at the time it was acquired, Pioneer operated four ready-mixed concrete plants and, in competition with other firms, it was the largest supplier of ready-mixed concrete, selling substantially all of its production in this Area. Pioneer was also one of the largest purchasers of portland cement in the Seattle Area.

(B)(2) Pioneer's total sales, its sales of ready-mixed concrete, and its net income for calendar years 1958 and 1959, and its assets

67

Complaint

as of the time of its acquisition on December 1, 1959, were approximately as follows:

	Total sales	Ready-mixed concrete sales	Net income	Assets
1958.....	\$6, 109, 269	\$3, 196, 736	\$238, 176
1959.....	5, 904, 559	2, 756, 138	201, 342	\$3, 982, 141

PAR. 8. (A) At all times mentioned herein, Lone Star, in competition with one or more other cement producers, was the principal supplier of portland cement to the Norfolk and Richmond Areas from plants located in South Norfolk and near Roanoke, Virginia. Lone Star also supplied portland cement to the Jacksonville Area from its plants located in Alabama.

None of respondent's competitors in the Norfolk, Richmond, or Jacksonville Areas, at the time of the acquisition of Southern Materials, was integrated with any manufacturer of ready-mixed concrete or concrete products located in any of these sections of the country.

(B) (1) Prior to and at the time it was acquired, Southern Materials operated twenty-seven ready-mixed concrete plants, twenty of which were located in Virginia, principally in the Norfolk and Richmond Areas, and seven of which were located in the Jacksonville Area. Southern Materials, in competition with other firms in each of these Areas, was the largest supplier of ready-mixed concrete, selling substantially all of its production in such Areas. Southern Materials was also the largest purchaser of portland cement in the Norfolk, Richmond, and Jacksonville Areas.

(B) (2) Southern Materials' sales, net income and assets for fiscal years beginning June 1, 1959, and ending May 31, 1962, stated in millions of dollars, were approximately as follows:

Year	Sales	Income	Assets
1962.....	\$26. 7	\$1. 5	\$16. 7
1961.....	19. 7	1. 0	15. 7
1960.....	19. 2	1. 1	14. 4
1959.....	16. 1	1. 1	11. 4

Ready-mixed concrete, in the fiscal year ending in 1960, accounted for more than 60% of Southern Materials' gross sales.

PAR. 9. In the following ways, among others, the effect of respondent's acquisitions of Pioneer and Southern Materials may be substantially to lessen competition or tend to create a monopoly in either the manufacture and sale of portland cement or in the manufacture and sale of ready-mixed concrete, or in both of these lines of commerce, in the Seattle Area, as a result of the acquisition of Pioneer, and in the Norfolk Area, or the Richmond Area, or the Jacksonville Area, or in all of these sections of the country, as a result of the acquisition of Southern Materials:

(1) Present and future competitors of respondent, both actual and potential, have been and may be precluded from selling portland cement to a substantial consumer;

(2) Present and future competitors of respondent, both actual and potential, have been or may be foreclosed from, and respondent has been or may be assured of, a substantial share of the market for portland cement;

(3) The entry of new sellers of portland cement may be inhibited or prevented;

(4) The competitive position of respondent in the sale of portland cement has been substantially enhanced;

(5) Further integration of suppliers and consumers of portland cement may result, in that competitors of respondent in the manufacture and sale of portland cement have been or may be encouraged, or feel a necessity, to merge or otherwise become affiliated with manufacturers of ready-mixed concrete, or of concrete products, or both; and competitors of respondent in the manufacture and sale of ready-mixed concrete, and of concrete products, may have been or may be encouraged, or feel a necessity, to merge or otherwise become affiliated with manufacturers of portland cement.

(6) As an integrated manufacturer and seller of portland cement, ready-mixed concrete, and concrete products, respondent has achieved or may achieve a decisive competitive advantage over its competitors which are engaged only in the manufacture and sale of portland cement, of ready-mixed concrete, or of concrete products; and

(7) The entry of new sellers of ready-mixed concrete or concrete products may be inhibited or prevented.

PAR. 10. Prior to its acquisition of Pioneer and Southern Materials, respondent had, it now has, and, after the divestiture of Pioneer and Southern Materials which is sought in this proceeding, it will continue to have, such a significant competitive position in the sale of portland cement in the Seattle, Richmond, Norfolk, and Jacksonville

Areas, and in every other section of the country in which Lone Star is engaged in the sale of portland cement, that the effect of any acquisition by it of any of the stock or assets of any corporation engaged in commerce, and engaged in the sale of ready-mixed concrete, or of concrete products, in any of these sections of the country, may be substantially to lessen competition or tend to create a monopoly as alleged in Paragraph Nine.

PAR. 11. The acquisition of Pioneer and of Southern Materials each constitutes a violation by respondent of Section 7 of the Clayton Act (U.S.C. Title 15, Section 18), as amended.

DECISION AND ORDER

On July 15, 1963, the Commission issued complaint in the above-captioned proceeding. Subsequently, complaint counsel and respondent executed an agreement containing a consent order, and on December 18, 1964, the hearing examiner certified this agreement to the Commission.

It appears that, in the circumstances, the agreement affords an adequate basis for disposition of this proceeding, the order contained in the agreement should be accepted, and the Commission itself should initially decide this matter and forthwith issue its decision and order. Accordingly, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent is a corporation organized, existing and doing business under the laws of the State of Maine with its office and principal place of business located at 100 Park Avenue, New York, New York.
2. The Federal Trade Commission has jurisdiction over the subject-matter of this proceeding and the respondent.

ORDER

It is ordered, That respondent, Lone Star Cement Corporation, and its subsidiaries, affiliates, officers, directors, agents, representatives, employees, successors and assigns, shall, within one (1) year from the date of service of this Order, divest, absolutely and in good faith, and to a purchaser or purchasers approved by the Federal Trade Commission, the following ready-mixed concrete plants acquired by respondent as a result of the acquisition of Southern Materials Company, Incorporated, and Pioneer Sand & Gravel Company, Incorporated, together with the land on which they are located (except as provided in the notes herein) and all machinery or equipment

Decision and Order

67 F.T.C.

thereon presently being used in the manufacture and sale of ready-mixed concrete, including such ready-mixed concrete mixer trucks as are necessary to establish such purchaser or purchasers as effective competitors in the manufacture and sale of ready-mixed concrete.

Norfolk Area

Little Creek
 Hampton Blvd. ("Grain Elevator")¹
 Virginia Beach
 Euclid
 Crawford St. (Portsmouth)²
 Virginia Avenue
 Hampton³
 Williamsburg
 Oyster Point
 Wise Point
 Lee Hall (Newport News)⁴

Richmond Area

Acca
 South Richmond
 Ashland
 Bellwood⁵
 Hopewell⁶

¹ At this location respondent may sell or, at its option, lease or sublease the land on which the ready-mixed concrete plant, machinery and equipment to be divested are situated, or may, at its option, sell the plant, machinery and equipment for removal.

² At this location the ready-mixed concrete plant to be divested consists of cement bins and truck repair shop, with related minor equipment. At such location respondent shall sell the cement bins and may sell or, at its option, lease or sublease the portion of the land on which such bins and truck repair shop are situated for a minimum term of ten (10) years, subject to earlier termination if respondent loses the right to occupy such portion of the land under its month-to-month lease from the owner thereof.

³ At this location the ready-mixed concrete plant to be divested consists of cement bins and truck repair shop, with related minor equipment. At such location respondent shall sell the cement bins and may sell or, at its option, lease or sublease the portion of the land on which such bins and truck repair shop are situated for a minimum term of ten (10) years.

⁴ At this location the ready-mixed concrete plant to be divested consists of cement bins. Respondent shall sell the cement bins and may sell or, at its option, lease for a minimum term of ten (10) years a portion of the land on the edge of the present property, which portion shall be sufficient to permit efficient operation of such plant.

⁵ At this location respondent may sell or, at its option, lease for a minimum term of ten (10) years the portion of respondent's land on which the ready-mixed concrete plant is situated.

⁶ At this location the ready-mixed concrete plant to be divested consists of a cement bin. Respondent shall sell such bin and may sell or, at its option, lease the portion of respondent's land on which it is situated for a minimum term of ten (10) years.

67

Decision and Order

Jacksonville Area

West (Edgewood)

Hap

Cecil Field

McClenny

Bowden

Beach (Mayport)

Seattle Area

Canal St.

Northlake⁷

Kent

Respondent shall begin to make good faith efforts to divest the aforesaid ready-mixed concrete plants promptly after the date of service of this Order and shall continue such efforts to the end that the divestiture thereof shall be effected within the aforesaid period of one (1) year. If divestiture of all of said ready-mixed concrete plants, or any of them, shall not have been accomplished within the specified one (1) year period, or any extension thereof, the Commission will give respondent notice and an opportunity to be heard before the Commission issues any further order or orders which the Commission may deem appropriate.

It is further ordered, That, in said divestiture respondent shall not sell or transfer, directly or indirectly, any of the aforesaid assets to any corporation, or to anyone who is at the time of divestiture an officer, director, employee or agent of a corporation, engaged in the production and sale of portland cement or the principal business of which is the distribution of portland cement, or to any corporation or person controlled by one of the foregoing corporations or persons, or to any person who is an officer, director, employee or agent of, or under the control or direction of, Lone Star Cement Corporation or any of its subsidiaries or affiliates, or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding shares of common stock of Lone Star Cement Corporation.

It is further ordered, That, pending divestiture, respondent shall not make any changes in any of the assets to be divested which shall

⁷ At this location the ready-mixed concrete plant to be divested consists of a central mixer and related minor equipment. Respondent shall sell the central mixer and related minor equipment and may sell or, at its option, lease for a minimum term of ten (10) years the portion of the land on which the central mixer and related equipment are situated.

impair their present capacity for the manufacture, sale and distribution of ready-mixed concrete, or their market value.

It is further ordered, That, for a period of three (3) years from the date of divestiture of each of the aforesaid ready-mixed concrete plants, respondent shall, in each calendar year, make available and affirmatively offer, to the purchaser or purchasers of said ready-mixed concrete plants, in good faith, and at prices, terms, and conditions and from locations then currently offered by respondent to competing purchasers in the relevant areas, a quantity of mineral aggregates, for the use of such purchaser or purchasers in the manufacture of ready-mixed concrete at each said ready-mixed concrete plant, equivalent to the quantity consumed by each such ready-mixed concrete plant in the calendar year 1963.

It is further ordered, That respondent shall not supply, in any calendar year, in any of the following areas, to the purchaser or purchasers of the aforesaid ready-mixed concrete plants for consumption in said plants in the manufacture of ready-mixed concrete, more than thirty-five percent (35%) of the portland cement consumed, in the aggregate, by all of the divested ready-mixed concrete plants in each such area:

Norfolk,
Richmond,
Jacksonville, and
Seattle,

Provided, however, That:

(i) The foregoing limitation shall not apply to sales of portland cement to any of said ready-mixed concrete plants following the expiration of three years from the date of divestiture of each such plant; and

(ii) Sales of portland cement to any of said ready-mixed concrete plants as a result of the specification by a customer of said plant, in an oral or written agreement with the operator of said plant, requiring the purchase of respondent's cement shall not be taken into consideration in computing the amount of cement supplied or consumed in accordance with this paragraph.

It is further ordered, That, for a period of three (3) years from the date of service of this Order, respondent shall not sell or distribute ready-mixed concrete in the Norfolk, Richmond, Jacksonville, or Seattle Areas except from locations at which respondent presently operates plants: *Provided,* That the above limitation shall not apply to ready-mixed concrete produced by any temporary plant established for the purpose of supplying concrete to a single project

which requires from respondent at least 15,000 cubic yards of concrete. For the purpose of the foregoing proviso a single project shall include, without limitation, projects such as a shopping center, housing development, apartment house, school, factory, bridge or a highway section.

It is further ordered, That, for a period of two (2) years from the date of service of this Order, or until the issuance or announcement by the Federal Trade Commission of a trade regulation rule or report concerning mergers or acquisitions in the cement industry, if such event occurs prior to the expiration of such two-year period, respondent shall cease and desist from acquiring, directly, or indirectly, through subsidiaries or otherwise, any part of the share capital or assets of any corporation engaged in the manufacture or sale of ready-mixed concrete or concrete products in the States of Virginia, Florida and Washington.

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this Order, and every sixty (60) days thereafter until respondent has fully complied with the provisions of this Order, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which respondent intends to comply, is complying or has complied with this Order. All compliance reports shall include, among other things that are from time to time required, a summary of all contacts and negotiations with potential purchasers of the specified ready-mixed concrete plants, the identity of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

IN THE MATTER OF

MAURICE COAT & SUIT MFG. CO., INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION, THE FUR PRODUCTS LABELING, AND THE
WOOL PRODUCTS LABELING ACTS

Docket C-876. Complaint, Jan. 19, 1965—Decision, Jan. 19, 1965

Consent order requiring manufacturers and wholesalers of wool, fur, and textile fiber products in Kansas City, Mo., to cease violating the Fur Products Labeling Act by falsely labeling artificially colored fur products as natural, failing to use the term "Natural" for furs which were not artificially colored, on labels and in advertisements, and deceptively invoicing its fur products; and to cease violating the Wool Products Labeling

Complaint

67 F.T.C.

Act by omitting required fiber content information on attached labels, and by using the term "Mohair" in lieu of the word "Wool" on affixed labels without giving the correct percentage of mohair present.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939, the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts the Federal Trade Commission having reason to believe that Maurice Coat & Suit Mfg. Co., Inc., a corporation, and Fashioned Originals, Inc., a corporation, and Frieda Garfinkel and Arnold H. Garfinkel, individually and as officers of the said corporations hereinafter referred to as respondents have violated the provisions of said Acts and the Rules and Regulations promulgated under the said Acts, 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 Maurice Coat & Suit Mfg. Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri.

Respondent Fashioned Originals, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri.

Respondents Frieda Garfinkel and Arnold H. Garfinkel are officers of the said corporate respondents and formulate, direct and control the acts, practices and policies of the said corporate respondents.

Respondent Maurice Coat & Suit Mfg. Co., Inc. is a manufacturer and wholesaler of wool products, fur products and textile fiber products. Respondent Fashioned Originals, Inc. is a wholesaler of wool products, fur products and textile fiber products. The office and principal place of business of the corporate respondents and individual respondents is located at 431 West 8th Street, Kansas City, Missouri.

PAR. 2. Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondent Maurice Coat & Suit Mfg. Co., Inc. and respondents Frieda Garfinkel and Arnold H. Garfinkel have been and are now engaged in the manufacturing for introduction into commerce, fur products, and have manufactured for sale, fur products which have been made in whole or in part of furs which have been shipped and received in commerce as the terms "com-

merce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

Subsequent to the effective date of the Fur Products Labeling Act on August 9, 1952, respondents Maurice Coat & Suit Mfg. Co., Inc., Fashioned Originals, Inc. and Frieda Garfinkel and Arnold H. Garfinkel have been and are now engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled to show that fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

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

1. To show the true animal name of the fur used in the fur product.
2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 5. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder inasmuch as required item numbers were not set forth on labels in violation of Rule 40 of said Rules and Regulations.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

1. To show the true animal name of the fur used in the fur product.
2. To disclose that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored, when such was the fact.

Complaint

67 F.T.C.

PAR. 7. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the Rules and Regulations promulgated thereunder in the following respects:

(a) The term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Rule 19(g) of said Rules and Regulations.

(b) Required item numbers were not set forth on invoices, in violation of Rule 40 of said Rules and Regulations.

PAR. 8. Certain of said fur products were falsely and deceptively advertised in violation of the Fur Products Labeling Act in that said advertisements intended to aid, promote and assist, directly or indirectly, in the sale and advertising of such fur products were not in accordance with the provisions of Section 5(a) of the said Act.

Among and included in the aforesaid advertisements, but not limited thereto, were advertisements of respondents which appeared in a catalog distributed by the respondents.

Among such false and deceptive advertisements, but not limited thereto, were advertisements which failed to show that the fur contained in the fur product was bleached, dyed, or otherwise artificially colored when such was the fact.

PAR. 9. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in that certain of said advertisements contained the name or names of an animal or animals other than those producing the fur contained in the fur product, in violation of Section 5(a)(5) of the Fur Products Labeling Act.

PAR. 10. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents falsely and deceptively advertised fur products in violation of the Fur Products Labeling Act in that the said fur products were not advertised in accordance with the Rules and Regulations promulgated thereunder inasmuch as the term "Natural" was not used to describe fur products which were not pointed, bleached, dyed, tip-dyed or otherwise artificially colored in violation of Rule 19(g) of the said Rules and Regulations.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair

and deceptive acts and practices and unfair methods of competition in commerce under the Federal Trade Commission Act.

PAR. 12. Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondent Maurice Coat & Suit Mfg. Co., Inc. and respondents Frieda Garfinkel and Arnold H. Garfinkel have manufactured for introduction into commerce, "wool products" as "wool product" and "commerce" are defined in the Wool Products Labeling Act of 1939.

Subsequent to the effective date of the Wool Products Labeling Act of 1939, respondents Maurice Coat & Suit Mfg. Co., Inc., Fashioned Originals, Inc. and Frieda Garfinkel and Arnold H. Garfinkel have introduced into commerce, sold, transported, distributed, delivered for shipment, shipped and offered for sale in commerce, "wool products" as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939.

PAR. 13. Certain of said wool products were misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the Rules and Regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were certain fabrics with labels on or affixed thereto, which failed to disclose the percentage of total fiber weight of the wool product, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) woolen fibers; (2) each fiber other than wool present in the wool product in the amount of 5% or more by weight; (3) the aggregate of all other fibers.

PAR. 14. Certain of said wool products were misbranded in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the Rules and Regulations promulgated thereunder in that the term "Mohair" was used in lieu of the term "Wool" on labels affixed to wool products without setting forth the correct percentage of the Mohair in violation of Rule 19 of the Rules and Regulations under the Wool Products Labeling Act of 1939.

PAR. 15. The acts and practices of the respondents as set forth above were, and are in violation of the Wool Products Labeling Act of 1939 and the Rules and Regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce, within the intent and meaning of the Federal Trade Commission Act.

Decision and Order

67 F.T.C.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, the Wool Products Labeling Act of 1939, and the Fur Products Labeling Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Maurice Coat & Suit Mfg. Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 431 West 8th Street, in the city of Kansas City, State of Missouri.

Respondent Fashioned Originals, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 431 West 8th Street, in the city of Kansas City, State of Missouri.

Respondents Frieda Garfinkel and Arnold H. Garfinkel 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 Maurice Coat & Suit Mfg. Co., Inc., a corporation, and its officers, and Fashioned Originals, Inc., a corporation, and its officers, and Frieda Garfinkel and Arnold H. Garfinkel, individually and as officers of the said corporations and respondents' representatives, agents and employees, directly or through

any corporate or other device in connection with the introduction, or manufacture for introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act do forthwith cease and desist from:

A. Misbranding fur products by:

1. Representing directly or by implication on labels that the fur contained in any fur product is natural when the fur contained therein is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.
2. Failing to affix labels to fur products showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.
3. Failing to set forth on labels the item number or mark assigned to a fur product.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish invoices as the term "invoice" is defined in the Fur Products Labeling Act showing in words and figures plainly legible all the information required to be disclosed in each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.
2. Failing to set forth the term "Natural" as part of the information required to be disclosed on invoices under the Fur Products Labeling Act and Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.
3. Failing to set forth on invoices the item number or mark assigned to fur products.

C. Falsely or deceptively advertising fur products through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or indirectly, in the sale, or offering for sale of any fur product, and which:

1. Fails to set forth in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(a) of the Fur Products Labeling Act.
2. Sets forth the name or names of any animal or animals other than the name of the animal producing the furs con-

tained in the fur product as specified in the Fur Products Name Guide, and as prescribed by the Rules and Regulations.

3. Fails to set forth the term "Natural" as part of the information required to be disclosed in advertisements under the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder to describe fur products which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

It is further ordered, That respondents Maurice Coat & Suit Mfg. Co., Inc., a corporation, and its officers, and Fashioned Originals, Inc., a corporation, and its officers, and Frieda Garfinkel and Arnold H. Garfinkel, 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 or manufacture for introduction into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment in commerce, of wool fabric or other wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding wool products by:

1. Failing to securely affix to, or place on each such product a stamp, tag, label, or other means of identification, showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a) (2) of the Wool Products Labeling Act of 1939.

2. Using the term "Mohair" in lieu of the word "Wool" on labels affixed to wool products without setting forth the correct percentage of the Mohair present.

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

IN THE MATTER OF

ATLANTIC PRODUCTS CORPORATION ET AL.

DECLARATORY ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF SEC. 2 (d) OF THE CLAYTON ACT

Docket 8513. Complaint, June 25, 1962—Decision, Jan. 26, 1965

The Commission having found a luggage manufacturer of Trenton, N.J., and its sales subsidiary in violation of Sec. 2(d) of the Clayton Act by failing

Complaint

to make its advertising and promotional allowances available to all competing customers on proportionally equal terms, but having suspended the issuance of a formal order by an order dated Dec. 13, 1963, 63 F.T.C. 2237, pending an industrywide investigation into such practices in the luggage industry, the Commission now orders respondents to file within sixty days of the service of this order a report of compliance "as if a cease and desist order was being entered."

COMPLAINT

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

PARAGRAPH 1. Respondents Atlantic Products Corporation and Atlantic Products Sales Corporation are corporations organized, existing and doing business under and by virtue of the laws of the State of New Jersey, both with offices and principal place of business located at 1 Johnston Avenue, Trenton, New Jersey. Respondent Atlantic Products Sales Corporation is a wholly owned subsidiary of respondent Atlantic Products Corporation, and the latter formulates, directs and controls all acts, practices and policies of the former.

PAR. 2. Respondents are now and have been for some time engaged in the manufacture, distribution, and sale of various types of luggage and golf bags. Respondent Atlantic Products Corporation has been responsible for the manufacture of above products, while sale and distribution of said products have been carried out by its wholly owned subsidiary, Atlantic Products Sales Corporation.

PAR. 3. Respondents sell and cause their products to be transported from their principal place of business in the State of New Jersey to customers located in other States of the United States. There has been at all times mentioned herein a continuous course of trade in said products in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 4. In the course and conduct of their business in commerce, respondents paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondents, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondents' products.

Initial Decision

67 F.T.C.

PAR. 5. For example, for some time since 1953 respondents have made available to certain of their customers a cooperative advertising plan whereby respondents will grant advertising allowances of 5% on net purchases of luggage, when net purchases for a specified six month period are \$1,500 or greater. Respondents have paid and continue to pay such 5% allowance to many of their customers qualifying under said plan. Such allowance or compensation has not and is not made available on proportionally equal terms to all other customers competing with said customers who have been and are recipients of such compensation and allowance in the sale and distribution of respondents' luggage.

PAR. 6. The acts and practices of respondents, as alleged, are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act.

Mr. Alvin D. Edelson, for the Commission.

Geiger, Harmel & Schuchat and Wald, Harkrader & Rockefeller, Washington, D.C., for the respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

MARCH 18, 1963

The complaint herein issued on June 25, 1962, charges respondents Atlantic Products Corporation and Atlantic Products Sales Corporation with violating Section 2(d) of the Clayton Act, as amended, through the failure to make advertising and promotional allowances available on proportionally equal terms to all competing customers. Specifically, the complaint alleges that for some time since 1953 respondents have made available to certain of their customers a cooperative advertising plan under which they grant an advertising allowance of 5 percent on luggage purchases of \$1,500 or more for a specified six-month period, and have paid such 5 percent allowance to many customers qualifying under the plan, but have not made such allowance available on proportionally equal terms to all other competing customers. Counsel supporting the complaint acknowledges the \$1,500 minimum-purchase requirement is the only practice alleged to violate Section 2(d):¹

Respondents' answer admits paying advertising allowances to certain customers, but denies failing to make such allowances available on proportionally equal terms to all other customers competing with those who received allowances. Additionally, as an affirmative de-

¹ Tr. 551.

fense, respondents assert that their good faith discontinuance of the single practice alleged to be illegal, prior to issuance of the complaint, accompanied by sworn assurances that the practice would not be resumed, has accomplished everything that could be accomplished by a cease and desist order and, accordingly, that there is no public interest in maintaining this proceeding.

Hearings were held at New York, New York, on November 19, 20, 21, 26 and 28, 1962, and in Trenton, New Jersey, on November 27, 1962. Proposed findings of fact, conclusions of law, and order, with reasons therefor, have been submitted by both parties.

The hearing examiner has carefully reviewed and considered the proposed findings of fact and conclusions of law, with reasons therefor. Such proposed findings and conclusions as are not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters. Upon the entire record in the case, the hearing examiner makes the following findings of fact and conclusions:

1. Respondents Atlantic Products Corporation and Atlantic Products Sales Corporation are corporations organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with their principal offices and place of business located at 1 Johnston Avenue, Trenton, New Jersey.²

2. Respondents are now and for several years have been engaged in the business of manufacturing, offering for sale, selling and distributing throughout the United States a number of machine-sewn products including golf bags, picnic cases, cosmetics bags, bowling ball bags, flight bags, and a "regular" line of soft, zippered luggage. This proceeding involves only the regular luggage line bearing the brand name "Atlantic", which is manufactured by Atlantic Products Corporation and distributed by its wholly owned subsidiary Atlantic Products Sales Corporation. The regular luggage line is distinctly different merchandise from respondents' other products. It is generally marketed through different channels of commerce and is sold to different customers throughout the United States. Atlantic Products Corporation has been a manufacturer of luggage since³ 1928, has always been a leader in this highly competitive industry.⁴

3. In the years 1950 to 1953, respondents' evidence indicates they encountered competition from other manufacturers who were offer-

² Complaint, admitted in respondents' answer.

³ Tr. 296, 63; Pollak, Tr. 85, 100, 135; McNeil, Tr. 292, 296.

⁴ See Girardi, Tr. 156; Kerner, Tr. 247; Pollak, Tr. 461.

ing cooperative advertising allowance "deals" to large retailers if they agreed to discontinue purchasing respondents' products and carry their lines. In addition, certain of respondents' competitors also offered graduated cooperative advertising allowances designed to favor large accounts: that is, allowances of progressively larger percentages were offered to larger buyers as their volume of purchases increased. Although importuned by their luggage customers to enter into such individually negotiated arrangements or to offer discriminatory allowances based on increasing percentages as purchase volume increased, respondents declined to do so. As a result, respondents lost a substantial number of customers.⁵

4. In the course and conduct of their business in commerce, respondents paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for advertising services furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondents. In this connection, respondents adopted in October 1953, a cooperative advertising plan known as "A.C.A.P." According to the testimony of respondents' witnesses this was the first time in the history of the luggage industry that an offer of advertising allowances was not made privately to selected large-volume customers, but was openly published and tendered to every customer regardless of size. It was the first such plan to be published in the industry. The A.C.A.P. plan, as promulgated in October 1953, provided that retailers who purchased respondents' registered trademarked luggage would receive a credit of 5 percent on net purchases of \$1,500 or greater during a specified six-month period. This credit could be expended during the following six-month period on advertising the company's products by newspapers, radio or television, billboards or car cards, billing enclosures or seasonal catalogs.⁶

5. The evidence establishes that the \$1,500 minimum-purchase requirement was incorporated in the A.C.A.P. plan for the following reasons:⁷

(a) Respondents' business experience and research demonstrated to them that retailers purchasing less than \$1,500 during a six-month period did not stock a sufficient inventory of respondents' merchandise to back up an advertising campaign, and thus were not interested in advertising their luggage.⁸

⁵ See Cart, Tr. 336-338; Pollak, Tr. 460, 461; Marsh, Tr. 595-605.

⁶ See Atlantic's Cooperative Advertising Plan, CX-1; Cart, Tr. 320; Pollak, Tr. 528.

⁷ In accord with respondents' proposed findings.

⁸ See Pollak, Tr. 471-474.

(b) The allowance that would have been earned on a smaller amount of purchases—less than \$75⁹ for a six-month period—would have been inadequate to purchase an effective amount of advertising, and thus would have been a waste for both respondents and their customers.¹⁰

(c) The cost of keeping A.C.A.P. accounting records for the under \$1,500 purchasers would have been prohibitive. During the first few years following adoption of the plan, respondents disbursed \$50,000–\$80,000 annually in advertising allowances. Under respondents' then existing manual accounting system, the administrative expense of keeping A.C.A.P. accounting records for the customers who purchased less than \$1,500 semi-annually and who did not want and could not use the allowance, would have added \$29,000–\$30,000 annually to the cost of administering the plan.¹¹

6. Respondents offered their plan and the allowance to all of their customers, without regard to the amount of their past purchases, by notifying them of the existence and terms of the plan in a descriptive booklet mailed to each of them. Thus, all of the respondents' customers were given the opportunity to obtain the allowance if they purchased the required dollar quantity of respondents' products.¹²

7. The \$1,500 purchase requirement was beyond the reach of some of respondents' customers, since the plan was tailored to the advantage of customers that could indulge in substantial advertising. This is demonstrated by the testimony of Theodore S. Cart, Chairman of the Board of Directors of the Atlantic Products Corporation:

This was an advertising plan that could only be indulged in by those people who had enough money to spend in advertising in any given community, and we will take New York which is closest to us. An advertisement by B. Altman & Company, Lord & Taylor, for instance, lends much more dignity to the product than even a national advertisement that doesn't indicate where the product is on sale. And the small dealer who paid precisely the same amount of money for the merchandise and has it on sale, whether he be on Eighth, Seventh or Sixth Avenue or what-have-you, was in a position to offer his customer the same piece of merchandise that had been offered by a

⁹ This amount appears questionable since CX 15-B shows that the respondents paid to Victoria Luggage for various newspaper advertisements the following amounts:

\$72.45	January 1961
32.20	January 1961
29.90	February 1961
27.60	April 1961
33.35	April 1961

¹⁰ See Pollak, Tr. 473, 474; Cart, Tr. 339; Kerner, Tr. 231–233.

¹¹ See Murray, Tr. 369–372, 388; Pollak, Tr. 473, 474. This evidence was not offered under any theory of cost justification. The evidence is clearly insufficient in this respect. However, (a), (b) and (c) demonstrate the plan was tailored to meet the needs of respondents and the more substantial advertisers in disregard of small dealers whose advertising was meager.

¹² CX 1; Pollak, Tr. 64, 482.

Initial Decision

67 F.T.C.

prestige store such as those stores who had sufficient funds to advertise the product.¹³

Respondents' argument that the plan indirectly benefited the small dealer is without substance as a defense in law and in fact. Factually, there is no specific evidence of such benefits in the market areas at issue, and even if there were it would have no legal significance in the face of any plan realistically made available only to those "who had enough money to spend in advertising in any given community" (e.g., large department stores, etc.)¹⁴ as distinguished from small dealers who do not advertise on so grandiose a scale, if at all.¹⁵ In determining the proportionally equal terms upon which a seller shall make available any payment or consideration referred to in Section 2(d), the act requires a frank recognition of the business limitations of each buyer. An offer to make a service available to one, the economic status of whose business renders him unable to accept the offer, is tantamount to no offer to him.¹⁶

Corroborative of the fact that the purpose of the plan had the expected exclusionary effect as suggested by Mr. Cart is the testimony of Victor S. Pollak, respondents' president, that 85 percent to 90 percent of the customers to whom the plan was offered did not seek its benefits. Although 10 percent or 15 percent, largely composed of stores who did advertise extensively, did take advantage of the plan in accordance with its purpose of being tailored to satisfy the needs of substantial advertisers, it was unusable by small dealers who did not advertise extensively, if at all.¹⁷ Under FTC interpretations, a supplier's cooperative promotional program should afford all competing customers an opportunity to participate on some suitable basis. They must not be arbitrarily excluded by eligibility requirements related to their type of business or purchasing volume, or by the limitation of promotional arrangements to types which they cannot use or perform.

¹³ Tr. 327.

¹⁴ Tr. 327.

¹⁵ Rowe, Price Discrimination Under the Robinson-Patman Act, page 401. Cf. Initial Decision in *Exquisite Form Brassiere, Inc.*, FTC Dkt. 6966 (Jan. 28, 1960), adopted by FTC (Oct. 31, 1960) [57 F.T.C. 1036], modified, 1961 CCH Trade Cas. par. 70,157 (D.C. Cir. 1961); *Brown & Williamson Tobacco Corp.*, FTC Dkt. 6908 (Sept. 9, 1959) [56 F.T.C. 275] (displays unsuitable for some customers); *State Wholesale Grocers v. Great Atlantic & Pacific Tea Co.*, 258 F.2d 831 (7th Cir. 1958), cert. denied sub nom. *General Foods Corp. v. State Wholesale Grocers*, 358 U.S. 947 (1959).

¹⁶ *State Wholesale Groc. v. Great Atl. & Pac. Tea Co.*, 258 F.2d. 831 at 839. Accord: *Exquisite Form Brassiere, Inc.*, FTC Dkt. 6966, Initial Decision, p. 6 (Jan. 28, 1960) [57 F.T.C. 1040], adopted by FTC (Oct. 31, 1960) [57 F.T.C. 1036], modified, 1961 CCH Trade Cas. par. 70,157 (D.C. Cir. 1961); Initial Decision, *J. A. Folger & Co.*, FTC Dkt. 8094 (Jan. 10, 1962) [61 F.T.C. 1166].

¹⁷ Tr. 95-96; see Appendix for some of respondents' favored customers (to whom the plan was available because of their capacity to take advantage of respondents' A.C.A.P. plan) and respondents' unfavored customers (to whom the plan was not available because of their apparent incapacity to take advantage of the plan).

As stated by the FTC's 1960 Guides:

The plan must allow all types of competing customers to participate. It must not be tailored to satisfy the needs of a favored customer or class, but must be suitable and usable under reasonable terms by all competing customers * * *. The seller cannot either expressly, or by the way the plan operates, eliminate some competing customers.¹⁸

Thus the supplier should not restrict his promotional program to large-volume or other selected accounts. In the *Elizabeth Arden* case, the Court of Appeals upheld the FTC's invalidation of a "tailored" plan for furnishing paid cosmetics "demonstrators" to a select number of its large retail accounts which "cooperated" with the supplier by window displays and other aggressive promotional efforts. Similarly, the Commission in several other industries has proscribed advertising and promotional plans which channeled benefits only to selected larger accounts or a favored customer class. In the same way, an eligibility requirement which conditions participation on a minimum purchase volume by the customer is vulnerable when it operates in practice to exclude customers competing with participating recipients. According to the Commission's 1960 Guides, illegality may result if such a limit "is beyond the reach" of competing accounts. Furthermore, participation may not be thwarted by a supplier's promotional requirements which customers cannot reasonably use or meet.¹⁹

¹⁸ Rule 9, 1 CCH Trade Reg. Rep., pp. 6072, 6075 (1960).

¹⁹ 39 F.T.C. 288 (1944), aff'd, 156 F.2d 132 (2d Cir. 1946), cert. denied, 331 U.S. 806 (1947). See also *Equisite Form Brassiere, Inc.*, FTC Dkt. 6966 (Oct. 31, 1960) [57 F.T.C. 1036] ("stylists" to larger accounts) modified, 1961 CCH Trade Cas. par. 70,157 (D.C. Cir. 1961). For examples of special allowances to large customers or classes, see *John B. Stetson Co.*, 41 F.T.C. 244 (1945) (allowances to three large customers); *Holzbeierlein & Sons, Inc.*, 39 F.T.C. 82 (1944) (allowances to DGS and large chains only); *Alfonso Gioia & Sons, Inc.*, FTC Dkt. 7790 (Oct. 22, 1960) [57 F.T.C. 964] (allowances to Stop-N-Shop); *Bercut-Richards Packing Co.*, FTC Dkt. 7651 (April 27, 1960) [56 F.T.C. 1313] (allowance to Seeman Bros., Inc.); *Herst Allen Co.*, FTC Dkt. 7867 (Aug. 31, 1960) [57 F.T.C. 530], and *Midwest Biscuit Co.*, FTC Dkt. 7868 (Sept. 3, 1960) [57 F.T.C. 540] (allowance to Benner Tea Co.); *Bayuk Cigars, Inc.*, FTC Dkt. 7395 (Feb. 12, 1960) [56 F.T.C. 881] (allowances to Union News Co.); *Longines-Wittnauer Watch Co.*, 55 F.T.C. 731 (1958), and *Trifari, Krussman & Fishel, Inc.*, 55 F.T.C. 397 (1958) (allowances to Associated Barr Stores, Inc., for special newspaper and TV promotion). E.g., *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959) (catalogues and cabinets for Red Front stores); *American Tobacco Co.*, FTC Dkt. 6830 (Sept. 9, 1959) [56 F.T.C. 263]; *Liggett & Myers Tobacco Co.*, FTC Dkt. 6642 (Sept. 9, 1959) [56 F.T.C. 221]; *R. J. Reynolds Tobacco Co.*, FTC Dkt. 6848 (Sept. 9, 1959) [56 F.T.C. 269] (allowances to cigarette vending machine operators); the numerous publishers cases, FTC Dkts. 7384 et seq., 7612 et seq. (June 30, 1960) (paperbacks, comics, magazine publishers' allowances to Union News chain retail outlets in railroad stations, bus and air terminals, hotels, and office buildings). Rule 9, Example 3, 1 CCH Trade Reg. Rep., pp. 6072, 6076 (1960). E.g., *Bulova Watch Co.*, 48 F.T.C. 971, 977 (1952); *Elgin National Watch Co.*, 48 F.T.C. 990, 997 (1952). See also *Jantzen, Inc.*, 55 F.T.C. 1065 (1959) (initial seasonal order of \$5000); *North American Philips Co.*, 55 F.T.C. 682 (1958) (ninety-six shavers); complaints in *Sunbeam Corp.*, FTC Dkt. 7409 (March 27, 1959) [p. 20 hereina] (minimum quantity for direct shipment); *United Biscuit Co. of America*, FTC Dkt. 7817 (Mar. 10, 1960) [64 F.T.C. 586] (monthly minimum purchases).

8. Respondents appear to take the position in their proposed findings that their plan was to meet competition generally. If this is asserted as an affirmative defense, it is, of course, without merit. The standards of a meeting competition defense have been established in *Standard Oil v. F.T.C.*, 355 U.S. 396 (1958). The Supreme Court held therein that one cannot meet general competition under Section 2(b) of the Clayton Act, as amended, but must meet specific competition, and further, it must be apparent *lawful* competition. This same principal was enunciated previously by the Supreme Court in *F.T.C. v. Staley*, 324 U.S. 746 (1945). Respondents have completely failed to adduce evidence of meeting competition in good faith in individual competitive situations as required.

9. Respondents also urge that a cease and desist order would not be in the public interest since the evidence establishes that the minimum-purchase requirement was voluntarily discontinued by respondents immediately and with retroactive effect, as soon as they learned that the Commission was challenging it. This discontinuance occurred four and one-half months prior to issuance of the complaint. Furthermore, there is no evidence that any violation by respondents was willful. The hearing examiner was impressed with the integrity of the officials of the respondent corporations when they testified and of their desire to avoid any violations of law pursuant to the interpretation thereof by the Federal Trade Commission and the courts. This, however, and their voluntary discontinuance of the A.C.A.P. plan does not insure a non-likelihood of a resumption of this plan or some similar plan in the future. The respondents are corporations subject to normal changes in management and stockholdings. These corporations are continuing in the same business. There is no evidence that any special controls have been established to guard against and preclude similar future violations by management such as was established in the *Mason, Au Magenheimer* case, Docket 7733 [66. F.T.C. 1219], decided by this hearing examiner, and in connection with which the Commission has issued a suspense order, although denying present dismissal.²⁰ Each case must be decided upon its own merits. Mere discontinuance of challenged practices does not, in and of itself, justify dismissing a proceeding as a matter of law. However, if it is shown that the discontinuance was made in good faith as distinguished from a mere promise,²¹ and there exist other factors that negate any reasonable possibility of the renewal of the activities in

²⁰ See Pollak, Tr. 551, 553-555; RX-3; RX-4.

²¹ *Ward Baking Company*, D. 6833, 54 F.T.C. 1919.

issue, there would seem to be no justification for continuing the proceeding. This result would seem to be persuasive if the practices complained of were terminated prior to the commencement of proceedings (i.e., investigative and adjudicative), or if the corporate concern charged with violations of the law had come under the control of new management who have demonstrated a clear intention to comply with the law corroborated by such compliance and the establishment of controls to insure nonviolation.²² Such facts are not present here, although there is an absence of willfulness.

10. It must be concluded, therefore, that respondents, through their A.C.A.P. plan have, since 1953, made available and paid advertising allowances to some of their customers while not making such advertising allowances available on proportionately equal terms, or paying such advertising allowances on proportionately equal terms to other of their customers competing in the resale of respondents' products of like grade and quality, or commingled products of respondents which were generally competitive.

11. It must also be concluded that the payments by the respondents, pursuant to their A.C.A.P. plan, as hereinbefore set forth, constitute violations of subsection 2(d) of the amended Clayton Act, 15 U.S.C. sec. 13 (as amended June 19, 1936), and that the issuance of a cease and desist order is in the public interest.

12. In the event a cease and desist order is issued, respondents urge a narrower order than that proposed by the Commission. The Commission's complaint contains a broad-scale proposed order to cease and desist that paraphrases the statutory language of section 2(d) of the Clayton Act and covers *all* of the products sold by respondents in commerce and *all* payments to customers "for advertising or any other services or facilities."

Although respondents manufacture and sell a large variety of products, this proceeding involves only their regular line of luggage. This line, which was the only merchandise covered by the cooperative advertising plan at issue, is distinct from respondents' other products, is marketed through other channels of commerce, and is sold to different customers. The Commission has held in circumstances similar to the instant case that a limitation in an order to the one product involved was "fully justified." *Quaker Oats Co.*, D. 8119 (April 25,

²² *Federal Trade Commission v. Civil Service Training Bureau*, *supra*; *Stokely-Van Camp, Inc., et al. v. Federal Trade Commission*, *supra*; *Matter of Grocery Distributors Association of Northern California*, *supra*; *Matter of the LeBlanc Corp.*, *supra*; *Matter of Consolidated Retail Stores, Inc.*, *supra*; *Matter of Chester H. Roth Co., et al.*, *supra*; *Matter of Huber Baking Co.*, *supra*; *Matter of Paxton and Gallagher Co.*, *supra*.

Initial Decision

67 F.T.C.

1962) [60 F.T.C. 798]. There the Commission said that because of the "many differences in the distribution system" of the respondent's grocery products, it saw "no reason for extending the scope of the order" to products other than the one involved.²³

The only promotional activities compensated under the A.C.A.P. plan from its inception in 1953 to the present are advertising or promotional services pursuant to a minimum-purchase requirement plan.

In *Transogram Company, Inc.*, D. 7978 (September 19, 1962) [61 F.T.C. 629], a section 2(d) matter involving payments made by toy manufacturers for advertising in catalogs controlled by their jobber-customers, counsel demanded substantially the same broad order as that sought by counsel supporting the complaint in the case at bar. The Commission, however, approved an order responsive to the "single, peculiar, industry-wide violation" found there.

The Commission's opinion stated that "the facts surrounding the violation are relevant, and may even be decisive," in framing an appropriate order. This is so because:

Granted that the Commission has undoubted power to formulate a remedy adequate to prevent repetition of the violation found, an analysis of the nature of the violation is still necessary to a decision of how that power should be exercised.

* * * * *

The purpose of an order is to prevent statutory violations, the occurrence of which in the future appears likely on the basis of reasonable inference from events that have already taken place.

This need is satisfied, the Commission held, "by narrow and precise definition of the practice involved."²⁴

The instant matter, like *Transogram*, involves a single, narrow practice (the minimum-purchase requirement), which is capable of precise definition and which can be permanently and effectively prevented by an order limited to the practice involved.

In the instant case, however, it does not appear, as respondents' counsel would seem to suggest, that the cease and desist order should limit itself to compensation for certain modes of advertising or pro-

²³ Tr. 63; see Pollak, Tr. 85, 100, 135; McNeil, Tr. 292.

²⁴ Thus, the Commission's decision was properly responsive to the standard set forth in *F.T.C. v. Henry Broch & Company*, 368 U.S. 360, 367-368 (1962), where the Supreme Court emphasized that "the severity of possible penalties . . . for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." (This opinion cites *N.L.R.B. v. Express Publishing Co.*, 312 U.S. 426.) See also *Swanee Paper Corp. v. F.T.C.*, 291 F. 2d 833 (2d Cir. 1961).

motion since the scope of the media as evidenced and conceded in this case is extensive.

13. Respondents seek a suspension of any cease and desist until further order of the Commission. However, prior to the hearings in this matter, on November 9, 1962, respondents moved the Commission to suspend adjudicative proceedings and institute an industry-wide investigation of cooperative advertising practices in the luggage industry. This motion was denied by Commission's order dated November 19, 1962. The order stated:

The Commission having determined that a suspension of this proceeding at the present time would not be in the public interest, and that the question of whether a final order to cease and desist should be issued in this proceeding, the scope of such an order, and its effective date, may be more appropriately considered after the Commission has determined whether a violation of law has occurred * * *

It would appear from the foregoing that, even if the hearing examiner had authority to suspend, it is foreclosed by the Commission's ruling. Furthermore, there is insufficient evidence before the hearing examiner concerning the industry-wide practices involved upon which a ruling or recommendation to the Commission could be made.

Accordingly, since the Federal Trade Commission has jurisdiction of the subject matter and respondents herein, the following cease and desist order shall issue:

ORDER

It is ordered, That respondents Atlantic Products Corporation, a corporation, and Atlantic Products Sales Corporation, a corporation, and their officers, employees, agents and representatives, directly or through any corporate or other device, in the course of business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of respondents as compensation or in consideration for any advertising or promotional services (pursuant to a minimum-purchase requirement plan) furnished by or through such customer in connection with the sale or offering for sale of respondents' regular line of luggage, unless such payment or consideration is made available on proportionally equal terms to all other customers competing in the distribution of such products.

Initial Decision

67 F.T.C.

APPENDIX

Purchaser	Purchases of registered trade-marked luggage	Payments and dates on which made	Service performed
PROVIDENCE, RHODE ISLAND			
FAVORED ¹			
The Outlet Co., 176 Weybosset St., Providence, R.I.	6-1-60—11-30-60, \$2,813.33.	5-21-61, \$140.-----	Newspaper advertising.
FAVORED ²			
T. W. Rounds, 52 Washington St.	6-1-60—11-30-60, \$2,124.36.	3-26-61, \$106.22--	Newspaper advertising.
UNFAVORED ³			
Louis & Company, 44 Weybosset St.	6-1-60—11-30-60, \$255.34. Year of 1959 purchases of \$951.13.	-----	-----
NEW HAVEN, CONNECTICUT			
FAVORED ⁴			
Bohan-Landorf, 964 Chapel Street.	6-1-60—11-30-60, \$1,709.59.	1-2-61, \$52.80. Since 1953 has never received less than \$50 a year pursuant to A.C.A.P.	Newspaper advertising.
FAVORED ⁵			
Temple Luggage, 172 Temple St.	6-1-60—11-30-60, \$1,987.01.	1-11-61, 2-15-61, 3-21-61, \$79.20; 4-20-61, \$20.15.	Newspaper advertising.
UNFAVORED ⁶			
A. H. Brown, 204 College St.	7-1-59—11-30-59, \$420.88. 6-1-60—11-30-60, \$853.26.	-----	-----
New Haven Luggage, 137 Orange St.	6-1-59—11-30-59, \$460.59. 6-1-60—11-30-60, \$486.90.	-----	-----

See footnotes at end of table.

84

Initial Decision

Purchaser	Purchases of registered trade-marked luggage	Payments and dates on which made	Service performed
WHITE PLAINS, NEW YORK			
FAVORED ⁷			
Victoria Luggage, 155 Mamaroneck Ave., White Plains, N. Y.	6-1-60—11-30-60, \$3,945.43.	1-3-61, \$72.45; 1-18-61, 32.20; 2-1-61, 29.90; 4-12-61, 27.60; 4-28-61, 33.35.	Newspaper advertising.
FAVORED AND UNFAVORED ⁸			
Deene's Luggage Shop, 124 Mamaroneck Ave., White Plains, N. Y.	7-1-58—11-30-58, \$2,384.00. 6-1-60—11-30-60, \$177.00.	Sometime between 12-1-58 and 5-31-59, \$183.20.	Newspaper advertising.
UNFAVORED ⁹			
Genung's, Inc.-----	6-1-60—11-30-60, \$319.00.	-----	-----
		Purchases 6-1--11-30-60	A.C.A.P. Credit
			Amount Used
ROCHESTER, NEW YORK			
FAVORED ¹⁰			
Likely Stores-----		\$1, 862. 97	\$93. 15
Sibley, Lindsay & Curr.-----		7, 625. 77	381. 29
			\$86. 73
			381. 29
UNFAVORED ¹¹			
Kreiger's-----		702. 11	-----
MT. VERNON, NEW YORK			
FAVORED ¹²			
Gibraltar Luggage Corp-----		\$1, 786. 27	\$89. 31
Uttal's Leather Store, Inc-----		1, 556. 26	77. 81
			\$89. 31
			76. 50
UNFAVORED ¹³			
Genung's, Inc-----		228. 60	-----

See footnotes at end of table.

Final Order		67 F.T.C.		
	Purchases 6-1-11-30-60	A. C. A. P. Credit	Amount Used	
SYRACUSE, NEW YORK				
FAVORED				
Wilson's Leading Jewelers-----	\$1, 642. 38	\$82. 12		
UNFAVORED ¹⁴				
Henry Frank Leather Co.-----	1, 103. 68			
BRIDGEPORT, CONNECTICUT				
FAVORED				
Fried's Luggage-----	\$2, 534. 32	\$126. 72	\$126. 72	
S. Silver, Inc.-----	2, 227. 89	111. 39	111. 39	
UNFAVORED ¹⁵				
D. M. Read-----	422. 84			

¹ CX 16A, 18, 16B, 16D.² CX 18, 17B, D, E, F, G.³ CX 18; Tr. 66, 166.⁴ CX 9A, 20A, 20F; Tr. 181; CX 20B.⁵ CX 21H-I-J-K-L 19A, 21A.⁶ CX 34A, 35, 36A, 38A, 19A.⁷ CX 15 D-E-M-Z-GG, A, B.⁸ Tr. 254, 253; CX 38.⁹ CX 38.¹⁰ Tr. 284.¹¹ Tr. 284.

Likely has gotten credits since 1952, except for the period 12-1-60-5-31-61.

Sibley, Lindsay & Curr has gotten A.C.A.P. credits since 1952, except for the period 12-1-54-5-31-55.

¹² Tr. 285.¹³ Tr. 286.¹⁴ Tr. 286-288.¹⁵ Tr. 288-289.

FINAL ORDER DIRECTING FILING OF COMPLIANCE REPORT

On December 13, 1963 [63 F.T.C. 2237], the Commission, having heard the above-captioned case on appeal from the initial decision of the hearing examiner, rendered a decision in which it found that respondents, a manufacturer of luggage and its sales subsidiary, had violated Section 2(d) of the Clayton Act (by failing to make its advertising and promotional allowances available to all competing customers on proportionally equal terms). However, in view of the apparent industry-wide incidence of the unlawful practice, and the sworn assurances of respondents that they had discontinued their

unlawful conduct and would not resume it in the future, the Commission decided to withhold entry of a cease and desist order against respondents pending the outcome of a proceeding by the Commission to eliminate violations of Section 2(d) in the luggage industry on an industry-wide basis.

In the year since the Commission rendered its decision, substantial progress has been made toward achieving widespread compliance with the requirements of Section 2(d) in the luggage industry, and the Commission's efforts along these lines will continue. We believe the time is now appropriate to enter a final order in this case.

Section 5(d) of the Administrative Procedure Act authorizes the Commission, "in its sound discretion, with like effect as in the case of other orders, to issue a declaratory order to terminate a controversy or remove uncertainty." The Commission's decision of December 13, 1963, declaring the requirements of Section 2(d) with respect to the challenged acts and practices of these respondents, has effectively terminated this controversy: Such acts and practices have been discontinued, have not been resumed, and, we believe and expect, will not be resumed in the future. In the circumstances, the entry of a formal cease and desist order at this time is not required to prevent recurrence of the unlawful conduct. *Chesebrough-Ponds, Inc.*, F.T.C. Docket 8491 (decided July 27, 1964) [66 F.T.C. 252].

To assure respondents' compliance with the declaratory findings and conclusions made in its decision of December 13, 1963 [63 F.T.C. 2237], the Commission is requiring respondents to file a report of compliance as if a cease and desist order was being entered. And we emphasize that while this order does not contain a formal command to cease and desist, the proceeding may, if warranted by changed conditions or the public interest, be reopened and the order enlarged to include such a command. Accordingly,

It is ordered, That respondents shall, within sixty (60) days after service of this order upon them, file with the Commission a signed report in writing describing in detail the manner and form in which they have complied and are complying with the requirements of law set forth in the Commission's decision of December 13, 1963 [63 F.T.C. 2237], in the above-captioned matter.

Commissioner MacIntyre not participating.